THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2009

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2009 Sir Maurice Byers Address: A vision of the structure and function of the Constitution

The Hon Tom Hughes AO QC: 60 years at the NSW Bar

Ethical settlement negotiation

An interview with Chief Justice Michael Black AC

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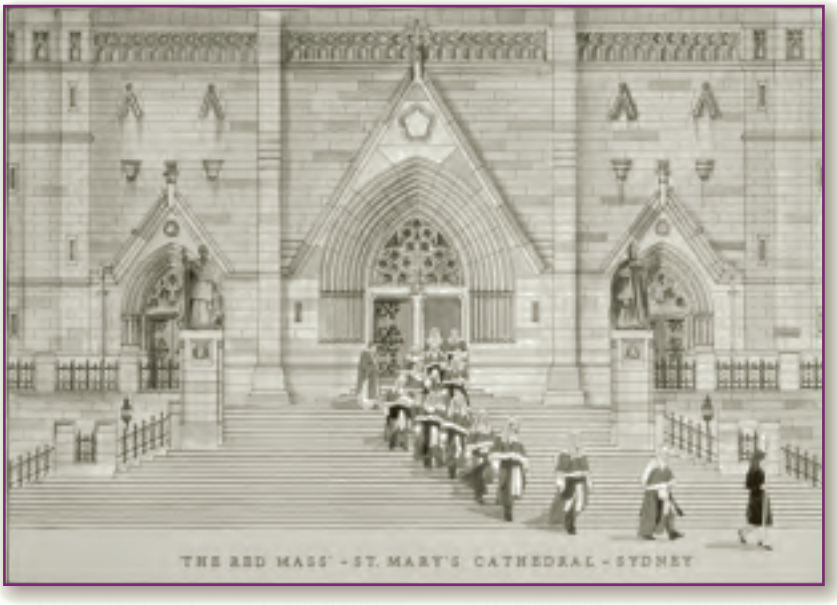

Picture: Simon Fieldhouse. www.simonfieldhouse.com

THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2009

barnews

ISSN 0817-0002

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Cover image: Chief Justice Black AC. Photo: Murray Harris Photography. Contents page and inside back cover images: Simon Fieldhouse.

Fiji

Whilst this issue was being prepared for publication, *Bar News* received a copy of the Fijian judiciary's strong and spirited response to an International Bar Association report alleging a lack of independence of the Fijian judiciary. That response is reproduced in the Opinion section of this issue. Subsequent to its receipt, Francis Douglas QC's appointment to the Fijian Court of Appeal was announced. Three days later, Douglas QC, in conjunction with New South Wales silks, Ian Lloyd QC and Randall Power SC, upheld an appeal brought by a series of politicians challenging the constitutionality of the appointment of Commodore Bainimarama as interim prime minister in December 2006 and the consequent dissolution of parliament. As is now well known, the Court of Appeal, together with the entire judiciary, was almost immediately dismissed and, at the time of going to press, the Republic of Fiji can only be described as being in a state of military dictatorship with a complete abrogation of the rule of law and an alarming rise in the level of press censorship, including the expulsion of independent journalists from the country. It is to be hoped that the rule of law in Fiji is restored as soon as possible and that responsible governments bring as much pressure to bear on the regime to secure that result.

Tom Hughes QC

On a more positive note, Tom Hughes QC has now notched up 60 years at the New South Wales Bar. He is still going strong, appearing for Channel 7 in a full appeal in the High Court on 10 March 2009 and three days later securing special leave to appeal on a constitutional question in *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCATrans 47. He has been an outstanding advocate, both at trial and on appeal, and *Bar News* pays tribute to him in this issue with reflections on his career from Sir Anthony Mason AC, the Hon John Howard AC and the Hon A M Gleeson AC.

The Republic of Fiji can only be described as being in a state of military dictatorship with a complete abrogation of the rule of law and an alarming rise in the level of press censorship...

This issue

The quality of the Sir Maurice Byers Annual Lecture has never been higher than this year's address by Commonwealth Solicitor-General Stephen Gageler SC, hot on the heels of defending the challenge to the government's stimulus package brought by Bar Association member, Bryan Pape. The full text of the solicitor-general's address is reproduced in this issue and will form part of a book containing each of the Byers lectures to date, to be published later this year by the Bar Association.

This issue also contains an extended interview with Chief Justice Michael Black of the Federal Court who has overseen the significant (and ongoing) refurbishment of the Federal Court component of the Joint Law Courts building in Sydney as well as a significant building programme interstate. His thoughts on court architecture are most interesting.

Chief Justice French also introduces himself, in his speech entitled 'Don't You Know Who I Am? Ego and Identity in the Administration of Justice', delivered at the Bench and Bar Dinner. There is also reproduced the address by Lord Bingham on the role of a Human Rights Act, delivered last December, as well as Chief Justice Spigelman's annual Opening of Law Term address

The focus in the previous issue of *Bar News* on legal history and the article on Judge Storkey VC, in particular, has elicited two further pieces of great historical interest concerning the role of District and Supreme Court judges' service in the First and Second world wars.

On a lighter note, it is wonderful to be able to publish Leslie Katz's piece on Australian judicial allusions to *Bleak House*. This is one of a number of pieces which Leslie has recently written on literary allusions in Australian judgments.

It is also excellent to have the opportunity to showcase two of Simon Fieldhouse's excellent recent artworks: the picture of the Red Mass on the Contents page and the St James Opening of Term service on the inside back cover. For more information visit simonfieldhouse.com/legal_works.htm

Finally, Lee Aitken eschews all fusion fallacies, and reports on his old friend Bullfry's recent foray into Equity jurisprudence, as the old dog grapples with the niceties of the constructive trust before the new chief judge. Meagher, Gummow & Lehane watch out and move over! Poulos QC's accompanying drawings illustrate what he imagines an Equity court might look like.

Andrew Bell SC

Speaking of rights

Barristers in schools

As I write this column Law Week has just concluded. The Law Week breakfast put on by the City of Sydney Law Society featured a discussion on the relationship between the media and the legal profession. Familiar questions were raised about why the media only seems interested in scandalous stories about lawyers and how the bad apples make life so difficult for the vast majority of upright, ethical practitioners.

For many years we have struggled to interest the media in stories that showcase the good work done by the bar.

With this in mind, the Bar Association has opted for a new approach. Because some of our poor press arises from ignorance and prejudice, we decided to take a long-term approach to the problem by informing the public about who we are and what we do before their prejudices are formed. To this end we developed a programme for primary schools. The barristers provide the children with some rudimentary information about the law and the legal processes after which they participate in a mock trial. The children play all the roles in the courtroom except for the judge. The programme received the strong support of the NSW Department of Education and Training. A successful pilot was held late last year. During Law Week year six students from four schools participated: Penrith, Summer Hill, Newbridge Heights and Newtown North Public Schools. The exercise with Newtown North Public School was conducted in the courtroom at the Police and Justice Museum in Phillip Street with the children appearing in the mock trial in wigs and gowns. I was privileged to attend two of them.

The children participated enthusiastically and the feedback from the schools and the department has been excellent. At Summer Hill the exercise was covered by the *Daily Telegraph.* The children asked many intelligent questions and the interaction was superb. When the reporter asked how many of them wanted to be lawyers, more than half put up their hands!

The programme was developed from an idea I took to the Working Party on the Bar in the Community. My thanks go to all members of the working party but, in particular, to Karen Conte-Mills and Margaret Cunneen SC for preparing the curriculum and for giving up so much of their time to conduct the exercises, to Andrew Martin, who filled in for Karen at two schools at short notice, and to Alastair McConnachie, the director of law reform and public affairs at the Bar Association for his effective coordination of the programme and liaison with the department.

In the near future I expect to be in a position to call for expressions of interest from barristers to run similar programmes in other primary schools across the state. A programme of this kind has the potential to make a real difference to the community's appreciation of the law and of lawyers, make the law more accessible and demystify the court process, which will benefit all who come before the courts, no matter in what capacity.

The notion that the appointment of foreign lawyers to judicial posts in Fiji under a military dictatorship will assist in the restoration of the rule of law is illusory.

Fiji

The demise of the rule of law in Fiji, to which the editor has referred, is of considerable concern. The military leader, Commodore Frank Bainimarama, who remains in control despite the decision of the Court of Appeal in *Qarase v Bainimarama & ors* declaring his government illegal, has refused to sanction elections until 2014. The editor mentioned the expulsion of independent journalists. It was widely reported that the highly respected ABC journalist, Sean Dorney, was deported because the regime was 'unhappy' with his reporting. The local media are forbidden from publishing anything that is critical of the government. Regulations enabling the Information Ministry to censor local media and also outlawing political meetings, which were due to expire on 10 May, have been extended.[1] The muzzling of the media has meant that little news is coming out of the country. As far as we can tell, the former solicitor general, New Zealander, Christopher Pryde, who supported the

legality of the current regime in the proceedings and who immediately sought leave to appeal when the decision was handed down, was dismissed along with all judges when the constitution was suspended, has been reappointed and some new magistrates including a new chief magistrate have been named but there have been no announcements of the appointment of any superior court judges.

The profession here and in New Zealand have condemned the developments in Fiji.

The Australian Bar Association called on Australia to take a leading role against the military dictatorship, noting that

> [t]he Fijian army is substantially financed by the United Nations through international deployments. The conduct of the army in ending the rule of law in Fiji means that it is totally inappropriate that it should have any continuing role in the maintenance of law & order in the international community. Presumably the Australian Government will take such action as it considers necessary to withdraw support for the regime through tourism and sporting ties.[2]

The Fiji and New Zealand Law Societies have publicly opposed foreign lawyers taking up judicial positions in Fiji. John Marshall QC, president of the New Zealand Law Society, has urged NZ lawyers not to take up appointments to any office,[3] claiming 'it puts more pressure on the interim, unlawful regime if they cannot find people who can fulfil these role'.[4] On the other hand, the recently reinstated Fiji solicitor general has dismissed such calls arguing that the country needs qualified lawyers to help restore the rule of law.[5]

April 1, 2009: NSW Attorney-General John Hatzistergos and president of the Australian Human Rights Commission Catherine Branson at NSW Parliament House, Sydney. Pic: Carlos Furtado / Newspix

It should be remembered that economic and sporting sanctions had a large part to play in the demise of apartheid in South Africa. The notion that the appointment of foreign lawyers to judicial posts in Fiji under a military dictatorship will assist in the restoration of the rule of law is illusory. At most it will lend legitimacy to the administration.

Legislating to protect human rights

There are many myths put about in the media about a charter of rights. Whilst some opponents will never change their minds, Lord Bingham's address published in this issue of *Bar News* should provide some sobering reading for some of the charter sceptics. In addition, a joint statement recently made by a number of prominent constitutional and human rights lawyers should allay concerns about any constitutional obstacles to such legislation, in particular, whether courts exercising federal jurisdiction could validly make declarations of incompatibility. The unanimous view of those who participated (including Sir Anthony Mason, Michael McHugh QC and Bret Walker SC) was that a Human Rights Act for Australia could

There are many myths put about in the media about a charter of rights. Whilst some opponents will bever change their minds, Lord Bingham's address published in this issue of Bar News *should provide some sobering reading for some of the charter sceptics.*

be drafted that would be constitutionally valid. In particular, there was agreement that there is no constitutional impediment to a statute with the following features:

- Identifying the human rights to be protected, being rights contained in the International Covenant on Civil and Political Rights.
- Allowing rights to be limited in defined circumstances, taking into account factors like the nature of the right and considerations of necessity and proportionality.
- Requiring that the attorney-general or the member introducing the legislation prepare and table in the Parliament of Australia a human rights 'statement of compatibility' which, at a minimum, would give reasoned consideration to whether the Bill was compatible with the human rights identified in the Act.
- Requiring that federal public authorities act in a way that is compatible with the rights identified in the Act unless required by law to do otherwise, which could extend to organizations acting on behalf of the Commonwealth in carrying out public functions.
- Requiring courts to interpret all Commonwealth legislation in a way that is consistent with the rights identified in the Act, so far as it is possible to do so consistently with the purpose of that legislation.
- If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of federal parliament and require a government response.

The full text of the statement is available on the website of the Human Rights Commission, which convened the roundtable meeting that produced the statement.[6]

Endnotes

1. Radio New Zealand News, 4 May 2009
2. Press release 14 April 2009
3. http://www.lawsociety.org.nz/home/for_the_public/media_centre/media_releases/media_releases2/2009/law_society_concerned_over_fijis_legal_situation
4. AAP, 20 April 2009
5. AAP, 20 April 2009
6. http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html.

Dear Sir,

In *Bar News* (Summer 2008/2009), an article written by David Ash appeared on Richard O'Connor, the third member of the first High Court.

The article contained a number of historical photographs of the court but also one which purported to be 'the Barton Ministry' in its first term of office. The photograph bore a code indicating its source as the National Archives. That photograph is indeed catalogued as indicated by the author. However the photograph is sadly not that of the first federal ministry but the second. The Archives is wrong.*

The photograph appearing (page 85) in *Bar News* shows as Governor-General Lord Tennyson, the second governor-general, the first being Lord Hopetoun. The Archives has perhaps been responsible for Sir Robert Garran choosing the wrong photograph for his work, *Prosper the Commonwealth* (page 120), published in 1958 (one would have thought he would of all people have known the difference) and for Professor Geoffrey Sawer making the same error in his work, *The Australian Constitution* (page 125), notwithstanding at page 122 he includes photographs of all governors-general up to Sir Ninian Stephen.

I acquired my photograph of the actual first federal ministry in about 1975 in a junk shop near the Court of Petty Sessions in Liverpool St in Sydney. It seemed an important piece of history.

It may be that Hopetoun had not created much of an impression. He had been a popular governor of Victoria (1889 – 1895). In 1898 he declined to become governor-general of Canada (the position going to another Scot, the Earl of Aberdeen). Hopetoun took the oaths of office on 1 January 1901, and swore in the Barton Ministry. He left Australia for good, in ill health in late 1902. Interestingly his son, the second marquess was offered the position of governor-general of Australia in 1935, but declined, instead becoming viceroy of India (1936 – 1943).

The second Barton ministry, as published in *Bar News* Summer 2008/2009

The first Barton ministry

I have, by the way, had my photograph taken out of its frame, multiple copies have been made and I will be sending several to the Archives.

John Sackar QC

*** Any failure to detect the pictorial error was not the failure of Ash but that of the editor, who is pleased (but surprised) to find himself in the company of Sir Robert Garran and Professor Sawer.**

The Magna Carta

The following speech was delivered by Attorney-General Robert McClelland to the Constitutional Law Conference at Parliament House, Sydney, on 20 February 2009.

Introduction

The Australian Government, through a committee of eminent Australians, is currently consulting the people of Australia on the recognition and protection of human rights. With limited exceptions, our Constitution does not recognise individual rights, freedoms or guarantees. In *Kruger v Commonwealth*[1] Dawson J said: 'Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus, the Constitution deals, almost without exception, with the structure and relationship of government rather than with individual rights.'

Nevertheless, in dealing with the structure and relationship of government, the Constitution does protect some fundamental individual rights. These rights are said to arise from 'silent constitutional principles'[2] that are part of our public heritage. That constitutional heritage includes the English constitutional instruments — Magna Carta and the *Bill of Rights* 1688.[3]

I will reflect on how the first of those English constitutional instruments has had a profound impact on the development of fundamental rights - namely, the right to due process and the rights of citizens not to be arbitrarily deprived of their property. In doing so, I will endeavour to avoid what one writer has described as the unsatisfactory compound of 'a mixture of legal dogma and legal history.'[4]

Magna Carta

Magna Carta is generally regarded as the origin of that principle which underpins the Westminster system: the rule of law. Its significance to Australia is recognised by the fact that a copy of the Charter is displayed in our federal parliament. According to modern values, it could be argued that the Charter is voidable because on 15 June 1215 it was obtained under clear duress from King John. But Magna Carta was subsequently confirmed by seven kings and its principles have been repeated from generation to generation.

There can be no doubt that the barons, clergy and foot soldiers who so pressured King John intended the document to be of great significance and intergenerational in its impact. Chapter 1 sets out that King John granted to all free men 'all the underwritten liberties, to be had and held by them and theirs, of us and our heirs for ever.' In Chapter 61 the king also committed that he shall 'procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such things has been procured, let it be void and null.'[5] Not a bad job of entrenching I must say.

The charterers have had significant success. Their intentions have been fulfilled, at least in respect to those matters I have mentioned — due process of law and resistance to arbitrary deprivation of property.[6]

...the barons, clergy and foot soldiers who so pressured King John intended the document to be of great significance and intergenerational in its impact.

Due process of law

Unquestionably the most significant clause of Magna Carta is contained in Chapter 39 which has been interpreted as saying: 'No freeman shall be taken or imprisoned or disseised, or outlawed, or exiled, or in any wise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgement of his peers or by the law of the land.'

Over time, the phrase 'the law of the land' evolved to become 'due process of law'. The earliest formal use of that term was in a statute of the year 1354 (28 Edward III) which provided that no person should be condemned without being first brought to answer by due process of the law, or, in Norman French, '*due proces de lei*'.[7]

There has been extensive writing and, indeed, controversy, about the evolution of this critical term.[8] But I think it is fair to say that the evolution of the phrase is significant because it became more than merely descriptive of 'the law of the land'. Instead, due process became a fundamental concept and principle which has both informed the development of the law and tempered its application.

Magna Carta is recognised as the source of the expression 'due process of law' contained in the Fifth Amendment to the Constitution of the United States, ratified 1791, and the 14th Amendment, ratified 1868.[9]

In the Australian context, in *R v Mackellar; Ex parte Ratu*, Murphy J specifically credited Magna Carta as a foundation of natural justice and due process, saying: 'The doctrine of natural justice is not a modern development; it is traditional in most English speaking countries. It is an aspect of due process, traceable in English law at least back to Magna Carta.'[10]

In *Ebner v Official Trustee in Bankruptcy*[11] Gleeson CJ, McHugh, Gummow and Hayne JJ said: 'Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta.'

There remains debate as to whether there is an implied constitutional right to a fair trial in Australia, at least at a federal level.[12] But it is nonetheless arguable that a fundamental principle of due process is integral to Australia's constitutional heritage and the development of

Australian jurisprudence.

It might be seen at a deep level in the High Court's decision that Chapter III of the Constitution, and the separation of judicial power, presents a barrier to any 'bill of attainder' or 'bill of pains and penalties' – even at state level.[13] It might be seen in concerns about legislation permitting the parliament to direct the detention of a person, for the purpose of punishment, when their guilt or innocence has not been determined by a court.[14] And it might be seen in the determination to uphold the discretion of courts to stay proceedings where an unfair trial would otherwise result.[15]

Interestingly, the principles of Magna Carta are echoed beyond the criminal jurisdiction. In *Groves v Commonwealth*[16] the High Court determined that a member of Australia's armed services could not be prevented from pursuing an action for negligence against the Commonwealth in circumstances where he was not involved in armed conflict. This was, the court said, because '[h]e may not have the benefit of [Chapter] 29 of Magna Carta, justice to him *can* be denied by the courts; unlike the rest of the community, he is excluded from what Sir Edward Coke described as the right of every subject, that he may 'for injury done to him … by any other subject … take his remedy by the course of the law and have justice and right for the injury done to him'.[17]

Deprivation of property

Australian courts have also recognised the historical foundations of Australian constitutional bulwarks against the arbitrary deprivation of property.

In the *Communist Party Dissolution Case*[18] the High Court said that, as at the date of the Constitution, 'the King had no power by the exercise of his prerogative to dissolve bodies corporate or unincorporate or forfeit their assets to the Crown or to deprive his subjects of their contractual or proprietary rights. Such action on his part would have been contrary to Magna Carta and the subsequent acts re-affirming Magna Carta referred to in *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 450.'[19]

Engraving showing King John of England signing the Magna Carta in 1215.

That is not to say, as was made clear in the *Communist Party Dissolution Case*, that a person or entity could not be deprived of their property by a valid law of the Commonwealth Parliament. However, as was explained in *Clunies-Ross v Commonwealth:*[20] 'an executive power of acquisition of land for a public purpose is different in nature to a legislative power of a national parliament to make laws with respect to the acquisition of land for a purpose in respect of which the parliament has power to make laws: see Magna Carta, c. 29 (25 Edw. 1 c. 29).'

The exercise of legislative power under section 51(xxxi) of the Constitution is of course conditional on just terms compensation. That precondition, I would argue, stems from the victory that the barons, clergy and people of England had over their monarch on 15 June 1215.[21]

International law

The issue of proprietary rights of the individual is interesting because it is in that area that a possible merging of the principles of Magna Carta and the primary international human rights instrument, the Universal Declaration of Human Rights, can be detected. For example, in *Newcrest Mining*[22] Kirby J referred to Article 17.2 of the Universal Declaration, which provides that '[n]o one shall be arbitrarily deprived of his property'. His Honour described the roots of Article 17 in the following terms: 'Whilst this article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems. Historically, its roots may be traced as far back as the Magna Carta 1215, Art 52 of which provided: 'to any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgement of his equals, we will at once restore these'.[23]

His Honour adopted similar reasoning in *Malika Holdings Pty Ltd v Stretton*[24] where he said that 'the Universal Declaration of Human Rights, Art 17, like the Magna Carta (1215), cl 52, treats as 'fundamental' the rule against arbitrary deprivation of property.'

Some may say we are seeing a merging of

ancient rights and ancient constitutional principles with developments in international law.

In that context we are reminded of the words of Brennan J in *Mabo v Queensland (No. 2)*, where he said: 'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal and fundamental rights.'[25]

There is clearly a difference of opinion as to the extent to which fundamental international human rights principles have influenced and continue to influence the development of the common law. I would suggest, however, that this will inevitably be the subject of ongoing academic and adversarial debate. In particular, our friends across the Tasman are also engaged in the debate. For instance, Cooke P (as he then was) of the New Zealand Court of Appeal has said that it is 'the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights.'[26]

Conclusion

Given this controversy the fundamental question for Australian policy makers to consider is: should the parliament, by legislative action or the executive by administrative action or practice, do anything to guide or influence that evolution of this important debate? It is an interesting challenge for Brennan J's son, Father Frank Brennan, who is presently chairing the Government's National Human Rights Consultation. I encourage the legal profession to lend their collective experience and expertise to this important debate.

Endnotes

1. (1997) 190 CLR 1 at 61.
2. See Murphy J in *Victoria v Australian Building Construction Employees' Union and Builders Labourers' Federation* (1982) 152 CLR 25 at 108.
3. Ibid.
4. Mummery, D., 'Due Process & Inquisitions' (1981) 97 *Law Quarterly Review* 287 at 303.
5. See Guthrie, W.D., 'Magna Carta' (1929) 15 *American Bar Association Journal* 39.
6. I would not wish to overstate my claim of the significance of the impact of the Magna Carta and note that its name has been taken in vain by all kinds of eccentrics. See, for instance, *Re Attorney-General (Cth); Ex parte Skyring* (1996) 135 ALR 29. In debate for another time, it has been suggested that the Magna Carta has also informed the development of the law in respect to the right to trial by jury for Commonwealth indictable offences, ensuring the right of appeal or review and, possibly, the separation of church and state.
7. Guthrie, Op cit, p. 40.
8. For a useful discussion of that evolution see judgment of Priestly JA in *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 at 347.
9. *Constitution of the United States of America: Analysis and Interpretation*, Senate Document 92-82, p. 1137, referred to by Murphy J in *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461.
10. *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461, per Murphy J at 483.
11. (2000) 205 CLR 337 at 343.
12. See Keyzer, P., *Constitutional Law*, 2nd ed., 2005, LexisNexis Australia, Sydney, p. 276-277.
13. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
14. *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.
15. *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Dietrich v The Queen* (1992) 177 CLR 292.
16. (1981) 150 CLR 113.
17. Ibid., per Stephen, Mason, Aickin and Wilson JJ at 126.
18. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
19. Ibid., per Williams J at 230-231.
20. (1984) 155 CLR 193 at 201.
21. Or, more accurately, perhaps against King John's immediate successor, Henry III. Under his reign, the chapter protecting the free man from being 'taken or imprisoned, or disseised, or outlawed, or exiled, or in any wise destroyed' was amended to insert, after 'disseised', the words 'of his free tenement or of his liberties or free customs'; Guthrie, Op cit, p. 40.
22. *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.
23. Ibid., per Kirby J at 658-659.
24. (2001) 204 CLR 290 at 328.
25. (1992) 175 CLR 1 at 42.
26. Quoting the Balliol Statement of 1992; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

Defence in the realm of fear

By Daniel Tynan

Although it is only early days for the Obama Administration, the president and his team have been conspicuously silent about whether they will persist with the Bush administration's controversial doctrine of pre-emptive self-defence. Developed in response to the September 11 attacks, the Bush Doctrine, as it is known, asserts a right to use military force against perceived terrorist threats before those threats can materialise into actual armed attacks.

Asked recently about the future of the doctrine, President-elect Barack Obama, as he was then, responded, 'We have to view our security in terms of a common security and a common prosperity with other peoples and other countries.' While this is by no means a repudiation of the doctrine, we can be hopeful that President Obama's broader foreign policy objectives, which emphasise engagement and multilateralism, may signal a shift back to a pre-Bush position of adherence to the international rule of law.

The Bush Doctrine is a significant departure from accepted norms of international law. After the Second World War, the international community vowed to end the scourge of war and promote international peace and security through proper adherence to principles of justice and international law.

The UN Charter embodies that commitment. Article 2 (4) of the charter prohibits the use of force by one state against others and is considered such a fundamental principle of law that no nation has the right to depart from it.

Military force is allowed only if the Security Council authorises its use or a country acts in self-defence under Article 51 of the UN Charter. The right of self-defence has always allowed countries to defend themselves in anticipation of an armed attack, but only if the threat of attack is credible and imminent. This is important because the destructive capacity of modern weapons of mass destruction naturally means that countries must have the capacity to defend themselves before they are attacked.

Some supporters of the Bush Doctrine argue that the prohibition of the use of force is a relic from a bygone era; a response incapable of regulating military responses to modern forms of asymmetrical warfare, including non-state terrorist threats.

There is some force in that argument, and international law must be able to respond to the reality of modern warfare if it is to remain relevant. But nations must respond within the scope of the law as embodied in the UN Charter. The difficulty with the Bush Doctrine is that it allows a country to act purportedly in self-defence to threats that are not imminent and, as a corollary, may not even be credible.

The allied invasion of Iraq demonstrates the point. In the absence of a compelling case to intervene under Article 51, and citing Iraq's development of nuclear weapons, the US asserted a right of pre-emptive self-defence. The US intervened without authorisation from the Security Council and was widely condemned by the international community for breaching the prohibition of the use of force. After more than five years of occupation, the quagmire in Iraq serves as a warning of the costs of pre-emption.

The present situation in Iran is also problematic. According to some intelligence estimates Iran may have the capacity to develop a nuclear weapon by the end of the year. Although the Security Council has passed three resolutions which oblige Iran to halt its nuclear activities, President Mahmoud Ahmadinejad has ignored these measures and Iran's nuclear programme has developed largely unchecked.

If the US or its allies were to launch targeted strikes against Iran's nuclear facilities, even if they were successful in eliminating the nuclear threat, there is no way to predict how Iran might respond. Iran may increase insurgent activities in southern Lebanon, the Gaza Strip or Iraq, or it may launch retaliatory military attacks on allied forces or civilians in Afghanistan, Iraq or around the world.

Launching pre-emptive strikes against Iran would also reinforce a dangerous precedent, established by the invasion of Iraq, that would enable other countries to act in the same way. Countries such as Pakistan, India, China, North Korea and indeed Iran would be given the green light to advance similar claims and act pre-emptively if they believed they were threatened by another country.

The potential to misuse the doctrine of pre-emption is too great to make it an acceptable approach to maintaining global and regional security.

Australia has also given equivocal support for the doctrine of pre-emption. Although it has never been a stated policy objective, in an interview in 2004 John Howard insisted it was open to Australia to take pre-emptive action against terrorists, particularly in South-East Asia. This generated deep suspicion among our neighbours.

The Howard government also supported the invasion of Iraq, thereby endorsing the doctrine used by the US to justify the allied intervention. The Rudd Government has always been critical of the Bush Doctrine but has not unequivocally disavowed it.

As one of its election commitments, the government is commissioning a Defence white paper which, among other things, will set out Australia's strategic defence and national security objectives. The government should make clear in the white paper that the doctrine of pre-emption forms no part of Australia's defence or foreign policy options.

This would not only honour Australia's commitment to promoting the international rule of law, but demonstrate the kind of global leadership that would be required of Australia if it is to gain a seat on the UN Security Council in 2013.

This article was first published in the *Canberra Times* on 26 February 2009.

The IBA's Fiji report: 'A Moon hoax'

In March 2009 the International Bar Association published a report, *Dire Straits: A Report on the Rule of Law in Fiji*, in which it said that 'since the December 2006 coup, the interim military regime has taken steps to influence, control or intimidate the judiciary and the legal profession'. A copy of that report is available from the IBA web site at www.ibanet.org

This article was released on 18 March 2009 as an initial response by the judiciary of Fiji to the IBA Report. On 9 April, the Fiji Court of Appeal ruled that the interim government led by Commodore Bainimarama was appointed unlawfully and refused an oral application for a stay of their judgment. On 10 April, the president of Fiji abrogated the Constitution and dismissed the entire judiciary. The views expressed herein do not represent the views of the New South Wales Bar Association.

Photo: iStockphoto

Since time immemorial men and women often wondered whether there was life on the moon. It was only when two human beings actually walked on the moon on 20 July 1969 that this question was finally answered. The answer could not be found by remote control.

So it is with the recent International Bar Association report on the rule of law in Fiji. The IBA admits that it is a 'remote review'. That is, that none of the five-member IBA team actually stepped inside a courthouse in Fiji.

It is 40 years this year since the first human beings walked on the moon. Despite the conspiracy theorists saying it all happened in a movie studio, we know that the astronauts brought back with them to Earth hard evidence –'841 pounds of Moon rock' which scientists around the world have confirmed could not have come from Earth.

Just as NASA's web site refuses to waste its time and resources doing a 'a point by point rebuttal to the conspiracy theorists of a Moon hoax' stating that 'Moon rocks and common sense prove Apollo astronauts really did visit the Moon', so too is the judiciary's response to the IBA report. Rather than wasting our time dealing with the unsubstantiated claims of disgruntled 'conspiracy theorists' and their politically-inclined sources, we deal only with the flawed methodology and some key issues which demonstrate the false deductions.

Was it just another junket of 'conflict entrepreneurs' mainly from first world countries who fly around telling the third world to pull up their socks?

It can be said that even a cursory glance at the IBA report will show that it is flawed in three ways – in its moral authority to hold an enquiry at all into Fiji's judiciary, in the methodology and style adopted, and in the body of its contents.

What is the International Bar Association? It might use the word 'international' in its title but this is not an international body formed by nation states. It is a private group of lawyers. Despite its claim to be 'the global voice of the legal profession', its report reveals it represents only '30,000 individual lawyers' worldwide, whereas in the USA alone, there are over one million lawyers.

Who was on the delegation? The report suggests the IBA normally appoints 'a high-level delegation of respected jurists'. Other than naming a judge from Australia, the 'level' of the other members is unstated. Was it just another junket of 'conflict entrepreneurs' mainly from first

world countries who fly around telling the third world to pull up their socks? Who do these conflict entrepreneurs represent other than themselves? The delegation of five comprised at least three white Australians, a token Malaysian and an unknown other. Significantly, the report is silent on how the team was chosen.

The report claims that the IBA has 'a long history of monitoring Fiji'. If that is so, then where was the IBA from 1987 until 2001? Where was the IBA monitoring the litigation which arose out of the 2001 and 2006 elections? Where was it during the *Qarase v Bainimarama* case in March 2007?

As to methodology, did the IBA ask their sources whether they have been closely connected to political parties, institutions or causes? If so, why is this not cited in the report? If the IBA spoke with lawyers as to specific cases in which they have appeared, did the IBA then speak with the lawyers to whom they were opposed in an attempt to achieve a balanced view? Did the IBA delegation even pause and consider whether their 'legal' sources might be disgruntled because of a loss of power, money and influence? Did the IBA even stop and question as to who was benefiting from the previous practices of non-random case allocation, 'judge shopping' and closed courts?

The IBA has questioned why judges would not talk with the delegation after the IBA's proposed visit was declined. Does it really need to be spelt out for a supposedly 'high-level delegation'? To put it bluntly, judges cannot discuss matters which are, or are likely to be, before the courts (including immigration disputes), something which the IBA report seems to have been oblivious to and, indeed, which it has decided to indulge in with little thought for the repercussions.

The report also cites a recent contempt case involving the media. It mentions an apology and an admission but fails to spell out in clear and plain language that the accused pleaded guilty. That is not the only half-truth or 'spin' in the report. Indeed, it is littered with them.

Take for instance the selective use of media reports. It is ironical that the delegation claims to have been the subject of inaccurate media reports but then puts forward other media reports as the alleged 'truth' on certain issues. So on the one hand, inaccurate media reports which denigrate the judiciary are to be accepted, but those which are inaccurate as to the IBA's attempted visit are to be dismissed out of hand? This is exactly why courts are always cautious in accepting media reports as evidence, as they are invariably based upon second and third hand hearsay. Such caution does not appear to have been applied by the IBA delegation. Instead, it has placed heavy reliance upon media reports (over 120 citations at a cursory glance), some less than objective web sites, spurious sources, and other 'commentators'.

A lack of balance and objectivity is also obvious in the report's selective use of judgments. The report refers to Justice Bruce's decision to grant the Law Society leave in judicial review proceedings concerning the appointment of the then acting chief justice. It is strange that the report does not mention, however, that Justice Bruce is a post-2006 appointment nor that he was the presiding judge when a much-applauded permanent stay was granted to stop the DPP proceeding with a charge against Ballu Khan of an attempt to murder members of the interim government. Nor did it mention that Justice Goundar, also a post-2006 appointment, ordered the release of property to the same Mr Khan and varied his bail conditions, favourably, pending the trial.

The report also fails to cite a single judgment post-2006 where the judiciary has found against the state.

Mr Khan was represented by a Mr Graham Leung. Mr Leung did not question the presiding judges' appointments at the time, nor their decisions. Perhaps he forgot to mention this to the IBA? A strange omission indeed.

The report also fails to cite a single judgment post-2006 where the judiciary has found against the state. The truth is otherwise — and there have been many such cases. How could a fair minded inquiry team omit this as part of its 'desk review'? Most of the judgments are easily accessible on the Internet through PacLII for all to see and scrutinise.

Suppose, for example, the IBA had looked at judgments handed down in the three months from July until September 2008. They would have found in July that members of the police force were convicted of the murder of Tevita Malasebe. In August, a travel ban was lifted to allow a citizen to travel to the USA, with the court finding that the ban was in breach of the freedom of movement provisions set out in the Fiji Constitution. Also in August, damages were awarded for an assault by soldiers following events in 2000. In another case that month, damages were awarded against the police for the unlawful detention of a mother and her child. In September, damages were awarded against the police for the unlawful detention of the wrong person on a warrant. These cases could have been referred to in a balanced report. Why was the IBA report strangely silent on these significant judgments?

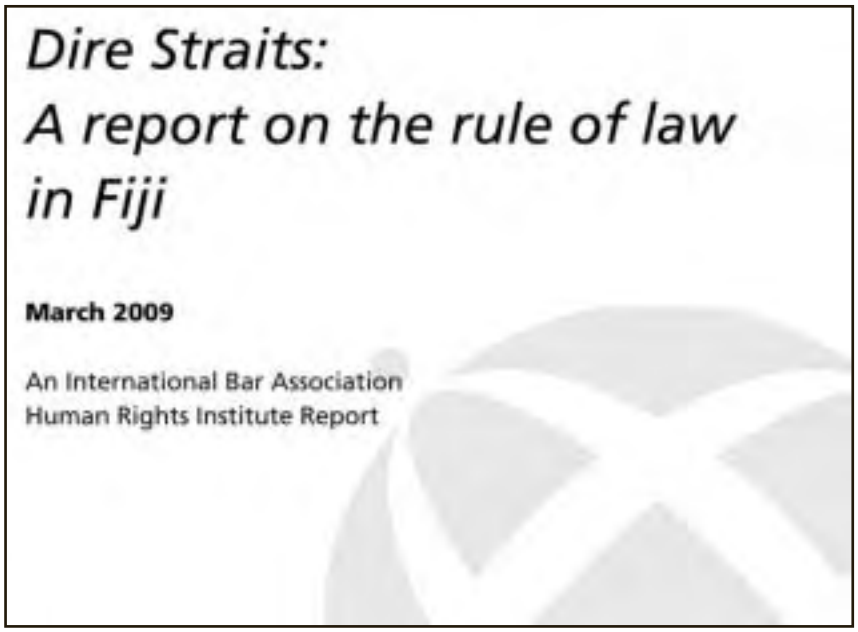
And such cases are continuing to be heard and dealt with in 2009 without fear

or favour. Just last week, damages were awarded against the Fiji Military in a case arising out of the events of 2000, while in another, a group of soldiers and police officers were convicted of manslaughter. These cases demonstrate the continuing and ordinary application of human rights law in the courts.

The IBA report selectively refers to intimidation of some pre-2006 judges without providing precise 'police report' details. It fails to mention, however, that physical and verbal attacks on the judiciary pre-dated December 2006. It also fails to mention any of the incidents involving judges appointed post-2006: a bomb threat, car damage, three home 'break-ins' and a 'mugging'. There has been an eerie silence from the Australian High Commission in relation to such incidents. A strange consular approach indeed, seeing that all but one of such incidents involved Australians. Does the IBA condemn the attacks on pre-2006 appointments but not those on judges appointed post-2006 as it is not politically correct to do so? Alternatively, is this again something which the IBA's sources failed to mention to them?

The IBA report condemns travel bans imposed on some foreigners visiting Fiji. By the same token, the Australian and New Zealand governments have imposed travel bans on visits by some of Fiji's citizens, including members of the judiciary and the legal profession. Does the IBA only condemn travel bans imposed by Fiji but not those imposed by Australia and New Zealand? So Australia and New Zealand's sovereignty is to be respected but Fiji's is to be dismissed out of hand?

It is astonishing that the report does not mention moves made by the



current judiciary for transparency and reform in the courts. In May 2008, three memoranda were released from the judiciary introducing a 'duty judge' roster to stop 'judge shopping' on urgent matters, requesting that all judges and magistrates conduct proceedings in open court, that they not hold 'grog' sessions in chambers, and asking that all judicial officers exercise care in entertaining private visitors in chambers. All of this was published in the media but seems to have slipped by the IBA's gaze. Then again, one wonders whether the IBA's sources showed this to them? Perhaps they were not interested in providing such examples to the IBA as they revealed good governance and open justice on the part of Fiji's judiciary post-2006. But it did not fit in with the story.

Was the IBA referred by their unnamed sources to the judgment of Justice Gates from 2000 in *Khan v State* where he ruled upon the question of 'allocation of cases'? Was it also mentioned to the IBA that the judgment had to be published overseas as a reported case because, for reasons never made public, there was at that time no *Fiji Law Reports* published in Fiji?

In addition, did the IBA's sources mention that as at January 2007, there were no *Fiji Law Reports* for the years 2000 – 2006 and that the IBA's own member, Mr Graham Leung, was president of the Law Society in 2005 and 2006 when no law reports were published? Further, in 2008, the judiciary with help from members of the local profession recommenced publication of the *Fiji Law Reports*. Again, did Mr Leung bring any of this to the attention of the IBA?

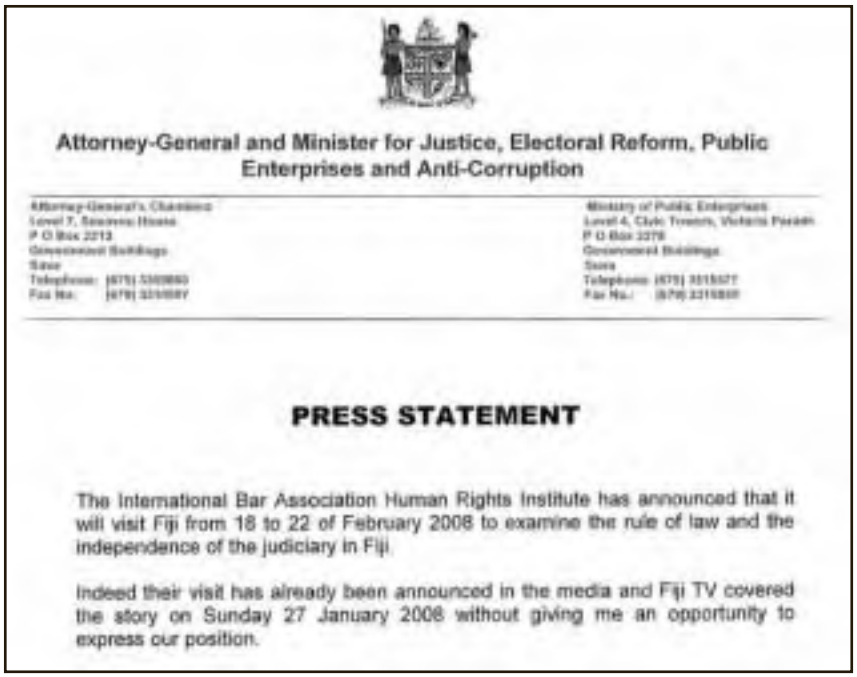
Was the IBA advised as to the changes in the sitting composition of the Court of Appeal in 2008? In 2006, the court was all male, largely from overseas. The court is now comprised of men and women from Fiji's High Court, as well as senior counsel appointed to the court from overseas. It also covers a wide age span, races and religions. They provide the court with a diversity, which is reflected in the judgments. For example, apart from the

There is more to a legal system than political cases pursued by the elite and their lawyers fighting over power and influence.

changes in civil damages (overturning the previous 'dogma' that damages for pain and suffering had to be lower for citizens of Fiji compared with Australia and New Zealand), appeals in sexual assault cases have turned around from a 90 per cent allowing of appeals in 2006, to an 87 per cent refusal rate in 2008. Perhaps, the victims of such horrific crimes may have something to say to the IBA? Then again, perhaps such judgments and statistics were not mentioned to the IBA by their sources as they represent an inconvenient truth as to what has been really happening at the coalface in the courts for the people of Fiji under a new Court of Appeal.

Indeed, the reliance by the IBA report on a few disgruntled lawyers as their sources, together with the absence of the views of victims of crime as well as plaintiffs in damages cases, probably says much about the flawed nature of the IBA report. There is more to a legal system than political cases pursued by the elite and their lawyers fighting over power and influence.

The IBA report personally attacks individual judges using inaccurate and false information. For example, the report fails to disclose that there were in fact two EU visits in 2008 to Fiji. The second mission visited on 1–15 July 2008 and specifically looked at the rule of law. It was the report of the second visit which found 'no evidence of interference by the Interim Government with the normal and independent functioning of any constitutional institutions'. The IBA report suggests that two judges made this up in their public statements when discussing the work and judgments of the judiciary in 2008. They did not (and could not) discuss the removal of the former chief justice as this involved various



Attorney-General and Minister for Justice, Electoral Reform, Public Enterprises and Anti-Corruption

PRESS STATEMENT

The International Bar Association Human Rights Institute has announced that it will visit Fiji from 18 to 22 of February 2008 to examine the rule of law and the independence of the judiciary in Fiji.

Indeed their visit has already been announced in the media and Fiji TV covered the story on Sunday 27 January 2008 without giving me an opportunity to express our position.

legal proceedings still before the courts. Instead, they were talking about the work of the judiciary, that is, the judgments, of which there was found to be no evidence of interference. Does the IBA claim not to know of the second EU visit and its findings or did their sources again fail to tell them of this report? The haste with which the IBA report dismissed the bona fides of the judges and rushed to condemn them illustrates the lack of independence and fairness in this inquiry. For neither had said anything but the truth. There were indeed two EU visits.

Much of the IBA report has little to do with the judiciary and more to do with the IBA's annoyance with the interim government refusing it entry. Fiji is a sovereign state. If it does not wish to allow access 'at this time', that is a matter for the interim government, not for the judiciary. Is the Australian judiciary responsible for the Australian Government's harsh immigration laws or for the travel bans?

As Chief Justice Gates said in December 2008 at the 10th Attorney General's Conference about the flawed methodology of such unsolicited reports: 'The procedure is characterised by unidentified accusers, undisclosed material, rumour, gossip and ever-present 'perceptions' which as you know would not count for much in a forensic inquiry or a murder trial.'

Our 'moon rocks' are the facts. The IBA can go on believing its unnamed sources that it is all a conspiracy. But just as the visits to the moon were real and not made on some Hollywood film set, similarly are the achievements of the current judiciary in Fiji. The courts are open, impartial and effective, serving all of the people. Meanwhile, can someone from the IBA commence reading the judgments?

Puttick v Tenon (2008) 83 ALJR 93; (2008) 250 ALR 582

Three principles of private international law in relation to proceedings in respect of a foreign tort appear to be well settled. The first is that the court must apply the law of the jurisdiction where the wrong occurred (the *lex loci delicti*).[1] The second is that, in determining where the wrong occurred, the correct approach is to analyse the series of events constituting the tort and to:

> …ask the question: where in substance did the cause of action arise?
>
> The cause of action arose within the jurisdiction if an act on the part of the defendant, which gives the plaintiff his cause of complaint, has occurred within the jurisdiction.[2]

The third settled principle is that an Australian court should only stay proceedings on *forum non conveniens* grounds if the local court is a clearly inappropriate forum.[3] And a court is not a clearly inappropriate forum merely because another court is more appropriate.[4]

Clear as the above principles are, however, their application in practice is often extremely difficult. The *lex loci delicti* may be difficult to locate; the place of the tort may be ambiguous or diverse;[5] and in practice it may be extremely difficult to persuade a local court that it is a clearly inappropriate forum.

These difficulties are illustrated in the recent decision of the High Court in *Puttick v Tenon*.[6]

Indeed, *Puttick* graphically demonstrates that a determination of the place of the tort – the *lex loci delicti* – requires a close analysis of the precise events constituting the alleged wrong in order to locate 'the act on the part of the defendant which gives the plaintiff his cause of complaint'.[7]

The case also illustrates the difficulty (and uncertainty) inherent in the 'clearly inappropriate forum' test required for a *forum non-conveniens* application.

The facts

Ms Puttick was the executor of the estate of her late husband. He had been employed by a company in New Zealand between 1981 and 1989. It was alleged that he contracted asbestos-related injuries during the course of that time, and that those injuries occurred during visits that he made to factories in Belgium and Malaysia in the course of his employment for that company.

Ms Puttick was the plaintiff (in substitution for her late husband) in proceedings instituted in the Supreme Court of Victoria claiming damages for those personal injuries suffered by Mr Puttick.

In the proceedings it was alleged that the defendant owed Mr Puttick a duty of care, and that it breached that duty.

The defendant (Tenon) entered a conditional appearance and sought either an order permanently staying the proceedings, or an order dismissing the proceedings summarily. It contended that the tort of negligence alleged in the proceedings had occurred in New Zealand, that the law to be applied in determining the claim was the law of New Zealand, and that the statute law of New Zealand providing for a no fault compensation scheme barred the common law claim made in the proceedings.

Judgment at first instance

At first instance, the primary judge stayed the proceedings on *forum non conveniens* grounds. He accepted that 'many – if not the great majority – of the witnesses and the relevant documents will be based or located in New Zealand'.[8] However, he also accepted that that fact, in and of itself, was *not* sufficient – as it merely demonstrated that New Zealand would be a more appropriate forum.

However, the primary judge held that there was a second factor which demonstrated that the court of Victoria was a clearly inappropriate forum – namely, that the law that governed the tort of negligence alleged in the proceedings was the law of New Zealand, as New Zealand was the place where the tort occurred.[9]

The Court of Appeal

Ms Puttick's appeal to the Court of Appeal was dismissed. By majority,[10] that court held that the primary judge was not shown to have erred in making the order for a permanent stay. The majority agreed that the *lex loci delicti* was the law of New Zealand, and held that that fact, coupled with what was identified by Warren CJ as 'the general undesirability of a Victorian court making a pronouncement upon a foreign legislative regime' was sufficient not to disturb the primary judge's order that the action be stayed permanently.[11]

The third member of the Court of Appeal (Maxwell P) dissented. He held that in substance the cause of action alleged by Ms Puttick had arisen in the 'unsafe overseas factories, in Malaysia and Belgium, where the employer, by its travel instruction, required Mr Puttick to work'. Thus, Maxwell P was of the opinion that the defendant 'failed to discharge the onus of showing that the Supreme Court of Victoria would be a clearly inappropriate forum'.[12]

The High Court

By special leave, Ms Puttick appealed to the High Court. Her only ground was that the majority of the Court of Appeal erred in finding that the omissions of the respondent in New Zealand determined the place where, in substance, the tort occurred and gave rise to the applicant's complaint in law'.[13]

The appeal was upheld.

French CJ, Gummow, Hayne and Kiefel JJ noted that *Zhang's* case[14] emphasised the need for a party relying upon a foreign *lex causae*

to do so clearly and with appropriate particulars.[15] Their honours said that in the present litigation the failure to heed what was said in *Zhang* gave rise to the difficulties which became manifest in the course of argument in the High Court.[16]

Their honours pointed out that the amended statement of claim made no express allegation that the plaintiff's claim was governed by any foreign law. There was no material in it that amplified the allegations that Mr Puttick had been 'required' to do certain things. No particulars were given in the pleading, or in the evidence adduced at first instance, of how, when or where it was that Mr Puttick had been 'required to travel to Belgium and Malaysia', repeatedly 'required to work in or inspect' one plant where asbestos products were being manufactured, or repeatedly 'required to work in, inspect or walk through' another such plant.[17]

Thus, their honours held that, on the material that was before the court, 'not even a provisional finding could be made about what was the place of the commission of the tort alleged'.[18] Rather, all that the material before the court demonstrated was that it was likely that there would be a lively dispute about those questions, and that one possible outcome of the dispute is that New Zealand law would be found to govern the rights and duties of the parties.[19]

Accordingly, their Honours held that the Court of Appeal (and the primary judge) erred in concluding that it was possible in this case to make a finding (even a provisional finding) about where the alleged tort occurred.[20]

Thus their honours held that it was not necessary to consider whether a principle of the kind mentioned by Warren CJ and the primary judge (that Australian courts should hesitate before expressing views about the construction or application of foreign statutes) should be adopted or rejected – because the premise for the consideration of that issue (namely, that New Zealand law applied) had not been established.[21]

Their honours emphasised that, in accordance with *Voth,* the focus in a *forum non conveniens* application must be 'upon the inappropriateness of the local court and not upon the appropriateness or comparative appropriateness of the suggested foreign forum'.[22]

[T]he case also demonstrates the extreme difficulty faced by an applicant in a forum non conveniens *application...the High Court is of the view that our courts must be extremely slow to decline to exercise jurisdiction which a plaintiff has regularly invoked.*

Their honours did not accept the respondent's invitation to reconsider the *Voth* test.[23]

On the contrary, their honours held that it by no means follows that showing that the tort which is alleged is, or may be, governed by a law other than the law of the forum demonstrates that the chosen forum is clearly inappropriate.[24] They said that considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the *lex causae* as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute.[25]

Thus, their honours held that the Court of Appeal should have held that:

> … Even if the lex causae was later shown to be the law of New Zealand, that circumstance, coupled with the fact that most evidence relating to the issues in the case would be found in New Zealand, did not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum.[26]

Accordingly, their honours held that the appeal should be allowed with costs.

Heydon and Crennan JJ agreed that the appeal should be allowed. They held that there were four questions for consideration. First, whether the courts below erred in concluding that the *lex causae* was New Zealand law. Secondly, whether the High Court should remit the matter to the Supreme Court of Victoria for the discretion to be re-exercised, or whether the High Court should re-exercise the discretion itself. The third question was whether the discretion should be exercised in accordance with the test stated in *Voth*, and the fourth was whether the court's discretion should be exercised in favour of or against the respondent's application for a stay.

As to the first question, Heydon and Crennan JJ held that, for the reasons given in the plurality judgment, it was not possible to decide whether the *lex causae* was New Zealand law. Thus, they held that the discretion of the primary judge, upheld by the majority of the Court of Appeal, miscarried because it depended in part on the proposition that the *lex causae* was New Zealand law. Thus, the discretion had to be exercised afresh. However, their Honours held that it would be unduly onerous on the parties, by remitting the matter to the Supreme Court of Victoria, in effect to compel them to conduct further interlocutory litigation. They held that the High Court should itself re-exercise the discretion.[27]

Like the plurality, their honours rejected the invitation to reconsider the *Voth* test. In the first place, they held that, on the facts, the *Puttick* case did not create a satisfactory forensic background against which to explore the correctness of *Voth*.[28] Secondly, they did not consider that the considerations relevant to overruling prior authorities of the High Court had been demonstrated to have been satisfied.[29] Thirdly, their honours held that the submissions of

the respondent (inviting the reconsideration of *Voth*) had not been developed in the detail which is desirable when a question of that very important kind is presented.[30] Finally, they held that it had not been demonstrated that even if the *Voth* test were overruled or modified, there would be any difference in the result in the instant case. Thus, any observations making a change to the *Voth* test would be *dicta* only.

As to the fourth question – namely how the High Court ought to exercise the discretion – their Honours held that while the matters relied on by the respondents certainly revealed that New Zealand is *an* appropriate forum, other factors indicate that Victoria is not clearly inappropriate. The proceedings were not oppressive, vexatious, or an abuse of process. Thus, their honours held that the High Court ought not to exercise its discretion differently from the way in which the primary judge would have exercised his discretion had he not found that the *lex causae* was the law of New Zealand.

Comment

This case constitutes a timely reminder of the care with which foreign law must be pleaded and particularised. Precise attention must be paid to each of the elements of the alleged cause of action in order to demonstrate that the act on the part of the defendant which gives the plaintiff his cause of complaint in fact occurred in the alleged foreign jurisdiction.

But the case also demonstrates the extreme difficulty faced by an applicant in a *forum non conveniens* application. Indeed, as noted, French CJ, Gummow, Hayne and Kiefel JJ said, in the present case, that 'even if the *lex causae* was later shown to be the law of New Zealand, that circumstance, coupled with the fact that most evidence relating to the issues in the case would be found in New Zealand, did not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum.'

Given that their honours had already held, on the facts, that it could not be demonstrated that the *lex causae* was New Zealand law, the above statement is *obiter*. Nevertheless it clearly demonstrates that the High Court is of the view that our courts must be extremely slow to decline to exercise jurisdiction which a plaintiff has regularly invoked. Circumstances will indeed have to be extraordinary for a defendant in such proceedings to succeed in a *forum non conveniens* application.

By Mark Friedgut

Endnotes

1. See *Pfeiffer v Rogerson* (2000) 203 CLR 503 in relation to intra-national torts and *Renault v Zhang* (2002) 210 CLR 491 in relation to torts arising outside Australia.
2. *Distillers Co (Biochemicals) Limited v Thompson* [1971] AC 458 at 468 per Lord Pearson. In *Voth v Manildra Flower Mills Pty Limited* (1990) 171 CLR 538 Mason CJ, Deane, Dawson and Gaudron JJ said at 567 that the above approach formulated in *Distillers* does no more than lay down an approach by which there is to be ascertained, in a common sense way, the place of 'the act on the part of the defendant which gives the plaintiff his cause of complaint'.
3. *Voth v Manildra Flower Mills Pty Limited* (1990) 171 CLR 538; *Henry v Henry* (1996) 185 CLR 571 at 587.
4. *Renault v Zhang* (2002) 210 CLR 491.
5. *Pfeiffer v Rogerson* (2000) 203 CLR 503 at 538-539[81].
6. *Puttick v Tenon* [2008] HCA 54.
7. *Distillers*, above, at 468.
8. See *Puttick* at [9].
9. See *Puttick* at [10].
10. Warren CJ and Chernov JA; Maxwell P dissenting.
11. See *Puttick* at [12].
12. At [13].
13. At [14].
14. *Renault v Zhang* (2002) 210 CLR 491.
15. At [17].
16. At [17].
17. At [18] and [20].
18. At [21].
19. At [21].
20. At [24].
21. At [25].
22. At [27].
23. At [30].
24. At [31].
25. At [31].
26. At [32].
27. At [37].
28. At [39].
29. At [40].
30. At [41].

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 251 ALR 322; (2008) 83 ALJR 196

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 251 ALR 322 is a decision concerning whether a late payment, if accepted, was made 'punctually' within the meaning of an indemnity agreement and, if not, whether the acceptance of payment or representations made in this regard constituted a waiver of this requirement.

The proceedings arose in the context of the collapse of an investment scheme known as the *'Port Macquarie Tea Tree Plantation'*, whereby investors would participate in a commercial tea tree plantation project ([10]). The appellant, Agricultural and Rural Finance Pty Ltd (ARF), lent money to participants such as the first respondent (Gardiner). The second respondent, OAL, managed the project and would indemnify the participants for liability to ARF in or on certain conditions.

ARF made four loans to Gardiner. In each case, the loan agreement required periodic repayments and provided that the whole of the principal outstanding was immediately repayable, at the option of ARF, 'if [Gardiner] defaults in the due and punctual payment of interest … or any repayment instalment' ([1]).

Each loan agreement was made contemporaneously with an indemnity agreement between ARF, Gardiner and OAL which provided that, in consideration of Gardiner paying a flat fee, if Gardiner *punctually* paid amounts due under the related loan agreement, and if, as a result of certain events, Gardiner ceased to carry on the business to which the money lent was to be applied, OAL would indemnify Gardiner against any demand by ARF for repayment under that loan agreement, and ARF would look only to OAL for repayment of the loan ([2]).

...the majority, commenting more generally, stated that the making of a representation, without more (such as election, variation or detrimental reliance) ought not suffice to alter the rights and obligations for which the parties stipulated their contract.

Gardiner did not pay certain sums due under, relevantly, the first and second loan agreements. ARF accepted late payment and did not choose to accelerate repayment of the whole of the outstanding principal ([5]). However, following the collapse of the scheme, ARF sought to recover the money lent to Gardiner ([25]).

It was accepted that Gardiner later ceased to carry on the relevant business as a result of an event of a kind specified in the indemnity agreements ([5]). The issue that arose was whether he could rely upon the indemnity agreements and require ARF to look only to OAL for payment. This in turn depended whether the late payment could be said to be 'punctual' and, if not, whether this condition to the indemnity was waived ([6]).

At first instance, Young CJ in Eq (as he then was) found in favour of ARF in respect of moneys owing under all four loan agreements. The Court of Appeal, however, allowed Gardiner's appeal in part and found that only the monies under the fourth agreement was due and payable ([27]). The decision turned on a letter sent by ARF in respect of an overdue payment that: '... as we failed to send reminder notices we will accept payment as 'on time' up until 30 June 1999.'

Spigelman CJ held that payment was made 'punctually' ([28]-[29]). Basten JA held that payment was not made 'punctually' but the letter constituted an express variation ([30]). Handley AJA dissented ([31]).

Gummow, Hayne and Kiefel JJ delivered a joint judgment that upheld the appeal to it and held Gardiner to be liable in respect of the first and second loan agreements. Heydon J agreed with the joint judgment. Kirby J dissented.

The majority held that the late payments were not made 'punctually', stating that ([32]):

> The word 'punctually' when used in cl 2 of the indemnity agreements, like the word 'punctual' in cl 5 of the loan agreements, should be read in its ordinary sense of '[e]xactly observant of [the] appointed time; up to time, in good time; not late'. Nothing in the text or context of the agreements (whether read separately or together) supports reading the critical words in some other way. [Footnotes omitted].

This meant that payment was to be in accordance with the contractual provisions whether or not ARF was content to accept a later payment. By using the words 'punctually' or 'due and punctual', the relevant clauses of the contract looked to the way in which the obligation to pay had been performed, which required consideration of what the borrower has done, not what the lender has done in response to the fact of payment ([34]).

The majority also rejected the argument that there was 'waiver' of the requirement that payment be made 'punctually' in the three senses in which the concept was argued before it.

First, there was no waiver in the sense of an election between inconsistent rights. ARF's election not to accelerate did not deny the fact of the breach by Gardiner but, to the contrary, the premise for analysis of the events as an election by ARF was that Gardiner had not made due and punctual payment ([63]). There was also no election by OAL because the lateness of payment did not give OAL a choice between competing rights ([66]).

Second, there was no waiver in that there was forbearance ([68]-[87]). A contracting party was not to be held (pending reasonable notice to the contrary) to that party's acceding to the opposite

party's request to forbear from insisting on performance as stipulated ([87]). This was not a case in which principles relating to estoppel, an election between inconsistent rights or variation arose.

Third, there was no waiver in that there was 'abandonment' or 'renunciation' ([88]-[93]). Even if ARF and OAL had said that they would not insist upon compliance with the condition for punctual payment, the time for abandonment or renunciation of the right to insist upon the condition had not arrived when those statements were made and what was said or done at that time constituted, therefore, no abandonment or renunciation ([93]).

Finally, the majority, commenting more generally, stated that the making of a representation, without more (such as election, variation or detrimental reliance) ought not suffice to alter the rights and obligations which the parties stipulated by their contract ([95]-[96]).

Accordingly, Gardiner could not rely upon the indemnity as an answer to ARF's claim for monies owing under the first and second loan agreements.

By Patrick Reynolds

Kennon v Spry (2008) 83 ALJR 145; (2008) 251 ALR 257

The central question in this case was whether the assets of a family trust were included among the property of the parties to the marriage for the purposes of a property settlement under the *Family Law Act 1975* (Cth).

The facts were that the husband had created a discretionary trust some 10 years prior to the marriage. The husband made direct financial contributions to the trust assets; the primary judge found that the wife made indirect financial contributions to the trust assets, by her efforts in the marriage. The husband was at all relevant times the sole trustee. The marriage lasted for 23 years, after which the parties separated in 2001. There were four children of the marriage, each of whom subsequently intervened in the proceedings.

A number of variations to the trust were effected over the years. First, in 1983 the husband caused to be executed a deed pursuant to which the husband: (1) released the trust from any loans advanced to it by him; and (2) released and abandoned any beneficial interest he may have held in the trust, and confirmed that he ceased to be a beneficiary, or a person to whom or for whose benefit any part of the trust fund and income could be applied.

Next, in 1998 the husband caused to be executed a further deed pursuant to which both the husband and the wife were excluded from receiving any part of the capital of the trust. Lastly, in 2002 the husband caused to be established four separate trusts, in the names respectively of each of the children of the marriage. In his capacity as trustee of the trust the husband then applied one quarter of the total income and capital of the trust fund to each of the trustees of the trusts for the four children.

By way of preliminary, the following propositions were affirmed in the various judgments. The term 'discretionary trust' has no fixed meaning and is used to describe particular features of certain express trusts (French CJ at [47]; see *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [8]). A person falling among the class of objects of the discretionary power conferred upon the trustee of a discretionary trust has no proprietary interest in the assets of a trust, only a mere expectancy or hope that one day the power will be exercised in that object's favour (Heydon J at [160]; and see *Gartside v Inland Revenue Commissioners* [1968] AC 553). However, an object of the trustee's discretionary power has certain rights, including a right in equity to due administration of the trust; moreover the trustee owes a fiduciary duty to the objects to consider whether and in what way he or she should exercise the power (Gummow and Hayne JJ at [125] and see *McPhail v Doulton* [1971] AC 424).

The question then was whether the husband or the wife, or both, had interests in or in relation to the assets of the trust that fell within the description of 'property of the parties to the marriage' in section 79(1) of the Family Law Act.

The effect of the primary judge's orders was that the 'net asset pool' to which regard could be had in assessing the parties' contributions included the assets of the trust (Kiefel J at [191]). A full court of the Family Court by majority dismissed an appeal from the decision of the primary judge. The High Court by majority

The central question in this case was whether the assets of a family trust were included among the property of the parties to the marriage for the purposes of a property settlement under the Family Law Act 1975 *(Cth)*

dismissed a further appeal.

In the majority, French CJ held:

> Where a property is held under such a trust [*ie, a discretionary trust with an open class of beneficiaries*] by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during a marriage, it does not, in my opinion, necessarily lose its character as 'property of the parties to the marriage' because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or discretion (at [65]).

French CJ further held:

> For so long as [*the husband*] retained the legal title to the Trust fund coupled with the power to appoint the whole of the fund to his wife and her equitable right, it remained, in my opinion, property of the parties to the marriage for the purposes of the power conferred on the Family Court by s 79. The assets would have been unarguably property of the marriage absent subjection to the Trust (at [66]).

Gummow and Hayne JJ (with whom French CJ agreed on this point) held (at [137]):

> And because, during the marriage, the husband could have appointed the whole of the Trust fund to the wife, the potential enjoyment of the *whole* of that fund was 'property of the parties to the marriage or either of them'. Furthermore, because the relevant power permitted appointment of the whole of the Trust fund to the wife absolutely, the value of that property was the value of the assets of the Trust.

Kiefel J was also in the majority in dismissing the appeal. However Kiefel J arrived at this outcome by a different route. Section 85A of the Family Law Act provides that the court may in proceedings under the Act make such order as the court considers just and equitable with respect to the application of the whole or part of property dealt with by 'ante-nuptial or post-nuptial settlements made in relation to the marriage'. Kiefel J held that this provision enabled the primary judge to deal with the trust property as contemplated by his orders.

In dissent, Heydon J would have allowed the appeal. Heydon J expressed the view that giving an extended meaning to the definition of 'property' would lead to a wholly unreasonable result (at [163]). Heydon J continued:

> For it would mean that if a discretionary trust existed under which a wife was among a class of objects of a bare power of appointment having thousand of members who had nothing to do with her family or the husband's family, the Family Court of Australia would have power to make a s 79(1)(a) order altering her 'interests' in the assets of that discretionary trust favourably to her.

Heydon J further held:

> Even if, contrary to the reasoning employed above, the wife's rights are 'property' rights, they are not forms of property to which the proceedings were directed. The proceedings were directed to obtaining orders enabling the wife to gain access, directly or indirectly, to the assets of the Trust. In those assets she had no property (at [164]).

As to section 85A, Heydon J held that the wife could not rely on this provision, since it had not been raised in either court below and, in any event, the settlement in question was not one 'in relation to the marriage' for the purposes of section 85A, since the trust had been established some 10 years prior to the marriage.

By Jeremy Stoljar SC

Parker v Comptroller General of Customs (2009) 252 ALR 619

In this case the High Court considered the extent to which principles of procedural fairness require an appellate court to afford parties the opportunity to be heard on non-binding decisions. The appeal arose out of a customs prosecution brought against the appellant for civil penalties and unpaid duty. The appellant was a director and shareholder of one of three companies investigated by the Australian Customs Service (ACS) over allegations of adulterating imported liquor with locally produced alcohol.

During its investigation the ACS seized documents from relevant parties under the purported exercise of a warrant issued under s 214(3) of the *Customs Act 1901* (Cth)[1]. Simpson J admitted those documents into evidence at first instance in the proceedings in the Supreme Court of New South Wales. Her Honour rejected the appellant's argument that the documents should not be admitted into evidence under the operation of s 138 of the *Evidence Act 1995*.

The appellant's argument was based upon the invalidity of the antecedent notice to produce under s 214(1) of the Customs Act which founded the purported issue of the warrant under s 214(3). During the proceedings at first instance the respondent accepted this invalidity – and the resulting invalidity of the warrant itself – but successfully argued that the documents, although unlawfully obtained, should be admitted into evidence in the exercise of the discretion under s 138.

In delivering the judgment of the Court of Appeal, Basten JA, with whom Mason P and Tobias JA agreed, held that although Simpson J had accepted the decision of Dunford DCJ in *Re Lawrence Charles O'Neill* (NSWDC, 18 August 1988, unreported) at 12-13 in his view *O'Neill* was incorrectly decided. However, Basten JA rejected the appellant's challenges to Simpson J's decision. In *O'Neill* Dunford DCJ held that the power to seize documents under a warrant issued under s 214(3) was limited, and did not extend generally to records relating to shipments over the preceding five years which were required to be kept by other provisions in the Act.

In the High Court the Appellant complained 'that without hearing the parties the Court of Appeal rejected the authority of *O'Neill* and thereby allegedly undermined his submissions respecting the unlawful or improper seizure of the "five year documents".' [121]. The majority, comprising Gummow, Hayne and Kiefel JJ rejected this submission, noting that the Court of Appeal had decided the appeal on the basis that *O'Neill* was correct given that the respondent had conceded at the trial that the documents were unlawfully obtained. The real issue at the trial was the extent of any culpability on the part of the ACS in failing to take *O'Neill* into account. Basten JA held that the evidence established that the ACS had not deliberately or recklessly ignored *O'Neill*. Rather it had acted on legal advice which took a broad construction of s 214 consistent with the approach later found to be in excess of authority. The majority held that this was a good answer to the limited special leave point. The majority also went on to hold that the appellant had not been denied procedural fairness in the Court of Appeal, stating (at [137]) that:

> The content of the requirement of procedural fairness at appellate level, as elsewhere, cannot be surveyed in metes and bounds. But this litigation illustrates a point of general importance, habitually assumed without elaboration. It is that consideration by a court of the weight to be given to decisions that are not authoritative (because made by courts lower in the hierarchy) does not necessarily attract an obligation to invite submissions by the legal representatives of the parties directed specifically to those decisions. To extend that invitation on occasion may be prudent, but it is not always mandated by the requirements of procedural fairness and, as the decision of this Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*[2] illustrates, it may be necessary to consider more than the dictates of procedural fairness. But what is required is that the parties are given a sufficient opportunity to be heard on the issues in the case and those issues will not often be defined in a way that requires specific identification of particular, but non-binding, previous decisions.

French CJ (at [85]) agreed with the majority to an extent and, although finding that the Court of Appeal should have informed the parties of its intention to consider *O'Neill*, nevertheless dismissed the appeal:

> To the extent that the Court of Appeal rested its decision upon the view that *O'Neill* was wrongly decided, it did so without prior warning to Mr Parker. This was a matter going to the proper construction of s 214(3) which had not been in issue before the Court of Appeal. On the other hand, I agree with the point made by Gummow, Hayne and Kiefel JJ[3]. A court is not necessarily obliged to identify to the parties or their legal representatives, from among prior non-authoritative decisions, those which it may decide not to follow. What is essential is that the parties to proceedings be given an opportunity to be heard on all the issues in the case. Where a proposition of law is not in contest, the court should not decide the case on the basis of a departure from that proposition without notice to the parties. In this case, the Court of Appeal should have given the parties notice of its intention to consider *O'Neill* and an opportunity to make submissions about it.

French CJ held that no additional argument that the appellant could have put had the parties been informed of the Court of Appeal's intention to consider *O'Neill* had been identified. Accordingly, there was no relevant procedural unfairness.

By Chris O'Donnell

Endnotes

1. Section 214 of the *Customs Act 1901* was repealed with effect from 1 July 1995.
2. (1993) 177 CLR 485; [1993] HCA 15.
3. At [137].

Case management in the Court of Appeal: a new Practice Note

A new Practice Note relating to case management of proceedings in the Court of Appeal was issued and commenced in operation on 27 March 2009 (Practice Note No. SC CA 1). This Practice Note replaces the previous version which had been issued on 7 April 2008.

In large part the new Practice Note is similar to its predecessor. There are three new requirements, which are as follows:

- Parties are now obliged to inform the registrar of the Court of Appeal at the earliest opportunity of any related appeal or application which should reasonably be taken into account in the listing of any appeal or application.
- Lists of authorities should disclose the name and contact details of the person(s) providing the list.
- Lists of authorities should annex relevant parts of unreported judgments from which passages are to be read at the hearing of an appeal or application.

Despite the small compass of these changes, in light of recent lectures by the president of the NSW Court of Appeal, the Hon Justice Allsop, in the New South Wales Bar Association's 2009 Continuing Professional Development Programme, it is timely to reflect upon other requirements of the Practice Note and Part 51 of the *Uniform Civil Procedure Rules 2005* (UCPR).

Submissions and summaries of argument

The substantive rules in relation to submissions and summaries of argument are contained in rr 51.12, 51.13, 51.36 and 51.45 of the UCPR. Importantly, a summary of argument and response (which are applicable to applications for leave) must not exceed 10 pages and submissions on appeal must not exceed 20 pages.[1] The Court of Appeal has recently commented on the nature and quality of submissions expected of counsel: *Hooker v Gilling* [2007] NSWCA 99 at [65] – [68]; and *Kendirjian v Ayoub* [2008] NSWCA 184 at [45] – [48] per McColl, JA. It is important to note that the court will order costs against counsel where the inadequacy of written submissions leads to unacceptable delay and additional work: see *Kendirjian v Ayoub* (No. 2) [2008] NSWCA 255 and ss 56 and 99 of the *Civil Procedure Act 2005* (NSW).

Chronologies

The substantive rules in relation to chronologies are contained in rr 51.34 and 51.35 of the UCPR. Chronologies should not only refer to the principal events leading up to the litigation (*Woods v Harwin* (CA(NSW), Mahoney AP, Clarke and Meagher JJA, 5 November 1993, unreported), they should also include reference to the key events in the litigation. Further, a chronology should not simply be a recitation of events favourable to one party, but should objectively set out all events relevant to the litigation. The Practice Note makes it clear that failure to file a proper chronology may have adverse costs consequences.

Concurrent leave and appeal hearings

Where leave is required to appeal, litigants will confront the vexed issue as to whether the hearing for leave to appeal and appeal should be concurrently heard. In their summaries of argument and responses, parties are required to address whether it is appropriate for both matters to be heard concurrently and, if so, why. In addressing these matters, parties should consider the extent to which the application for leave to appeal will canvass the merits of the appeal, the extent to which evidentiary materials will overlap, whether there are any issues of public importance, questions of prejudice and delay and any other matter considered by the parties to be relevant. Applications for concurrent hearings will be determined on the papers by a judge of appeal.

Interlocutory applications and motions

All interlocutory applications and motions will continue to be listed before the registrar on Monday mornings at 9.45am unless otherwise stated. Contested matters may be referred to the referrals judge for hearing on that day.

Appeal books

Part 51 of the UCPR makes detailed provision in relation to the filing and content of appeal books. It is important to bear in mind that non-compliance with these rules may result in adverse costs orders, including orders that costs of preparing non-compliant appeal books not be recoverable from clients: *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [68]. Adverse costs orders may also be made where appeal books contain irrelevant materials: *Slater v Thompson* [2003] NSWCA 220 at [30].

Conclusion

Although the new Practice Note does not make a significant departure from its predecessor in relation to case management in the Court of Appeal, recent cases and comments made by the president have put practitioners on notice of the standards expected from counsel who appear before the court.

AR Moses SC

Endnotes

1. Unless leave is granted by the court because of the nature of the case.

Report on a personal injury conference

By Andrew Stone

The inaugural Bar Association common law CPD programme took place at the Westin Sydney on Saturday 7 February 2009. Although predictions as to the demise of the common law bar become even more frequent, over 80 barristers gave up a Saturday to polish their professional skills and earn CPD points.

Since the late 1990s the legislative regimes governing various types of common law claims have grown substantially more complex, including changes to both the manner of litigating and method of assessing motor accident claims, industrial accident cases and medical negligence. The *Civil Liability Act 2002* endeavoured to codify (at least in part) the general common law both as to liability and damages. There have been changes to asbestos litigation. Even the Commonwealth joined in with amendments to the Trade Practices Act.

The speakers' programme for the day reflected the diversity of challenges now facing the common law practitioner.

Current and former members of the judiciary kindly agreed to speak. The former president of the Court of Appeal, Justice Mason, reflected upon changes in torts law during his period on the bench with the added perspective of his more recent academic pursuits. Justice Beazley spoke on Calderbank offers in the Court of Appeal with the aim of improving the quality of applications before the court, hopefully to be matched by a commensurate decrease in time-consuming costs judgements. Justice Harrison ventured as far back as *Donaghue v Stevenson* before addressing more recent developments.

David Russell SC reviewed recent issues in dust diseases with a particular emphasis on domestic assistance claims and asbestos litigation. Steven Campbell SC undertook the hardest task of the day in addressing Section 151Z of the Workers Compensation Act – a provision that has confounded advocates and the judiciary alike.

Philip Mahony SC and Henry Silvester presented a thoughtful paper on professional liability since the introduction of the *Civil Liability Act 2002*. Mark Robinson presented a terrific seminar on administrative law for personal injury lawyers. Since administrative decision making replaced the role of the court in determining substantial aspects of motor accident and workers' compensation claims, a greater familiarity with administrative law procedures has become an absolute must for common law practitioners.

The afternoon programme continued to delve into the new and technical. Andrew Stone (assisted by Dr David Bowers) spoke on AMA IV and the medical assessment guidelines. Margaret Holz explained the operation of the new Lifetime Care and Support Scheme. Andrew Morrison SC presented a detailed and highly practical paper reviewing significant recent cases.

The day concluded with an ethics hypothetical from Jeremy Gormly SC and Andrew Stone. The ethical dilemmas postulated created a lively debate and the opportunity for audience participation.

Feedback from participants suggested that the day was an outstanding success with demand for a similar CPD event next year.

Special thanks go to Chris, Jo and Katie from the Bar Association's Professional Development Department who organised speakers, registration, papers and the excellent venue. Bar Association President Anna Katzmann SC and the chair of the Common Law Committee, Ross Letherbarrow SC shared the chairing duties and added their considered commentary.

In addition to the educational benefits the day provided one further bonus. In the not so distant past large portions of the common law bar congregated on a daily basis in the John Maddison Tower, whether in the reserve list in Court 15B, on level 12 for arbitrations, in the Workers Compensation Court, or the coffee shop. With the substantial reduction in litigation and the development of new forums for determining motor accident and workers' compensation claims some collegiality is lost – we just don't see as much of each other. One of the major feedback points from the day was that it was good to catch up with colleagues during the breaks in the programme. Planning is now underway to organise a dinner for the common law bar in the second half of the year.

Verbatim

Q: So you have nominated two occasions there. You had your first in Gosford Hospital, is that right?

A: Yeah, I've been to Gosford four times all up.

Q: Which hospital at Gosford?

A: The Gosford Hospital (witness indicated).

Q: Which one?

A: There's only one Gosford Hospital that I know.

Q: What's the name of that?

A: Gosford Hospital.

The Hon T E F Hughes AO QC

By the Hon Sir Anthony Mason AC KBE, Chief Justice of Australia (1986 – 1995)

As my mother knew Tom's mother, I encountered him at a very early age. My early impression of him was by no means favourable. This was not his fault. It was because my mother held him out as a desirable role model. 'Why can't you be well-mannered, like Tom Hughes?' she would say.

So the image I had of him was of a boy who handed around the scones and cakes at Eastern Suburbs' afternoon tea parties attended by Roman Catholic mothers in the early 1930s.

I next encountered him at the Sacred Heart Kincoppal Convent then situated at Elizabeth Bay. The Rose Bay Convent was a separate institution, though it was also administered by the Sacred Heart Order. The convents then educated boys as well as girls at the level of kindergarten and the first year or so of primary school. Tom was a year, perhaps two years, ahead of me, this being a massive gap at that age in human experience and savoir faire. This meant that I did not fraternise with him to any extent. He seemed to be a distant, proper, upright boy and people spoke of him in terms of high praise. Had I then known that in later years he would earn the nickname 'Frosty', it would not have come as a surprise.

He left Kincoppal for Riverview. His career at Riverview was made known to me by my uncle, who was a Jesuit with connections to Riverview. He provided me with copies of the school magazine, which revealed that Tom excelled in athletics and other activities, being the winner of the 880 yards.

My early impression of him was by no means favourable. This was not his fault. It was because my mother held him out as a dersirable role model. 'Why can't you be well-mannered, like Tom Hughes?' she would say.

We saw more of each other at the law school, after he was discharged from the RAAF where he served in the same squadron as Gough Whitlam. He was admitted to the bar before I was and read with Bruce Macfarlane and also with Ken Asprey (with whom I later read).

Tom quickly developed a busy common law practice. He appeared as junior counsel with many silk, including Ken Asprey and Tony Larkins, impressing them all with his knowledge and skill. He also appeared frequently on his own and this was no doubt the foundation of his success as an outstanding advocate.

I recall that in one case, in which he was led by Rae Else Mitchell QC, Else Mitchell left the cross-examination of a critical witness to Tom with beneficial results for their client. This led to Else Mitchell presenting Tom with a red bag.

A young Tom Hughes.

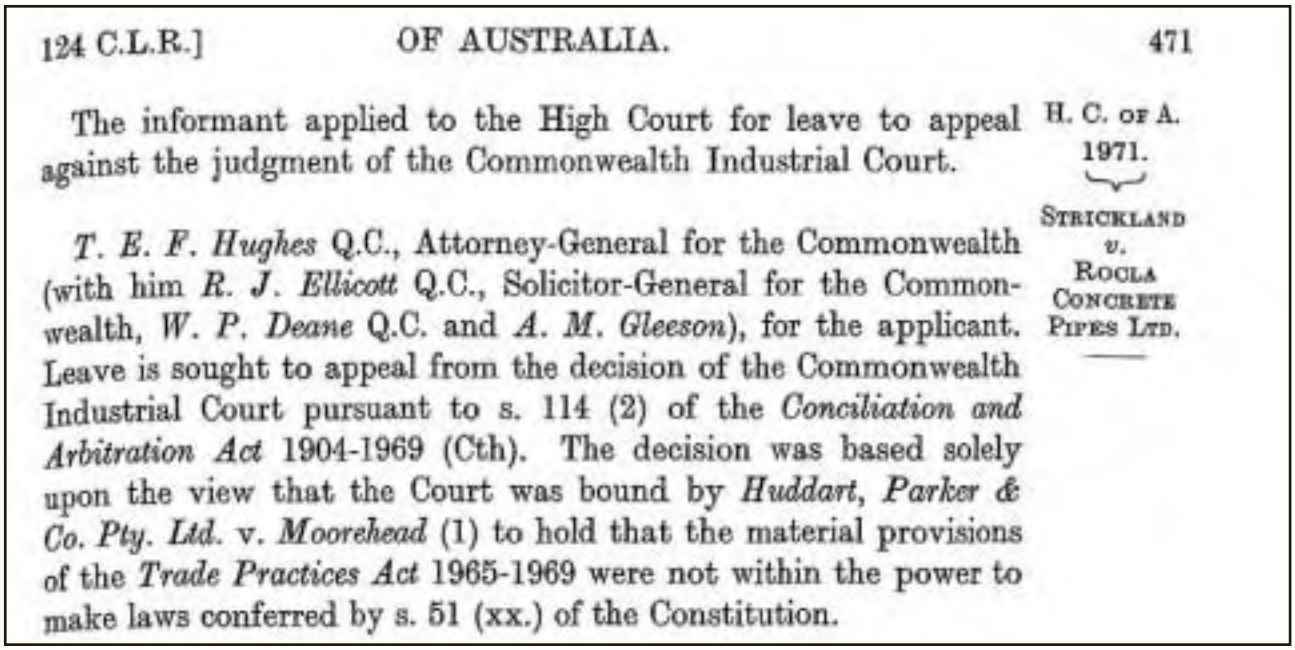
Tom was a great friend of Tony Larkins. Tom's style as an advocate exhibited characteristics of both Larkins and Asprey, each of whom was expert in acting a part. They were both theatrical in style, Larkins being the more flamboyant and more given to rhetorical flourishes which involved the use of arresting language. The use of arresting, even archaic, language has always been a feature of Tom's advocacy, most notably before juries.

Like many successful advocates, he has an imposing presence and voice, evocative of the image of an aristocratic Guards officer, an image which, I imagine, would have daunted not only the dedicated perjurer but the witness who was hesitant or lacking in confidence.

He was, and is, a vigorous cross-examiner who looked at the judge or the jury rather than the witness, particularly during the telling parts of the cross-examination. Like other successful cross-examiners he was prone to begin his cross-examination with questions such as 'Do you put yourself forward as a witness of truth?' or 'Do you put yourself forward as a man of honour?'

Unlike some outstanding advocates he was also a good lawyer with the result that he was at home in any court, including the High Court where he argued constitutional questions with great ability.

As an advocate, whether at trial or in an appeal, he seemed to be the very personification of rectitude. And the appearance reflected the reality. As a judge you felt that you could trust Tom – within limits, of course. He managed to create the impression that his opponent, whoever he might be, was suffering from a rectitude impairment, if only by comparison. Even such an engaging and charming counsel as Sir Maurice Byers QC could seem devious and



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STRICKLAND v. ROCLA CONCRETE PIPES LTD.

The informant applied to the High Court for leave to appeal against the judgment of the Commonwealth Industrial Court.

T. E. F. Hughes Q.C., Attorney-General for the Commonwealth (with him *R. J. Ellicott* Q.C., Solicitor-General for the Commonwealth, *W. P. Deane* Q.C. and *A. M. Gleeson*), for the applicant. Leave is sought to appeal from the decision of the Commonwealth Industrial Court pursuant to s. 114 (2) of the *Conciliation and Arbitration Act* 1904-1969 (Cth). The decision was based solely upon the view that the Court was bound by *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1) to hold that the material provisions of the *Trade Practices Act* 1965-1969 were not within the power to make laws conferred by s. 51 (xx.) of the Constitution.

a trifle tricky when compared to Tom.

The reflection of rectitude was a great advantage to him in cross-examination. It seemed to point up the contrast between the cross-examiner and the shifty witness. It was also an advantage in address. It gave added point to the stern denunciation of the deceitful and dishonest conduct of those whose machinations had brought Tom's client undone.

Tom became a federal MP when I was solicitor-general. When in Canberra, he was our neighbour in Forrest, a suburb of Canberra.

About this time, there was an occasion when he entertained Billie Mackie Snedden, then federal attorney, and me to dinner at his Sydney home in Bellevue Hill. I do not have an extensive recollection of the evening. The one thing I do recall was that Tom produced a demi-john of Scotch whisky. Perhaps that is why my recall is so limited. I hasten to add that I do not suggest that Tom drank too deeply from the demi-john. There can be no doubt that his reason for buying such a large container of whisky was economy rather than thirst.

As an advocate, whether at trial or in an appeal, he seemed to be the very personification of rectitude. And the appearance reflected the reality.

In 1969 Tom became federal attorney-general. For some years his chief claim to public fame was as the attorney-general who wielded a cricket bat in the face of the anti-Vietnam War demonstrators who protested at his home in Sydney. The cricket bat belonged to his son Tom.

Some years later Tom and I were involved in a fathers and sons school cricket match in Centennial Park where a savage dog – a mastiff or an Irish wolfhound – attacked the sister of one of the boys, puncturing her lung. This event resulted in the match being abandoned before Tom was called upon to bat. So we did not discover whether his cricketing ability with the bat when facing the school bowlers equalled the ability he exhibited with the bat when confronted by the anti-Vietnam War demonstrators.

The owner of the dog refused to give his name. Tom bravely led a posse of fathers who followed the savage beast and the owner to his house in Paddington. This heroic expedition enabled us to ascertain the owner's name and address.

Tom Hughes was a highly regarded law officer, a professional attorney-general who appeared as counsel in the High Court in major cases. He succeeded in *Strickland v Rocla Concrete Pipes Ltd* in persuading the High Court to uphold Pt V of the *Trade Practices Act 1974* (Cth) on the basis that it was supported by the corporations power. It was a critical decision in the development of the corporations power. He was not, however, in favour of the establishment of the Federal Court and the Family Court. Ultimately his view did not prevail.

He continues to devote his boundless energy to the law and his rural interests.

The Hon T E F Hughes AO QC

By the Hon John Howard AC, Prime Minister of Australia (1996 – 2008)

Jaiwei Shen's superb portrait of Tom Hughes, which hangs in the National Portrait Gallery, captures its subject in fully robed, rhetorical flight. It is the image of Tom Hughes which so many of his friends and colleagues have known over many years.

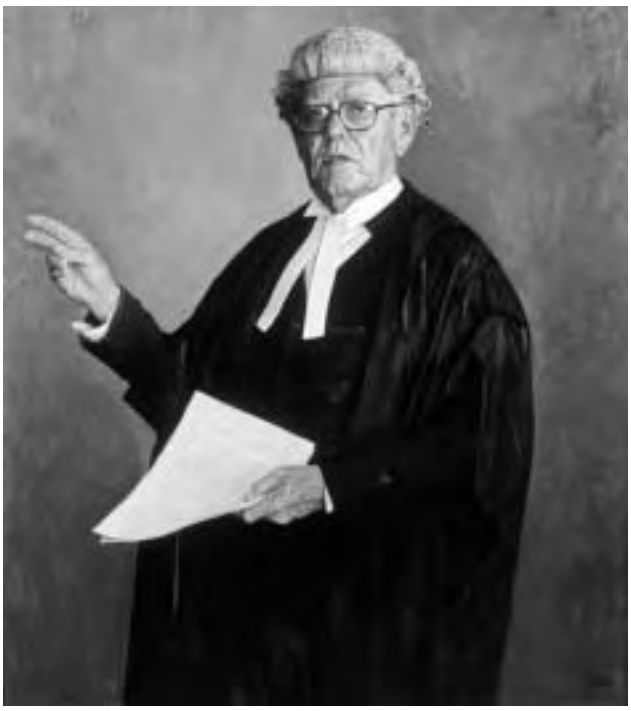
When I admired the portrait at the gallery's opening last December I thought how wonderful it might have been if Jaiwei Shen had been at Campsie railway station on a Saturday morning in October or November 1963 and been able to capture the political candidate Tom Hughes on the back of a utility truck haranguing the locals about the shortcomings of the then sitting Labor MP for the electorate of Parkes, Leslie Haylen. The scene would have been very different and not just for the absence of wig and gown, but the focussed passion would have been exactly the same.

That was my first experience of the public face of Tom Hughes. When he sought pre-selection for Parkes quite a number of people opined that he did so in the steadfast belief that he had no hope of winning. I always had my doubts about this. I cannot recall encountering anyone in politics who didn't want to win. For somebody with the competitive instincts of Hughes it seemed even less plausible.

Whatever his motives he became the chosen Liberal for a seat which then comprised the suburbs of Earlwood, Campsie, Canterbury, Hurlstone Park, Ashbury, Croydon Park and a touch of Dulwich Hill. It is a metaphor for the changed political demography of Sydney that a seat comprising those areas was, in the 1960s, marginal political territory because even in some of the Labor Party's darkest days between 1996 and 2007 those suburbs remained predominantly Labor.

When Tom became the candidate for Parkes he was a stranger from Bellevue Hill, whom the locals took to immediately. He charmed them and they liked his energy and enthusiasm for the task. I had lived in Earlwood all my life, was active in the local Liberal Party organisation and became his campaign director. Thus commenced a friendship which has continued to this day. Almost immediately his political opponents labelled him 'Packer's Pea for Parkes', due to his close association through legal representation with the Packer family. Such barbs did not bother the candidate who developed a very thick skin within a few short weeks.

Tom was responsible for one of the more famous political photographs in recent Australian memory. It showed him brandishing a cricket bat in defence of his family home under siege from an anti-conscription / Vietnam War demonstration.



Portrait of Hughes QC by Jaiwei Shen.

It was a memorable campaign blending together an army of Tom's legal mates and wide circle of friends with a band of enthusiastic locals. He spent every spare moment knocking on doors and must, in the space of a few weeks, have canvassed thousands of his future constituents. Just a week out from the election the world was shaken by the tragic assassination of President John F Kennedy on 22 November 1963. This overwhelmed the remaining weeks of the campaign but would not have affected the result.

The news of Kennedy's assassination came through at approximately 8.30 on the morning of Saturday 23 November. Like all people of my age group I remember exactly where I was and what I was doing at this time. I heard the news at home, but joined Tom and the campaign team at our local headquarters in Earlwood just a few moments later. Local campaign challenges suddenly seemed trivial.

To our delight Tom Hughes secured a swing of over seven per cent on election day and was to remain the member for Parkes for six years until the abolition of the seat in time for the 1969 election. He had confounded many who thought that a so-called 'silvertail' from the eastern suburbs of Sydney would not go down well with more knockabout people. It illustrated the absurdity of such stereotypes in our essentially classless society. The people of Parkes liked Tom Hughes. He worked very hard for them and issues relating to where he lived simply didn't arise.

There wasn't a great deal of mobility in the senior ranks of the

Tom Hughes was a huge loss to Australian politics. In that great realm of what might have been he had the intellect, the passion and the flair to reach any position.

parliamentary Liberal Party during the 1960s and Tom had to wait six years before becoming attorney-general in the Gorton government after the 1969 election. He was anything but idle as a backbencher. Amongst other things he played an active part in defending Australia's involvement in the war in Vietnam and also became a leading advocate for freer trading principles in Australia's wool market.

In the ballot for Liberal leadership following the drowning of Harold Holt, Tom Hughes was a staunch Gorton man, a conspicuous loyalty he still maintains. Gorton appointed him attorney-general after the 1969 election and he made the most of an all too brief tenure as the first legal officer of the Commonwealth. As attorney-general he was responsible for a significant expansion of the Commonwealth's corporations' power in the *Concrete Pipes Case*. Almost thirty years later the government I led had reason to be grateful for this when the High Court upheld the use of the corporations' power to underpin its industrial relations legislation.

In this time Tom was responsible for one of the more famous political photographs in recent Australian memory. It showed him brandishing a cricket bat in defence of his family home under siege from an anti-conscription/Vietnam War demonstration. Australians of many political persuasions identified with his gesture.

Sadly, Gorton's downfall and more particularly Bill McMahon's foolish decision to sack Hughes as attorney-general effectively sounded the death knell of Tom's political career. He left politics at the 1972 election not long short of his fiftieth birthday. His

Pictures (above and below left): Attorney-General Tom Hughes brandishing a cricket bat in defence of his home during an anti-Vietnam War demonstration. Photo: Newspix

subsequent stellar career at the bar has become something of a legend. I thought Tom Hughes was a huge loss to Australian politics. In that great realm of what might have been he had the intellect, the passion and the flair to reach any position. Yet having decided to return to his first love I never detected in my continuing friendship with him lingering regrets about leaving politics. That is not to say he ever lost any of his intense interest in political affairs, nor did his concerns for the fortune of the Liberal Party ever diminish.

He is an intensely loyal person as I know from my long friendship with him. He demonstrated it, controversially, in his powerful eulogy at John Gorton's State Memorial service in 2002. In that tribute to his departed friend, he attacked Malcolm Fraser's role in Gorton's downfall as prime minister. To many it was inappropriate. For Tom it was a last opportunity to speak with feeling and passion about what he had always seen as an injustice done to an admired friend and former colleague.

For more than 40 years I have counted Tom Hughes as a close friend whose company I have always enjoyed and whose style and skills I continue to respect. It is hard to think of a more durable figure in the professional life of Australia than Tom Hughes. His continuing stamina and enquiring intellect are inspirational. Keep going Tom – your friends and admirers wish you many more years of classy rhetoric and advocacy.

The Hon T E F Hughes AO QC

By the Hon Murray Gleeson AC, Chief Justice of Australia (1998 – 2008)

It is not easy to imagine the New South Wales Bar without Tom Hughes. He was there when I arrived in 1963; he was there when I left in 1988; and he is still there. I have been invited to make some personal observations on his sixty years as a barrister.

In 1963, Tom was a relatively new silk, with a large and varied practice. His political career was beginning. I was one of a group of young barristers rounded up to distribute how-to-vote cards in his electorate when he first became a candidate for the House of Representatives. In those days, it was not unusual for a busy lawyer to enter parliament, federal or state, while continuing to practise. In Tom's case, this involved dividing his time between Phillip Street and Canberra. The practical impossibility, nowadays, of such a dual operation almost certainly has deprived the community of some valuable contributions to public life. The days when eminent barristers (such as Menzies, Barwick, Bowen, Ellicott, or Hughes – to take only one side of politics) could serve in parliament, and maintain a legal practice, have gone. Confronted with a choice between that form of public service and the law, most would choose the law. Yet it is only in recent years that being a member of parliament (as distinct from a minister) has been regarded as necessarily a full-time occupation. This can discriminate against people whose income is derived solely from personal exertion. Those with income from property may not have as much to lose as those who are required to give up an occupation as a condition of entering politics. There may be other reasons, as well, why it is not necessarily a good thing for parliament to be made up entirely of people who are exclusively politicians. Tom's years of parliamentary service are a reminder of a time when it was thought to be in the public interest that elected representatives might bring with them a wide range of past and current occupational experiences. He was a better representative because he was an excellent lawyer. Furthermore, in my assessment, his effectiveness as a barrister in many cases was enhanced by his political experience. I would hesitate to contradict Sir Owen Dixon, but I cannot accept his opinion that, while a lawyer can become a good politician, there is no going back. Tom made the move to politics, and the move back to law, very successfully, and while he was in parliament his legal and political careers complemented each other.

My professional association with Tom, which also became a valued personal friendship, began when he was appointed attorney-general in the Gorton government. He led a team of barristers, of which I was the most junior member, to argue the *Concrete Pipes Case* on behalf of the Commonwealth. He was of a moderately centralist disposition, and he made the most of an opportunity to persuade the High Court to reconsider the scope of the corporations' power. A couple of years ago, I re-read the transcript of the hearing in that case. Tom presented the Commonwealth argument powerfully. It should be added that the then chief justice (also of a moderately centralist disposition) provided a following breeze. The case concerned the power of the federal parliament to make laws regulating business activities of trading corporations. The decision provided the constitutional underpinning for the modern trade practices legislation. The capacity of the Commonwealth to regulate financial corporations, including their practices as to executive remuneration, is now at the centre of public attention. It would be entertaining to hear Tom's response to a suggestion that such regulation is a matter for the states.

Tom made the move to politics, and the move back to law, very successfully, and while he was in parliament his legal and political careers complemented each other.

Hughes QC with legendary West Indian cricket captain Clive Lloyd.

Tom led me in his first case after he ceased to be attorney-general. The case, although it had a commercial flavour, was in the common law list and, as was usual in those days, was heard before a judge and jury. Our client was suing a Japanese corporation. The matter came on for hearing the day after Anzac Day. The other side had produced, on discovery, a record of a discussion in a Tokyo teahouse in which a visiting Australian lawyer had remarked that the Japanese corporation had slim prospects of success in the pending litigation. It would be excessive to describe Tom's exploitation of these irrelevancies as ruthless; it would be better described as resourceful.

I was Tom's junior many times after that and, after I took silk, we were often opponents. In my last case at the bar, he and I were opposed in an international arbitration. He was an excellent lawyer

and a charismatic advocate, equally at home in jury trials or before appellate courts. His area of special expertise was defamation law, but I can think of few barristers with as wide a range of experience. He appeared, sometimes for the prosecution, and sometimes for the defence, in a number of important criminal trials.

In equity suits, Tom had a particular technique that troubled incautious opponents. A statement of claim had to be verified by the plaintiff. When Tom, appearing for a defendant, cross-examined the plaintiff, he would invariably ask whether the witness had read and understood the statement of claim before putting his oath to it. The answer was almost always yes, without mentioning by way of qualification that the statement of claim was a technical legal document that had been drafted by a lawyer in accordance with rules and conventions with which the witness was not familiar. Tom would then confound the witness by drawing attention to alternative allegations, apparent inconsistencies and (to the witness) unintelligible assertions. For most, this was a bruising experience. It was surprising that so many of his opponents fell for it. Most of the problems could have been anticipated and managed with a little help in a pre-trial conference. On the other hand, there is something comforting about seeing an old tactic work again and again.

Tom's mentors included the late Sir Jack Cassidy, and Antony Larkins. From them he learned the importance of attention to detail. His questions in chief, and in cross-examination, and his legal arguments, were prepared meticulously. He had a realistic appreciation of the weaknesses as well as the strengths of a case. He was not one of those barristers whose geese are all swans. He was courteous, and adept at handling an adverse judicial reaction to a witness or a line of argument. I once heard him say, in response to an explosion of judicial rage, 'I hope to be able to deflect your Honour's tentative asperity.' This is much better than saying: 'Your irritation is a gross over-reaction based on a misunderstanding of what has occurred'. He was a forceful advocate, but never self-indulgent. Everything he did was disciplined; calculated to advance his client's cause, not to make himself look or feel better. He was comprehensively professional.

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Hughes QC speaks at the '50 Not Out' dinner in 1999.

His career was rich in service to the community and to his profession. Tom came to the bar after service in the Second World War as a pilot. I have referred above to his political career, and his work in the parliament and as attorney-general. He was a member of the Bar Council for a number of years, and made a notable contribution as president.

Many years ago Tom Hughes pointed out to me the commendation of the patron saint of French lawyers, St Yves:

Advocatus et non latro

Res miranda populo.

A lawyer and not a thief,

A thing almost beyond belief.

The New South Wales Bar can be proud of this great advocate, who has served his profession, and the public, with distinction.

Beyond the text: a vision of the structure and function of the Constitution

The 2009 Sir Maurice Byers Address delivered by Stephen Gageler SC

John Adams was the highly skilled Massachusetts lawyer who successfully defended British troops at the Boston Massacre and who went on to become the second president of the United States. In David McCullough's Pulitzer Prize winning biography of him there is an observation attributed to a British spy in Philadelphia at the time of the Continental Congress which resulted in the Declaration of Independence. It was said of John Adams that he 'saw large issues largely'.[1] It should be said also of that quintessential Australian lawyer, Sir Maurice Byers, that he saw large issues largely. Underlying the acuteness and agility of mind that he brought to each of the many constitutional cases in which he appeared during his half century at the New South Wales Bar was a profound understanding of the constitutional system in which he worked. Elements of the constitutional vision of Sir Maurice Byers are spelt out in the two-volume final report of the constitutional commission, which he chaired.[2] The *Final Report of the Constitutional Commission*, published in 1988, should be a standard reference for any practising constitutional lawyer. Other important elements of the constitutional vision of Sir Maurice Byers emerged more subtly in his arguments. More often than not, those arguments were successfully translated into law. One of my fondest recollections as a new barrister was sitting with Sir Maurice in his chambers preparing for argument in the *Political Advertising Case*.[3] We sat and discussed the case for some time and then he decided to write part of the argument himself. He wrote in longhand in fountain pen on ruled sheets of paper. With an elegance of hand that matched his elegance of prose, he penned a submission which still can be found, in a slightly edited form, in the report of that case in the *Commonwealth Law Reports*. I read it in part for the beauty of its language and in part for the grandeur of its vision:[4]

> The agreement of the Australian people called the Constitution into existence and gave it substantial validity. The *Commonwealth of Australia Constitution Act* … gave that agreement legal form. The Constitution derives its continuing validity from the will of the Australian people. … The Constitution enshrines the principles of representative and responsible government:. … Section 106 preserves the existence of State Constitutions in which representative and responsible government were at the time of federation, and remain, essential characteristics … The principle of responsible government permeates the Constitution, forming part of the fabric on which the written words of the Constitution are superimposed. That principle, involving as its essential feature executive responsibility to a popularly elected legislature, has as its principal design and effect that the actual government of the State is conducted by officers who enjoy the confidence of the people … Representative and responsible government is responsive to the voice of the people … The fundamental premise of the structure of the Constitution, and in particular of the electoral processes specifically provided for by ss 7, 24, 28 and 128 and preserved in the case of State Constitutions by s 106, is the continuous ability of the Australian people as a whole to make informed judgments on matters of political significance. This necessarily involves the capacity at all times for free and unhindered public discussion on all such matters, subject to traditional and proportional limitations … A law which seeks to control the content of a communication on a matter of political significance, in the absence of some compelling justification, is therefore invalid on two grounds: first, as an interference with the free operation of the institutions and processes created or preserved by the Constitution, in particular the electoral processes required or preserved by ss 7, 24, 28, 106 and 128; secondly, as a denial of a fundamental premise on which the representative and responsible government established and preserved by the Constitution is based, viz. the ability of the Australian people to control the institutions of government through electoral processes.

At this point Sir Maurice put down his pen and chuckled to himself. 'It's a fraud on the power', he exclaimed, 'a fraud on the power'. History shows that the argument won the case. More importantly than winning the case, history shows that the constitutional vision reflected in the argument informed the reasoning of the majority in a way that had a profound effect on the development of constitutional principle. The particular constitutional principle to which the *Political Advertising Case* gave rise has been refined and confined in subsequent cases to the point of being reduced to a two-part 'test' for constitutional validity. In that form it endures and has become part of our constitutional heritage.

My intention is not to focus on any particular constitutional principle. My intention is rather to look at the broad sweep of modern constitutional doctrine as that doctrine emerged soon after Australia's coming of age in the First World War and particularly as that doctrine developed in the last quarter of the twentieth century when the influence of Sir Maurice Byers was at its height.

My hope is to provide a coherent conceptual explanation not only for some of the main themes of modern constitutional doctrine but also for some of the apparent contradictions for which it is sometimes criticised. Why are things implied seemingly more important than things expressed? Why are some things matters of

form and other things matters of substance? Why is there judicial deference to legislative choice in some areas and strict scrutiny in others? How, legitimately and without constitutional amendment, has there been allowed to occur the steady centralisation of power in the central organs of government?

My premise is that no coherent conceptual explanation for the observed constitutional phenomena can occur except through the prism of some over-arching understanding of the structure and function of the Australian Constitution and of the role of the exercise of judicial power in maintaining that structure and function. The text is not determinative.

II

Before I attempt to give my own explanation, let me attempt to answer two groups who would deny the premise: interpretivists and originalists. Neither is a true type and my attempt at personification is to criticise ideas not any individual.

The epitome of the interpretivist was Professor Anstey Wynes whose book entitled *Legislative, Executive and Judicial Powers in Australia* went through several editions between 1936 and 1976.[5] The central notion of interpretivism is that the exercise of judicial power is properly confined to the exposition and application of the constitutional text. Constitutional interpretation is not fundamentally different from statutory interpretation and the exercise of judicial power in a constitutional case is not fundamentally different from the exercise of judicial power in any other case. The text, read in context, is determinative and the exercise of the judicial power in a constitutional case involves nothing more than the application of the interpreted constitutional text to the facts if, and to the extent that, to do so is required in order to determine a controversy about the legal rights or duties of the particular parties before the court. There is, of course, a large element of truth in this: the Constitution, in a carefully crafted and much debated written form, was enacted as a schedule to an Act of the Imperial Parliament which declared it to be binding on 'the courts, judges, and people of every State and of every part of the Commonwealth'[6] and the sole method of changing the Constitution is in essence a legislative process in which a 'proposed law' for the alteration of the Constitution is to be passed by both Houses of the Commonwealth Parliament and approved by electors before being presented to the governor-general for the queen's assent.[7]

How, legitimately and without constitutional amendment, has there been allowed to occur the steady centralisation of power in the central organs of government?

The Australian Constitution is therefore undeniably cast in statutory form and the statement of Chief Justice John Marshall in *Marbury v Madison* in 1803 that a court, in applying the law to the facts in a particular case, is obliged to interpret and apply the constitutional text as the supreme law was never in doubt in Australia.[8] But nor was the emphasis placed by that same great judge in *McCulloch v Maryland* in 1819 on the constitutional nature of the constitutional text.[9] Translated but unattributed in the language of Sir Owen Dixon in 1945:[10]

> … it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.

The largest and most emphatic words in the Constitution – take 'judicial power' and 'absolutely free' as well-worn examples – have no fixed or intrinsic meaning and it would be in vain to attempt to search for one. It is in the nature of our shared human existence that language is inherently ambiguous and that the ambiguity of language is compounded the bigger is the idea and the more enduringly it is expressed. The beginning of wisdom is to embrace the ambiguity of the ancient and canonical text; not to deny it. That insight may not be limited to law and it is certainly not limited to constitutional law. In 1959 three members of the High Court – Sir Owen Dixon, Sir Victor Windeyer and the usually very black-letter Sir Frank Kitto – said this of the Statute of Monopolies:[11]

> The truth is that any attempt to state the ambit of s 6 of the *Statute of Monopolies* by precisely defining 'manufacture' is bound to fail. The purpose of s 6, it must be remembered, was to allow the use of the prerogative to encourage national development in a field which already, in 1623, was seen to be excitingly unpredictable. To attempt to place upon the idea the fetters of an exact verbal formula could never have been sound. It would be unsound to the point of folly to attempt to do so now, when science has made such advances that the concrete applications of the notion which were familiar in 1623 can be seen to provide only the more obvious, not to say the more primitive, illustrations of the broad sweep of the concept.

If the sentiment expressed in that statement was true for a Jacobean statute which established basic principles to govern a field of intellectual property, how much more must they be true for a Victorian statute which established basic principles for the government of a nation. How much more still must it be true of that statute going into the twenty-first century when, with the growth of Australian nationhood and the waning and ultimate abdication of Imperial parliamentary power, it must now be treated as having an independent ongoing existence deriving its legitimacy from the sovereignty of the Australian people.

That brings me to the originalists. Originalism in Australia is a relatively new phenomenon. It appears to have been sparked largely through the intellectual influence of the neoconservative American Federalist Society. And it appears to have been encouraged by a

misunderstanding of the use made of pre-federation history in the unanimous judgment of the High Court in *Cole v Whitfield* in 1988.[12] In the face of the inherent ambiguity of the constitutional text, the claim of the originalist is to find meaning in the intentions of those who framed that text. The originalist invokes 'the framers' intent' not as a metaphor for 'meaning' but as an historical fact external to the text which in turn provides meaning to the text. More often than not, it is a claim that cannot be delivered in practice because it involves looking for something that is just not there. But much more problematic conceptually for the originalist in Australia than what we *don't* know from history about the intentions of the framers is what we *do*. What we do know is that on big things that mattered: (a) the intentions of the framers differed between themselves; (b) the intentions of the framers were not static; and (c) at least for the most part the framers were not themselves originalists. We know all of that from the pages of the *Commonwealth Law Reports*, without needing to pore over the Convention Debates or other historical materials, because we know that the first five members of the High Court were drawn from amongst those who had been most influential in framing the constitutional text. There is to be seen chronicled in the pages of the first 28 volumes of the *Commonwealth Law Reports* a deep division between Sir Samuel Griffith on the one hand and Sir Isaac Isaacs on the other as to the fundamental nature of the federal system established by the Constitution. The division was apparent from the beginning and was only ultimately resolved with the triumph of Sir Isaac Isaacs in the *Engineers Case* in which judgment was delivered on 31 August 1920, exactly one year after Sir Samuel's retirement and less than three weeks after his death. What cannot be underestimated in having produced the change in the climate of judicial thought in which the long-held views of Sir Isaac would triumph was the profound effect on the Australian psyche of the shared experience of the horrors of World War I. That experience had a profound effect on the thinking of Sir Samuel himself. Volume 25 of the *Commonwealth Law Reports* records an extraordinary ceremonial sitting of the High Court on 13 November 1918, two days after the Armistice. There, in the presence of Sir Isaac and three other justices, Sir Samuel made a short speech from the bench in which he referred to the occasion as being 'without precedent in the recorded annals of the world'.[13] He said that 'Australia may look with pride upon the part taken by her sons, whose valour will not be forgotten'.[14] He then continued as follows:[15]

> But only a small part of the work is done. The task before the nation involves the recasting of conditions and the revision of doctrines that have long been regarded by multitudes as axiomatic and fundamental.
>
> If, after a long and not inactive or unobservant life, I may say what to me appears the matter most urgently calling for treatment; it is the question of the mutual relations of the people of a State to one another. The old deeply rooted idea of division into classes, who are natural enemies, and whose destiny and duty are to prey upon each other, must give place to the sense of equality and of the paramount duty of every man to bear his part of the load of his neighbours' burdens as well as of his own. I know that a radical change of mental attitude, not in one part only of the community, is essential to a wise performance of this task – but I do not despair of the result.

Justice Richard O'Connor in 1908 had referred to the 'broad and general' terms of the Constitution as having been 'intended to apply to the varying conditions which the development of our community must involve'.[16] Neither Sir Samuel Griffith nor any other member of the High Court ever did anything to indicate disagreement with that essentially progressive and dynamic approach.

The originalist invokes 'the framers' intent' not as a metaphor for 'meaning' but as an historical fact external to the text which in turn provides meaning to the text. More often than not, it is a claim that cannot be delivered in practice because it involves looking for something that is just not there.

It would be a serious misunderstanding of *Cole v Whitfield* to see the use made of pre-federation history by the High Court as an attempt to tie the course of modern constitutional development to the original intention of the framers. The High Court referred to pre-federation history not to fix the meaning to the words 'absolutely free' as at 1900 but to identify the mischief to which section 92 was directed when it declared that 'on the imposition of uniform duties of customs' – something that was to occur soon after federation by force of legislation of the new national parliament – 'trade, commerce and intercourse among the States … *shall be* absolutely free'. There is a difference between being informed by history as to the provenance of a constitutional command expressed in grand and emphatic terms and being captured in the application of that command by the historical position as it appears to have existed at a particular point in time. There has been a continuity in our national economic development which started before federation, which continued after federation and which it has been the important function of section 92 at and from federation to augment. In re-aligning the legal operation of section 92 to the function originally conceived for it, *Cole v Whitfield* should be seen as re-establishing the functional approach to section 92 adopted by all of the first five members of the High Court in *Fox v Robbins* in 1908[17] which had become lost through the distortions of text-based and reality-free interpretivism. The recent decision in *Betfair*[18] illustrates that section 92 after *Cole v Whitfield* remains well capable

of adaptation to the new economic and technological conditions of the twenty-first century. Neither in respect of section 92 nor more generally should *Cole v Whitfield* be seen as having replaced the error of interpretivism with the error of originalism.

Note that I have said nothing critical of legalism. I have empathy with legalists. After all, I am a lawyer. Law is what I do and law is all I do. Law is my field of expertise and my zone of comfort. I understand why, in the aftermath of the decision in the *Communist Party Case*[19] and the defeat of the subsequent Communist Party referendum, Sir Owen Dixon on the occasion of his swearing-in as chief justice wanted to extol the virtues of 'strict and complete legalism'.[20] I understand why, at the time of explaining or deciding cases of great political controversy, other judges have thought it appropriate to invoke that same dictum. My great difficulty is that, despite reading Judge Richard Posner's recent sympathetic examination of its modern American incarnation,[21] I have never been sure exactly what legalism means. Strict and complete legalism, like absolutely free trade and commerce, is an emphatic statement of the obscure. It is a statement that is devoid of any fixed or definite meaning. It seems to mean different things to different people. To some it refers to the traditional common law process by which, in an individual case, issues are joined, arguments are made and the case is decided. To others it encompasses also the essential ethical and prudential qualities of judicial decision-making: intellectual rigour, intellectual honesty, respect for authority and absolute transparency of reasoning. If that is all that strict and complete legalism means, then I would aspire to be counted a legalist. I am also prepared to concede that legalism as defined to that point can properly be used to predict and explain the vast majority of outcomes in the vast majority of cases. But it seems that to some strict and complete legalism extends to the content of constitutional principle as if logic and technique were somehow determinative. That far I cannot go. Legalism can tell us how. Legalism cannot tell us why. The strictest of logic and the highest of technique cannot alone explain why any important constitutional principle takes the form that it does. The *Engineers Case*,[22] *Melbourne Corporation*,[23] the *Communist Party Case*,[24] the *Boilermakers' Case*,[25] the *Tasmanian Dam Case*,[26] the *Political Advertising Case*,[27] *Kable*:[28] none of them can be explained simply in terms of logic or technique. As Professor Leslie Zines demonstrated in a pioneering article written in 1965, that legalist of legalists, Sir Owen Dixon, had a very clearly defined vision of the structure and function of the Australian Constitution.[29] The constitutional vision of Sir Owen Dixon differed slightly from that of Sir Isaac Isaacs which in turn differed markedly from that of Sir Samuel Griffith. The difference had nothing to do with lawyering: no one of them was a lesser lawyer than the other.

III

In 1987, with the enthusiasm of youth, I published an article in the *Federal Law Review* with the ambitious title 'Foundations of Australian Federalism and the Role of Judicial Review'.[30] The article was my attempt to refute the broadest notion of what I then understood to be legalism and to provide an alternative conceptual explanation for some of the main themes of constitutional doctrine as they had emerged to that date by focussing less on the text and more on the structure and function of the Constitution. Twenty-two years later, I continue to adhere broadly to that explanation and I continue to adhere broadly to the vision of the structure and function of the Constitution. The explanation, I think, continues to make sense of the bulk of the decided cases. The underlying vision of the structure and function of the Constitution was and remains contestable. It is incapable of empirical justification. It involves simplification and abstraction. It is inherently idealised and aspirational. It is therefore inherently incomplete and it cannot, if only for that reason, be taken too far. It remains, nevertheless, the way I see it.

Strict and complete legalism, like absolutely free trade and commerce, is an emphatic statement of the obscure. It is a statement that is devoid of any fixed or definite meaning.

The vision begins with the first of the unanimous resolutions of the Australasian Federation Conference in 1890. That resolution expressed the opinion that 'the best interests and the present and future prosperity of the Australian Colonies' would be 'promoted by an early union under the Crown' and that 'the national life of Australia in population, in wealth, in the discovery of resources, and in self governing capacity' had developed to an extent that justified that 'higher act'.[31] The preamble to the preliminary resolutions of the National Australasian Convention in Adelaide in 1897 contained a similar declaration that the purpose of federation was 'to enlarge the powers of self-government of the people of Australia'.[32] Sir Robert Garran much later explained that the reason for that declaration was 'to direct the attention of opponents and lukewarm supporters to the fact that, though federation involved the surrender by the governments of certain rights and powers, yet as regards each individual citizen there was no surrender, but only the transfer of those rights and powers to a plane on which they could be more effectively exercised'.[33] In contrast to the justification offered by James Madison and other American Federalists for federation of the newly liberated politically turbulent American colonies a century earlier, it appears to me incontrovertible that federation of the newly self-governing Australian colonies at the end of the nineteenth century was conceived not as a means of dividing and constraining government

but as a means of empowering self-government by the people of Australia. There is in our pre-federation history no hint of which I am aware of any intention of giving effect to the dominant American Federalist view that federation should be designed to achieve 'mutual frustration':[34] that federalism itself should operate as a mechanism for avoiding majoritarian excesses by setting up rival institutions of government which would make ambition check ambition and thereby secure the 'rights of the people'.[35] The Australian Constitution was conceived rather as a mechanism for moving to a higher and more beneficial plane the powers of self-government of those people who, as ultimately recorded in the preamble to the Imperial Constitution Act, 'agreed to unite in one indissoluble Federal Commonwealth under the Crown'.

The vision then accommodates itself to the structure of the Constitution and of the Imperial Constitution Act to which the Constitution is scheduled. The critical elements of that structure appear to me to be as follows:

- the declaration in covering clause 3 that upon the proclamation in fact made by the queen to take effect from 1 January 1901 the people of the former colonies 'shall be united in a Federal Commonwealth under the name the Commonwealth of Australia';
- the transmogrification by covering clause 6 of the former colonies into states whose constitutions were to continue as at the establishment of the Commonwealth by force of section 106;
- the establishment by section 1 of the Constitution of a parliament of the Commonwealth consisting of the queen, as represented by the governor-general, the Senate and the House of Representatives each of which by sections 7 and 24 of the Constitution was to be composed of representatives 'directly chosen by the people';
- the conferral on the parliament of the Commonwealth by section 51 of the Constitution of specific and enumerated legislative powers;
- the declaration in covering clause 5 that the Constitution Act, including the Constitution, 'shall be binding on the courts, judges, and people of every state and of every part of the Commonwealth'; and
- the automatic invalidation by section 109 of the Constitution of any law of a state to the extent that it is inconsistent with any law of the Commonwealth.

The vision then accommodates itself not only to the result but also to the actual reasoning in the *Engineers Case*. In a pivotal passage that is unfortunately rarely read and even more rarely understood, the joint judgment authored by Sir Isaac Isaacs said this:[36]

> For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government. The combined effect of these features is that the expression 'State' and the expression 'Commonwealth' comprehend both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism.

The import of the passage will emerge in a moment but the passage itself first needs to be unpacked. As understood in the Australasian colonies at the end of the nineteenth century, responsible government meant much more than simply the existence of a particular relationship between the legislature and the executive. Sir Samuel Griffith in his *Notes on Australian Federation* explained in 1896:[37]

> The system called Responsible Government is based on the notion that the head of the State can himself do no wrong, that he does not do any act of State of his own motion, but follows the advice of his ministers, on whom the responsibility for acts done, in order to give effect to their volition, naturally falls. They are therefore called Responsible Ministers. If they do wrong, they can be punished or dismissed from office without effecting any change in the Headship of the State.

Sir Samuel continued:[38]

> The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible. The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people.

Sir Owen Dixon was much later to observe in a different context that the Constitution 'from beginning to end treats the Commonwealth and the States as organisations or institutions of government possessing distinct individualities' and made the point that in so doing it avoided the complexities that might arise from conceptions of sovereignty and went instead 'directly to the conceptions of ordinary life'.[39] The point to be made for present purposes is that both for the Commonwealth and for each of the states there exists through the mechanism of responsible government something that can be described as 'the government' and which not only itself lacks sovereign status but which, through the need for the government constantly to maintain the confidence of a popularly elected legislature, can be seen to have an existence constantly contingent on it maintaining the confidence of the

people. The government at each level is thus formally responsible to a head of state who can legally do no wrong yet in practice is politically responsible to and identifiable with the people.

What, according to the majority in the *Engineers Case*, was the importance of responsible government and the unity of the Crown to the Australian federal system? The importance emerges when it is recognised that the people who comprise the Commonwealth and the people who comprise the states are one and the same people. Those people, through the exercise of political power, ought at least for the most part be well able to look after themselves. Conflicts between the Commonwealth and the states are not the conflicts of warring sovereigns but those of institutional functionaries, each in law, formally answerable to a unified Crown, and each in fact, politically answerable to a unified Australian people. 'When the people of Australia', wrote Sir Isaac, 'united in a Federal Commonwealth, they took power to control by *ordinary constitutional means* any attempt on the part of the national Parliament to misuse its powers.' The consequence was that '[i]f it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done.' [40]

This understanding of the Commonwealth and the states as institutional functionaries politically answerable to, and identifiable with, the same people of Australia can then accommodate itself to the factual circumstances of our national development as recorded in the observations of Sir Victor Windeyer in the *Payroll Tax Case* in 1971[41] and as repeated by the majority in the *Work Choices Case* in 2006[42] as continuing to have contemporary resonance:

> The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur.

This is not in its content a statement of legal principle and it does not become one simply because it was written by one Justice of the High Court and quoted by others. Nor is it purely historical. It is an encapsulation of the political and economic development of Australia as a nation which could just as easily have been authored by a political scientist or a politician who seeks to be a statesman. It is value-laden but the values with which it is laden are long-term national values with which few Australians, on mature reflection, could disagree. It appeals to our sense of national destiny. Its utility is that it can stand above the immediate political or economic controversies of the moment but still inform and justify the choices that are to be made in their just resolution. It tells us where we have come from and helps us to understand where we might be going.

Conflicts between the Commonwealth and the states are not the conflicts of warring sovereigns but those of institutional functionaries, each in law, formally answerable to a unified Crown, and each in fact, politically answerable to a unified Australian people.

IV

There was an inter-disciplinary seminar held in 1951 at the newly formed Australian National University to celebrate the Jubilee of the Australian Constitution.[43] The seminar was held at a time when the extreme concentration of Commonwealth power which had characterised the era of the Second World War was abating, albeit in what Professor Geoffrey Sawer who convened the seminar presciently identified at the time as 'merely a temporary pause in the steady growth of Commonwealth power'.[44] Percy Herbert Partridge, who was then Professor of Social Philosophy at the Australian National University, presented a paper entitled 'The Politics of Federalism'.[45] Professor Partridge's thesis was that in its first 50 years of operation the Australian federal system '[had] itself been moulded by circumstances and events at least as much as it [had] forced them into its own mould'; that Australian public opinion had come to accept and expect the pre-eminence and leadership of the Commonwealth in an increasingly wide range of fields; that Australian citizens no more identified themselves with state governments than they did with the Commonwealth government and were increasingly less apt to make the assumption that the state governments as distinct from the Commonwealth government were 'instruments of self-government'; and that 'it is the existence of the six separate governments which chiefly produces the sentiments, the attitudes and the interests which

in turn support those governments'. 'In other words', argued Professor Partridge, 'I am putting the view that in Australia the States no longer correspond with distinct interests or social foundations for the political divisions within the federal structure: it is the political divisions themselves which are the important thing'.[46] What he was saying was that it was the institutional structures of the Commonwealth and the states themselves which had come by-and-large to result in the practical division or overlap between Commonwealth and state responsibilities, not any formal allocation of power.

Professor Partridge's paper was not specifically directed to the role of the exercise of judicial power and no-one appears at the time to have thought that it had any implications for the judicial review of legislative or executive action. Contrast the fate of an almost identical thesis advanced just three years later by Herbert Weschler, Professor of Law at Columbia Law School. At a conference held in 1954 as part of the Bicentennial Celebration of Columbia University, Professor Weschler delivered a now famous paper entitled 'The Political Safeguards of Federalism: The role of the States in the Composition and Selection of the National Government'.[47] In it Professor Weschler enumerated in the design of the United States Constitution three structural mechanisms that were employed to serve the ends of federalism. The first was the preservation of the states as separate sources of authority and organs of administration. The second was the role of the states in the composition and selection of the central government. Only the third was the formulation of a distribution of authority between the central government and the states 'in terms which gave some scope at least to legal processes for its enforcement'. Professor Weschler explained:[48]

> Scholarship – not only legal scholarship – has given most attention to the last of these enumerated mechanisms, perhaps because it has been fascinated by the Supreme Court and its interpretations of the power distribution clauses of the Constitution. The continuous existence of the states as governmental entities and their strategic role in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. Of the Framers' mechanisms, however, they have had and have today the larger influence upon the working balance of our federalism. The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.

The existence of the states as governmental entities, Professor Weschler argued, was the 'prime determinant' of what he described as 'working federalism'. The national political process, was 'intrinsically well adapted to retarding or restraining' unwarranted intrusions by the national government on the domain of the states.[49] Professor Weschler opined that where hostility to the exercise of power by the central government existed it could be seen in practice to rest 'far less on pure devotion to the principle of local government than on opposition to specific measures' and that federalism 'would have few adherents were it not, like other elements of government, a means and not an end'.[50] These sentiments quite clearly echoed those of Professor Partridge, whose paper (given in Australia three years earlier) Professor Weschler at this point cited in a footnote.[51]

Where Professor Weschler, as a lawyer, went further than Professor Partridge, as a political scientist, is that he drew an implication for the judicial review of legislative action. The Supreme Court, he said:[52]

> ... is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.

Expounded by an eminent lawyer at a time when the New Deal had produced what were regarded almost universally as beneficial outcomes through the exercise of Congressional power on a hitherto unimagined scale, at a time when the judicial invalidation of legislative action had come to be associated with a bygone and regressive era epitomised by the striking down in *Lochner v New York*[53] of a law setting a maximum ten hour working day for labourers, at a time when legal realism had long since destroyed any faith in the determinacy of the constitutional text, and at a time when academic legal thought in the United States was moving generally towards an attempt to explain the law in terms of process rather than outcome, Professor Weschler's thesis was quickly assimilated into the mainstream of constitutional thinking in the United States. The thesis came to be developed and expanded upon by later generations of legal scholars: most specifically and elaborately in relation to issues of federalism by Professor Jesse Choper in his book published in 1980 entitled *Judicial Review and the National Political Process*[54] but much more generally by Professor John Hart Ely in his much celebrated, much debated and justifiably influential book published in the same year entitled *Democracy and Distrust*.[55] The thesis in its most generalised form is that the Constitution of the United States places its essential trust in the democratic institutions of government and that the role of the judicial power is appropriately to respect such outcomes as are rationally open to those democratic institutions save in those cases where the representative and majoritarian characteristics of those democratic institutions themselves give rise to a danger of abuse. A stricter form of judicial scrutiny is therefore warranted, for example, under the First Amendment where governmental action in any way affects participation in the political process and under the Fifth and Fourteenth Amendments where governmental action adversely affects a discrete and insular minority.

Professor Weschler's thesis had come, by 1985, to be openly acknowledged in the Supreme Court of the United States as explaining and guiding its decision-making on issues of federalism.

Writing in that year for the majority in *Garcia v San Antonio Metropolitan Transit Authority*,[56] Justice Blackmun cited both Professor Weschler's 1954 paper and Professor Choper's 1980 book in stating that it was then 'no novelty to observe' that the composition of the national government was 'designed in large part to protect the states from overreaching by Congress'.[57] Justice Blackmun went on openly to embrace the notion that a choice was made in the design of the United States Constitution 'to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the national government itself rather than in discrete limitations on the objects of federal authority'.[58] Of course nothing is static and nothing in the constitutional law of the United States is ever uncontroversial. The Supreme Court from the mid 1990s has been observed to have edged towards taking a more active role in the policing of federalism, but not by much.

The open acknowledgement of the primacy of the political process and of its implications for judicial review in the constitutional system of the United States ought cause us at least to ask whether a similar acknowledgement of the primacy of the political process ought not be used to explain and to guide judicial review within our own constitutional system. Why shouldn't the underlying purpose of the Constitution continue to be seen, in the terms declared in 1897, as being to enlarge the powers of self-government of the people of Australia? Why shouldn't its establishment of institutions politically accountable to the people of Australia be seen as the primary mechanism by which the Constitution achieves that purpose?

The open acknowledgement of the primacy of the political process and of its implications for judicial review in the constitutional system of government in the United States ought cause us at least to ask whether a similar acknowledgement of the primacy of the political process ought not be used to explain and to guide judicial review within our own constitutional system.

Isn't the existence of political accountability the theoretical justification actually given in the *Engineers Case* in setting the primary orientation which has in fact shaped the development of our constitutional doctrine since 1920? Aren't the observations made by Professor Partridge as to the division or overlap between Commonwealth and state responsibilities, arising in practice not from any formal division of power but from the existence and interplay of the Commonwealth and the states themselves, at least as true now as they were when they were uttered in 1951? Should not the exercise of judicial power take the essentially political nature of those institutions as its starting point and tailor itself to the strengths and weaknesses of the institutional structures which give them political accountability? Why should there not openly be judicial deference where, by virtue of those institutional structures, political accountability is inherently strong? And why should there not openly be judicial vigilance where, by virtue of those institutional structures, political accountability is inherently weak or endangered? In short, why is it not appropriate to see the Constitution as creating a political system whose ordinary constitutional working will be through the political process, and to see the role of the judicial power within that political system as akin to that of a referee whose extraordinary constitutional responsibility is for the game itself rather than a linesman whose only responsibility is to call in or out? These are not rhetorical questions. My answer to each of them is 'yes'.

V

Let me then try to deliver on providing a coherent conceptual explanation for the broad sweep of constitutional doctrine as it emerged from the *Engineers Case* in 1920 and particularly as it developed in the last quarter of the first century of our national existence. You start with the notion that the Constitution sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system, not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.

This will not give you the answer to a particular case: the possibilities are always richer, and the considerations which might legitimately be taken into account are always more varied, than could be explained or predicted by any one theory. But it can give you a framework for understanding at a very broad level why a great deal of modern constitutional doctrine might take the form that it does and how aspects of that doctrine might possibly develop in the future.

Take the broad reach of Commonwealth legislative power. Section 51 of the Constitution alone expressly confers power on the Commonwealth Parliament to make laws for the good government of the nation 'with respect to' forty enumerated subject-matters. Within a system for enlarging the powers of self-government of

the people of Australia and in relation to an institution politically accountable to the whole of the people of Australia, there is no reason why that conferral of legislative power should generally operate narrowly and every reason why it should generally operate expansively. And so it does. Modern constitutional orthodoxy is first that each of the enumerated subject-matters is to be construed with all the generality that the words used admit, and secondly that either the formal legal operation or the substantive factual operation of a law will be sufficient to allow that law to be described as one with respect to a subject-matter irrespective of the purpose of the law and irrespective of whether or not the law might equally be described as a law with respect to some other subject-matter.[59] The trade and commerce power can be used to stop a mine,[60] the external affairs power to stop a dam,[61] the taxation power to guarantee superannuation for all working Australians[62] and the corporations power to set up a system of industrial relations.[63] In a seldom-remembered statement made in 1926[64] and approved by the Privy Council in 1930,[65] Sir Isaac Isaacs, after stating that 'the Constitution is for the advancement of representative government',[66] said this:[67]

> It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. … Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.

Modern constitutional doctrine has not yet moved so far as openly to embrace Sir Isaac's general approach to the judicial review of the exercise of Commonwealth legislative power but the outcomes in modern constitutional cases are not far from outcomes that general approach would have produced.

Take next the repeated rejection in modern constitutional doctrine of the notion that there might exist some exogenously imposed and judicially enforceable 'federal balance'. Paraphrasing its most recent rejection in the *Work Choices Case*,[68] the notion is incapable of being reduced to a judicially manageable standard, 'carr[ies] a misleading implication of static equilibrium',[69] gives insufficient weight to the position of the Commonwealth as 'a government to which enumerated powers have been affirmatively granted' and gives insufficient weight to an understanding that the framers of the Australian Constitution 'appear … to have conceived the states as bodies politic whose existence and nature are independent of the powers allocated to them'. The last two of those propositions are drawn from the judgment of Sir Owen Dixon in *Melbourne Corporation*.[70] Neither is simply a matter of logic nor of history. They are matters of perspective. Together they make irrelevant to the constitutional validity of an exercise of Commonwealth legislative power any question as to whether the Commonwealth may thereby be taking control of a subject-matter historically within state legislative control. They leave the particular question of where at any given time the balance between Commonwealth and state responsibilities might be struck entirely to the political forces identified by Professor Partridge in 1951 as stemming largely from the Commonwealth and the states as separately functioning governmental entities.

Take next the principle which emerged as a constitutional implication in 1947 in *Melbourne Corporation* itself: of which Sir Anthony Mason said in the *Tasmanian Dam Case* in 1983 ' [s]o much and no more can be distilled from the federal nature of the Constitution and ritual invocations of 'the federal balance'.'[71] Expressed in *Austin* in 2003 at its most general level, the principle is 'that the Commonwealth's legislative powers do not extend to making a law which denies one of the fundamental premises of the Constitution, namely, that there will continue to be State governments separately organised'.[72] The principle operates substantively to safeguard not the ability of the states to exercise any particular functions but rather their capacity to function institutionally as governments of those geographical sections of the Australian people to whom they are responsible. The political interplay of the states, as separately functioning governments of geographical sections of the Australian people, with the Commonwealth as the government of the whole of the Australian people can then be allowed by ordinary constitutional means to produce the mix of legislative and executive responsibilities that will exist in practice at any given point in time.

Take next the other great principle which emerged as a constitutional implication at the prompting of Sir Maurice Byers in the *Political Advertising Case* in 1992.[73] That principle is in a very real sense the critical underpinning of the political accountability which is itself the underpinning of the *Engineers Case*: because political accountability provides the ordinary constitutional means of constraining governmental power, where a process of communication by which that political accountability is maintained is burdened by law, judicial deference must give way to judicial vigilance. According to the *Lange* formulation in 1996[74] as refined in *Coleman v Power* in 2004,[75] the law – whether it be Commonwealth or state – will be invalid unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Constitution. A government which relies for the constitutional legitimacy of an exercise of legislative power on political accountability to the people of Australia cannot, in Sir Maurice's language, be allowed to commit a 'fraud on the power'. It is the crucial function of the judicial power to ensure that does not occur.

Take a related area in which deference has given way to vigilance in the judicial scrutiny of the exercise of Commonwealth legislative

power. It concerns the use of section 51(xxxvi) of the Constitution to alter the franchise in the face of the requirement of sections 7 and 24 of the Constitution that senators and members of the House of Representatives be 'directly chosen by the people'. Despite leaving such scope for judgment as to warrant the epithet of a 'category of indeterminate reference' those words were recently said in a joint judgment of three members of the High Court in *Roach*[76] to embody a 'constitutional bedrock' requiring the existence of a 'substantial reason' for denying to a member of the Australian community 'a voice in the selection of … legislators'.[77] A 'substantial reason' in this context was said to be a reason that is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[78]

Constitutional law is not like a flower or a tree. It does not exist as a thing in nature. To borrow the language of Yorta Yorta*, it does not have an existence that is independent of the society of which it forms part. At any given time, it exists within the collective imaginations of those who practise and administer it.*

Other areas in which in which deference might well give way to vigilance in the judicial scrutiny of the exercise of Commonwealth legislative power is in respect of the prohibition by section 51(ii) of the Constitution of discrimination between states or parts of states by a Commonwealth law of taxation or, more generally, in respect of the prohibition by section 99 of the Constitution of the giving of preference to one state or part of a state over another state or part of a state by a Commonwealth law of trade, commerce or revenue.[79] In the case of Commonwealth laws in the field of economic regulation which impact differently in different states, the ordinary mechanism of political accountability to the Australian people as a whole might arguably be seen to be a relatively weak restraint.

The problem of differential impact in the field of economic regulation is, of course, more acute in the case of state laws which operate to impose a higher burden on out-of-state commercial operators than they do on competing in-state commercial operators. According to *Cole v Whitfield*, as applied in *Betfair*, such a law will withstand judicial scrutiny under section 92 of the Constitution only if it can be demonstrated to be reasonably necessary to achieve a competitively neutral objective. Commenting on the development of a similar doctrine limiting the exercise of state legislative power in the United States, the joint judgment in *Betfair* said this:[80]

> That development had been in response to an apparent, albeit at times inconvenient, truth. This is that legislators in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers.

They went on to quote from Professor Lawrence Tribe's standard text on American constitutional law:[81]

> That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers is to protect and promote the interests of their own constituents. That role is one that they will inevitably try to fulfil even at the expense of citizens of other states.
>
> In this context, the rhetoric of judicial deference to the democratically fashioned judgments of legislatures is often inapposite. The checks on which we rely to curb the abuse of legislative power — election and recall — are simply unavailable to those who have no effective voice or vote in the jurisdiction which harms them. This problem is most acute when a state enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the state's borders.

VI

The original and advertised title of this lecture was 'Beyond the text: the structure and function of the Constitution'. Part way through writing it, I changed that title to 'Beyond the text: a vision of the structure and function of the Constitution'. The premise, of course, was and remains that the text is not determinative. I changed the title because, in going beyond the text and talking about the structure and function of the Constitution, I do not presume to tell it like it is but only as I see it. Constitutional law is not like a flower or a tree. It does not exist as a thing in nature. To borrow the language of *Yorta Yorta*, it does not have an existence that is independent of the society of which it forms part.[82] At any given time, it exists within the collective imaginations of those who practise and administer it. They are relatively few but they still cannot all be expected to see things exactly the same way. They are the custodians for the present of a constitutional tradition which they must interpret each for themselves in terms that are meaningful to them and for their own time. The constitutional issues with which they deal must be put in a long term perspective. The doctrine of precedent is a white-fella's version of respect for elders. It is not a matter of science. It is a matter of responsibility: to the past and for the future. Unless we are to reduce to the randomness of the single instance the lessons provided to us by the thousands of constitutional cases decided over what is now more than a century of our national development, we need some organising principle. We need at some level, explicitly or implicitly, to place them within a larger narrative and to give them some sense of purpose. We need to ask not only how, but why? I have

chosen to do so explicitly. What I sought in part to do in 1987 and what I have sought to re-do today is to explain and defend constitutional orthodoxy by reference to my own conception of the function of the judicial power within the overall system of government established by our Constitution. I trust that my vision is true to the vision of Sir Maurice Byers but I doubt that he would mind if it admits of some genetic variation. This is my version of our story.

Endnotes

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8. *Marbury v Madison* (1803) 5 US 137 at 180.
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10. *Australian National Airways Pty Ltd v Commonwealth* (*Airlines Nationalisation Case*) (1945) 71 CLR 29 at 81.
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18. *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.
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36. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*Engineers Case*) (1920) 28 CLR 129 at 146-147.
37. Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) at 17-18.
38. Ibid.
39. *Bank of New South Wales v Commonwealth* (*Bank Nationalisation Case*) (1948) 76 CLR 1 at 363.
40. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*Engineers Case*) (1920) 28 CLR 129 at 151-152.
41. *Victoria v Commonwealth* (*Payroll Tax Case*) (1971) 122 CLR 353 at 395-396.
42. *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 73.
43. Seminars on Federalism, Australian National University, September and October 1951.
44. Sawer, *Federalism: An Australian Jubilee Study* (1952) at viii.
45. Partridge, 'The Politics of Federalism' in Sawer, *Federalism: An Australian Jubilee Study* (1952) at 174.
46. Ibid. at 195.
47. Weschler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government" (1954) 54 Colum L Rev 543.
48. Ibid. at 544.
49. Ibid. at 558.
50. Ibid. at 552.
51. Ibid. at n 34.
52. Ibid. at 559.
53. *Lochner v New York* (1905) 198 US 45.
54. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980).
55. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).
56. *Garcia v San Antonio Metropolitan Transit Authority* (1985) 469 US 528.
57. Ibid. at 550-551.
58. Ibid. at 552.
59. See, for example, *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Aust National Airways Pty Ltd* (1964) 113 CLR 207 at 225-6; *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229

CLR 1 at 103; *Cole v Whitfield* (*Crayfish Case*) (1988) 165 CLR 360 at 399; *Murphyores Incorporated Pty Ltd v Commonwealth* (*Fraser Island Case*) (1976) 136 CLR 1 at 11-12, 19-20; *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at 151.

60. *Murphyores Incorporated Pty Ltd v Commonwealth* (*Fraser Island Case*) (1976) 136 CLR 1.
61. *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1.
62. *Superannuation Guarantee Charge Act 1992* (Cth).
63. *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1.
64. *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153.
65. *Shell Co of Australia v Federal Commissioner of Taxation* (1930) 44 CLR 530.
66. *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178.
67. Ibid. at 180.
68. *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1.
69. Ibid. at 73.
70. *Melbourne Corporation v Commonwealth* (*State Banking Case*) (1947) 74 CLR 31.
71. *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1 at 129.
72. *Austin v Commonwealth* (2003) 215 CLR 185 at 246.
73. *Australian Capital Television Pty Ltd v Commonwealth* (*Political Advertising Case*) (1992) 177 CLR 106.
74. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
75. *Coleman v Power* (2004) 220 CLR 1.
76. *Roach v Electoral Commissioner* (2007) 233 CLR 162.
77. Ibid. at 198-199.
78. *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199.
79. Cf. *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388.
80. *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 459.
81. Ibid. at 460; Tribe, *American Constitutional Law* (3rd ed, 2000) Vol 1 at 1051-1052.
82. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

Dignity, fairness and good government: the role of a Human Rights Act

On 11 December 2008 Lord Thomas Bingham delivered the following lecture in the Banco Court, Queens Square. The lecture marked the 60th anniversary of the Universal Declaration of Human Rights.

It would clearly test to destruction the tolerance of the ordinary red-blooded Australian to have a Pom getting off the plane from London and telling them how to run their country. So I shall not presume to say how the current human rights debate in this country should be resolved. But perhaps I may contribute some thoughts, prompted by our own experience in the United Kingdom, acknowledging as I do so that the Australian context, while in some ways similar, is in others significantly different.

In the autumn of 1992 I was appointed master of the rolls – in effect, the president of the civil Court of Appeal of England and Wales – and was interviewed by a radio journalist who asked what single change I would most like to see made in the law. I said my choice would be to incorporate into domestic law the European Convention on Human Rights, to which the UK had formally acceded in 1951, the first state to do so. This was not a novel or original choice on my part. The former head of my chambers in the Temple (Lord Scarman) had strongly argued for incorporation, in his Hamlyn Lectures of 1975[1] and even more particularly after his retirement in 1986. Two Bills providing for incorporation had passed through the House of Lords, only to fail in the Commons. In recent years incorporation had been championed by a number of prominent advocates, among them Lord Lester QC. But in 1992 both the main parties, for rather different reasons, were adamantly opposed to the idea, which was supported only by the numerically weak Liberal Democrats. On 2 March 1993 I developed my reasons for favouring incorporation in a Denning Lecture entitled 'The European Convention on Human Rights: Time to Incorporate'.[2] By then, however, the political scene had had altered significantly: just before my lecture, the late John Smith, then leader of the Labour Party in opposition, encouraged (as I understand) by his shadow Lord Chancellor (Lord Irvine), had adopted incorporation of the Convention as part of the Labour Party's programme. This, despite misgivings in some sections of the party, it thereafter remained.

The victorious allies, Britain and France, were prominent in promoting and drafting the [European] Convention, wanting to share with other less fortunate nations the rights and freedoms which they took for granted...I do not think that either country foresaw that its own laws and institutions would be subjected to scrutiny and found wanting.

It is well-known that the European Convention, like the Universal Declaration which it followed, found its genesis in the horrors which had afflicted much of the world in the 1930s and 1940s. The victorious allies, Britain and France, were prominent in promoting and drafting the Convention, wanting to share with other less fortunate nations the rights and freedoms which they took for granted. After all, we had grown up on Magna Carta and they on the Declaration of the Rights of Man and the Citizen of 1789. I do not think either country foresaw that its own laws and institutions would be subjected to scrutiny and found wanting.

By the 1990s, however, there was no longer room for complacency in Britain that we had nothing to learn. As early as the 1950s, complaints made by Greece about British conduct in Cyprus had caused official embarrassment.[3] One suspect had been 'subjected to the Chinese water torture', or what we may now refer to as 'waterboarding'.[4] A 15-year old suspect had been whipped so severely as to require treatment in hospital.[5] After the rather casual grant by the British Government of a right of individual petition to the European Court of Human Rights in Strasbourg in 1966, the rate of applications to Strasbourg sharply increased and so did the incidence of decisions adverse to the UK. Thus violations were found in relation to the right to life[6], the right not to be subjected to inhuman or degrading treatment[7], the right to personal liberty[8], the right to a fair trial[9], the right to respect for private life,[10] the right to freedom of expression[11], the right to freedom of association[12] and the right not to be discriminated against in the enjoyment of Convention rights.[13] Throughout this period the orthodox rule was that, the Convention not being part of English law, no notice could be taken of it by the British courts[14], save interstitially, as for instance where a statutory provision was found to be capable of bearing two meanings, one consistent and one inconsistent with the international obligations of the UK as expressed in the Convention, in which event preference was to be given to the former.[15] The context of course was that the United Kingdom was bound in international law to observe the Convention and comply with Strasbourg decisions to which it was party, and it was regarded as unthinkable to renounce the Convention.

It seemed to me in the early 1990s, and still does, that this orthodox approach had at least four grave weaknesses. First, it meant that

complaints reached the European institutions at Strasbourg without the benefit of a domestic judgment addressing the Convention issues. Sometimes such a judgment would have made no difference; quite often it would. It is rather a sterile process to exhaust domestic remedies when there are no domestic remedies to exhaust. It was always my expectation that the UK's record would improve when the court in Strasbourg had the benefit of a British judgment, and so it has proved.

Secondly, it seems to me hugely important that a domestic legal system should command the confidence of the public as one which is inclusive, belongs to them and affords a remedy for obvious wrongs. It is destructive of such confidence if there is a justified belief that for a significant category of serious wrongs the domestic court can offer no remedy and the disappointed litigant is obliged to go away and seek this superior justice abroad. Such, until the *Human Rights Act 1998* came into force, was the position.

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Thirdly, it was very undesirable that members of the public should have been put to the expense and the very considerable delay of seeking redress in Strasbourg for a Convention complaint which could, had the Convention been part of domestic law, have been granted more inexpensively and much more quickly at home.

The fourth weakness was the most serious of all. If the rights and freedoms embodied in the Convention were, as described, 'fundamental', it was a grave defect that they were not fully protected in domestic law. Of course, many of them were protected by the common law and statute and a mixture of the two, and the judges on the whole did their best to remedy perceived injustices. But the coverage was piecemeal, as evident from the record of cases lost by the UK at Strasbourg, and it is not easy to see why fundamental rights and freedoms should not be directly and expressly recognised in domestic law without taxing the ingenuity of the judges.

Perhaps I may give just one example to illustrate these weaknesses. In *X (Minors) v Bedfordshire County Council*[16] five child plaintiffs complained that they had been the victims of maltreatment and neglect which had been brought to the attention of the defendant council but on which, for a long time, the council had failed to act. The facts, only assumed when the strike-out application was heard in England, but established or accepted when the claimants took their complaint to Strasbourg, were very strong. An experienced and highly respected child psychiatrist described the children's experiences as 'to put it bluntly, horrific' and added that it was the worst case of neglect and emotional abuse that she had seen in her professional career.[17] The local authority's failure to intervene, which had permitted the abuse and neglect to continue, was held by a majority of the Court of Appeal and unanimously in the House of Lords to afford the children no tortious remedy in negligence against the local authority in English law. So the children applied to Strasbourg under the Convention. It was there accepted that the neglect and abuse suffered by the children reached the threshold of inhuman and degrading treatment[18] and a violation of article 3 of the Convention was found, arising from the failure of the system to protect the children from serious, long-term neglect and abuse.[19] The court awarded compensation amounting to £320,000, a very large figure by Strasbourg standards.[20]

So the Labour government of 1997, fresh to office after a long period of Conservative government, inspired by Lord Irvine, introduced what became the 1998 Act. The general thrust of that Act will be very familiar to this well-armed audience, but perhaps I may comment on five features of it. First, the cornerstone of the Act is the provision in section 6(1) which makes it unlawful for any public authority, widely defined so as to include a court or tribunal, to act in a way which is incompatible with a Convention right. Thus parliament was requiring compliance with the scheduled Convention rights across the whole spectrum of government, parliament itself, alone, excluded.

Second is the power conferred on the higher courts by section 4, if satisfied that a provision of primary legislation is incompatible with a Convention right, to make a declaration of incompatibility. This was not to affect the validity of the statute and was not to be binding on the parties, but it would be a formal statement of the court's view. If a declaration was made, ministers were empowered but not obliged to put it right. Thus there was to be no power to annul, strike down or set aside primary legislation. The reason for this unusual device was very clearly explained in the White Paper introducing the Bill:

> The government has reached the conclusion that the courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the government attaches to parliamentary sovereignty. In this context, parliamentary sovereignty means that parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of parliament would confer on the judiciary a general

> power over the decisions of parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with parliament. There is not evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this government had no mandate for any such change.[21]

These closing sentences were, I think, completely accurate. There was no judicial pressure for more sweeping powers, and had the Bill not preserved parliamentary sovereignty, it is perhaps unlikely that it would have passed. The government's expectation at the time was that there would be relatively few declarations of incompatibility, and this has proved to be the case.

The government's expectation in this regard was attributable to the third feature of the Act to which I draw attention. This was the requirement in section 3(1) of the Act that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." I emphasise the imperative "must". This provision also was explained by the White Paper:

> 2.7 The Bill provides for legislation – both Acts of parliament and secondary legislation – to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present role which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.
>
> 2.8 This 'rule of construction' is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case-law, taking into account the Convention rights.[22]

Thus the intention and the expectation were that use of this unusual interpretative power would obviate the need for declarations of incompatibility in all but a small minority of cases.

The fourth feature I would mention, less well known than the others I have mentioned, is the obligation placed by section 19 on a minister in charge of a Bill in either house of parliament, before its second reading, either to make a statement that in his view the provisions of a Bill are compatible with the Convention rights, or to make a statement to the effect that although he is unable to make a statement of compatibility the government nonetheless wishes the House to proceed with the Bill. This second course was followed in relation to what became the *Communications Act 2003*, because of doubt about the effect of Strasbourg authority, but that was a rarity and the first course is the norm. Thus a government Bill is ordinarily presented to parliament on the premise that it is (in the jargon) Convention-compliant, reflecting the intention of the Human Rights Act as a whole that the scheduled rights should be reflected across the whole spectrum of public administration.

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The fifth feature, which is well-known, is a requirement that British courts, when determining questions which have arisen in connection with Convention rights, must take into account any judgment, declaration or advisory opinion of the European Court (or an opinion or decision of the Commission or the Council of Ministers).[23] This has been understood, in my view correctly, as meaning that Strasbourg authority is not strictly binding on UK courts, like the law of the European Community, but that UK courts should ordinarily follow it unless there is some good reason for not doing so.

The UK, like Australia, is party to the International Covenant on Civil and Political Rights, 1966, many of the articles of which (although differently numbered) match corresponding provisions of the European Convention. But I think it is true to say that in the UK the impact of the ICCPR and the rulings of the Human Rights Committee of the UN have been very marginal compared with those of the Strasbourg institutions. It is no doubt unwelcome, perhaps even a little humiliating, for a proud sovereign state to be found by any respected international body to have violated important human rights, but it must be very doubtful whether the UK's experience of reverses in the Human Rights Committee would have impelled it to give domestic effect to the rights in the ICCPR. To that extent at least, the situation in Australia differs from that in the UK.

As is well known, the *Human Rights Act 1998* has attracted much media criticism in the UK, particularly in the tabloid and right-wing press and in sections of the Conservative Party. Much of this criticism has been the product of misrepresentation and misunderstanding and there is a tendency to blame the Act for almost anything of which the public disapprove. But among many ill-directed criticisms are some points which are serious and call for consideration. Whether these are points which have relevance in an Australian context I do not know, and must leave you to judge.

First, it is sometimes argued that the Act is unnecessary, that common law and statute can readily be interpreted and applied to provide the protection that is needed. Up to a point this is true.

There are well-known cases in which, although the Convention is invoked, the courts find the common law and the Convention jurisprudence to be in harmony and choose to base their decision on the common law alone.[24] But the common law and statute have not always provided adequate protection, as evidenced by the British record of failure at Strasbourg before 2000, when the Act came into force. As was explained in the White Paper, already referred to, one of the reasons for this record of failure was that:

> there has simply been no framework within which the compatibility with the Convention rights of an executive act or decision can be tested in the British courts: these courts can of course review the exercise of executive discretion, but they can do so only on the basis of what is lawful or unlawful according to the law in the United Kingdom as it stands.[25]

Thus the Act was necessary if, in accordance with the UK's duty in the international law under article 1 of the Convention, the rights embodied in the Convention were to be secured to everyone within the jurisdiction of the UK in the domestic courts, without the need for a journey to Strasbourg.

It is said, secondly, that the effect of the Act is to undermine the sovereignty of parliament. I do not find this point entirely easy to understand. As I have tried to show, the Act was very carefully devised so as to preserve parliamentary sovereignty. It was a surprise to many when, in the course of e-mail exchanges with Henry Porter, an *Observer* journalist, Tony Blair himself appeared to misunderstand this fundamental premise of the Act.[26] But there is, I suggest, no room for doubt. The courts cannot annul an Act of parliament. They can declare it to be incompatible with a Convention right, but that does not affect its validity or effect. Ministers may act to rectify a provision declared to be incompatible but are not obliged to do so and may, if they choose, leave the complainant to try his luck in Strasbourg. And it cannot, I think be suggested – nor, to my knowledge, has it been suggested – that parliament lacks the power to repeal the Act if the necessary majority favours that cause. There are some statutes, like that giving equal voting rights to women, which parliament is exceedingly unlikely to repeal, and the 1998 Act may be or become one of them, although repeal would not free the UK of its international law duty to comply with the Convention. But I think it clear that, domestically, parliament has maintained the whip hand, as was always intended.

A third criticism is that the process established by the Act is undemocratic, since it permits decisions of the nation's representatives in parliament, including particularly elected members of the House of Commons, to be challenged by unelected judges. It is of course true that a declaration of incompatibility questions the lawfulness of primary legislation, and exercise of the interpretative power in section 3 of the Act may involve the interpretation of legislation in a sense which it is acknowledged parliament did not intend. This has been described as a strong obligation[27], and such it is. But if one asks what authority these unelected judges have for departing from their usual role of seeking to give the words of a statute the meaning which parliament intended its words to bear, the answer is clear: they have the authority of a mandatory instruction issued to them by parliament itself. To determine whether it is possible to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights of course calls for what may be a difficult and controversial exercise of judgment, but judgment is what judges are paid to exercise, even if unelected. It must nonetheless be accepted that any Bill or Charter of Rights is, in one sense, undemocratic in that it is counter-majoritarian. Its purpose is to give a measure of protection to minorities who lack the strength and the representation to obtain protection through the political process: prisoners, mental patients, gypsies, homosexuals, asylum-seekers, despised racial or religious minorities and the like. It was recognition by the American Founding Fathers that a majority may exert its power to oppress a minority – a phenomenon amply demonstrated in the country's history – which inspired the 1791 amendments to the US Constitution, comprising the US Bill of Rights and such is the inspiration of later instruments also. Chief Justice Sir John Latham made the point very succinctly when he said that in Australia the popular minorities can generally look after themselves; protective laws are basically needed for minorities and especially unpopular minorities.[28]

A fourth criticism of the Act is that it gives too much power to the judges, in particular, to make decisions of a sensitive and personal nature. It is true, I think, that the Act leads to judges making decision of a rather different kind from those they were used to making. This was recognised in parliament when the Bill was debated, and was an intended consequence. But the judges are still making what are distinctively judicial decisions. They have to establish the facts, which are often crucial. They have a text, contained partly in the Act and partly in the Convention rights scheduled to the Act. They have principles of interpretation to apply, some of them deriving from domestic sources, some from Strasbourg

As is well known, the Human Rights Act 1998 *has attracted much media criticism in the UK, particularly in the tabloid and right-wing press and in sections of the Conservative Party. Much of this criticism has been the product of misrepresentation and misunderstanding...But among many ill-directed criticisms are some points which are serious and call for consideration.*

and other international sources. They have a body of precedent to work on, some of it from Strasbourg, some domestic, some from other sources, some of it binding, some not. The task which the judges perform is not different in kind from their conventional role, and they have of course to give reasons, based on the text, the principles of interpretation and the authorities, for reaching whatever conclusion they do. They are not metamorphosed into legislators. Nor is any decision made by a judge which is not in the last resort made by a judge under the pre-existing regime. The question, at least for the UK, was: which judge should make the decision in the first instance?

Then it is said – a fifth criticism – that the Act is a source of mischief because it involves the judges in political controversy and makes for conflict between the government and the judiciary. It is certainly true that in the UK the courts have given some decisions under the Act which have been very unpopular with the government. But that is also true of judicial review decisions not given under the Act. There is, as I have suggested elsewhere,[29] an inevitable and proper tension between the two arms of government. Particularly when confronted by serious threats such as terrorism, governments understandably seek to exercise their powers to the limit of what is lawful. But in doing so they may cross the line which divides the lawful from the unlawful, and then it is the constitutional role of the courts so to hold. There are countries in the world where all judicial decisions find favour with the powers that be, but they are not countries where one would wish to live. Governments of course have no greater appetite for losing cases that any other litigant, perhaps even less; but most would recognise that losing cases on occasion is part of the price to be paid for the rule of law.

A sixth criticism, sometimes made in the UK by those who generally favour a bill or charter of rights, is that the Act gives domestic effect to the wrong rights, either because the Convention, now nearly 60 years old, is looking rather dated, or because it does not give effect to distinctively British rights. Neither of these criticisms is in my view at all persuasive. The age of the Convention is not very relevant since the articles are expressed (like chapter 39 of Magna Carta 1215) in very broad terms, and the Strasbourg court has treated the Convention as a living instrument:[30] the meaning of the articles does not change but their application has been held to do so in relation, for example, to the distinction between inhuman and degrading treatment and torture and the treatment of homosexuals[31] and transsexuals.[32] The second point is also misplaced. There is nothing un-British or foreign about the content of the Convention rights, to which British negotiators made a great contribution. Nor, in the land which gave birth to Magna Carta and the Bill of Rights 1689, is there anything antithetical to the UK Constitution in the notion of a Bill or Charter of Rights. There are, no doubt, rights which could be added to those guaranteed by the European Convention and its protocols, but the Convention imposes a minimum, not a maximum: any state which wishes to secure more extensive rights than the Convention guarantees is not precluded from doing so.

The European Court of Human Rights, Strasbourg. Photo: iStockphoto

The Act is also criticised, seventhly, not for doing too much but for doing too little. For instance, Henry Porter, a respected *Observer* journalist, has deplored the failure of the Act to stem the seemingly inexorable increase of personal surveillance in Britain,[33] making the British perhaps the most watched people in the free democratic world.[34] I share the author's concern. But I question whether this result can be attributed to a defect in the Convention. The courts can, after all, only rule on complaints which litigants choose to bring before them and it seems that on the whole the British public is less concerned about official intrusion into their private affairs than one might expect, perhaps because they do not appreciate the extent to which it is going on.

I come to an eighth criticism. This is that the effect of the Convention is to elevate the rights of the individual over those of the community to which he or she belongs. I do not consider this to be a justified criticism. While some of the Convention rights (such as the prohibition of torture) are expressed in unqualified terms and have, on occasion, been applied in an unqualified way,[35] it has repeatedly been held in Strasbourg that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights';[36] a theme loyally echoed in the domestic cases.[37] To the extent that individual rights have been improperly preferred to community rights, this is a perversion, not an implementation, of the Convention.

A ninth criticism of the Act is that it provides a field day, and rich pickings, for lawyers. Before it came into force there was indeed a worry that the courts would be swamped by an uncontrollable flood of claims. This has not happened. There have been a considerable number of claims under the Act, but they have been manageable

and the pickings have not been rich. Under the statute now in force in Victoria there has, as I understand, been a surprising reluctance to rely on the Act.

The tenth and last criticism which I would mention is, if justified, the most serious of all: that the Convention gives rise to much wrong decision making. This must not be a matter of opinion. There are Strasbourg decisions which I myself consider wrong,[38] and domestic decisions also which I have been party to overruling.[39] It is not, however, uncommon that judicial decisions fail to command universal acceptance, and I do not think that the incidence of aberrant decision-making is greater in this field than in others. Challenged to identify decisions they criticise as foolish or mischievous, most critics either falter or fall back on what turn out to be not judicial decisions but misconceived interpretations of the Act by official bodies. What is perhaps more remarkable, because more unusual, is the development of a constructive dialogue between the UK courts and that at Strasbourg. Where the Strasbourg court gives a judgment which the UK courts venture to criticise, the Strasbourg court has on more than one occasion shown a refreshing willingness to modify its position.

These are, I think, the main criticisms directed at the *Human Rights Act* and the European Convention. As will be obvious, they do not, in my opinion, amount to very much. They do not begin to outweigh the very real benefit which the Act confers by empowering the courts to uphold certain very basic safeguards even – indeed, particularly – for those members of society who are most disadvantaged, most vulnerable and least well-represented in any democratic representative assembly. Decisions have undoubtedly been made in the UK which have, in my view, been beneficial and which would not – in some cases could not – have been made without the mandate given by the Act. Examples are plentiful, but among those which spring readily to mind are the ordering of a public enquiry into the beating to death of a young Asian detainee by a rabidly racist and violent detainee put into the same cell at a young offenders' institution;[40] a finding that the conditions in which prisoners were held at Barlinnie Prison in Glasgow amounted to inhuman or degrading treatment or punishment;[41] a finding that the indefinite detention of a foreign

national suspected of association with terrorism without charge or trial was disproportionate, irrational and discriminatory;[42] a finding that an 18-hour curfew, coupled with stringent restrictions on where the subject could go, whom he could meet and whom he might speak to, amounted to an unlawful deprivation of liberty;[43] a finding that temporary judges in Scotland lacked the security necessary to make them appear to be an independent and impartial tribunal;[44] an order restraining the return of a mother and child to Lebanon, where the child would be required to live with a violent father she had never met;[45] a finding that the police had unlawfully interfered with a demonstration against the Iraq war outside a Royal Air Force base in Gloucestershire;[46] and an order condemning as discriminatory and disproportionate a scheme requiring immigrants seeking to marry otherwise than under the rites of the Church of England to obtain the consent of the Secretary of State.[47] These examples could, as I say, be multiplied. I do not for my part doubt that such decisions enhance the fairness, decency and cohesiveness of the society in which we live in the United Kingdom.

1. *English Law – The New Dimension* (Stevens & Sons, 1974), pp.10-21.
2. (1993) 109 LQR 390-400; and see Thomas Bingham, *The Business of Judging* (OUP, 2000), pp. 131-140.
3. See AW Brian Simpson, *Human Rights and End of Empire* (OUP, 2001), chapters 18 and 19.
4. Ibid., 930.
5. Ibid., 946.
6. E.g. *McCann v United Kingdom* (1995) 21 EHRR 97.
7. E.g. *Ireland v United Kingdom* (1978) 2 EHRR 25; *Tyrer v United Kingdom* (1978) 2 EHRR 1.
8. E.g. *Ashingdane v United Kingdom* (1985) 7 EHRR 528.
9. E.g. *Golder v United Kingdom* (1975) 1 EHRR 524; *Saunders v United Kingdom* (1996) 23 EHRR 313.
10. E.g. *McGinley and Egan v United Kingdom* (1998) 27 EHRR 1; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Malone v United Kingdom* (1984) 7 EHRR 14.
11. E.g. *Tolstoy-Miloslavsky v United Kingdom* (1995) 20 EHRR 442; *The Observer* and *The Guardian v United Kingdom* (1991) 14 EHRR 229.
12. E.g. *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.
13. E.g. *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.
14. *R v Secretary of State for the Home department, Ex p Brind* [1991] 1 AC 696.
15. *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771.
16. [1995] 2 AC 633.
17. *Z v United Kingdom* (2001) 34 EHRR 97, para 40.
18. Para 74.
19. Para 74-75.
20. See *D v East Berkshire Community Health* NHS Trust [2005] UKHL 23; [2005] 2 AC 373, para 22.
21. 'Rights Brought Home: The Human Rights Bill'.
22. Ibid., chapter 2, paras 27-28.
23. Section 2(1).
24. E.g. *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551F; *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277, 299D; *A and others v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71; [2006] 2 AC 221, para 52.
25. White Paper, above, para 1.16.
26. 'Britain's Liberties: the Great Debate', *The Observer* (London), 23 April 2006.
27. *R v Director of Public Prosecutions, Exp Kebilene* [2000] 2 AC 326, 366A, 373F; *R v A* (No. 2) [2001] UKHL 25, [2002] 1 AC 45, para 44; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 30.
28. *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 124.
29. Thomas Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 79.
30. *Handyside v United Kingdom* (1979) 1 EHRR 737, para 49.
31. *Dudgeon v United Kingdom* (1982) 4 EHRR 149, para 60.
32. *Goodwin v United Kingdom* (2002) 35 EHRR 18.
33. *The Observer* (London), 9 March 2008, p.33.
34. Timothy Garton Ash, 'The threat from terrorism does not justify slicing away our freedoms', *The Guardian* (London), 15 November 2007, p.33.
35. E.g. *Chahal v United Kingdom* (1996) 35 EHRR 413.
36. *Sporring and Lonnroth v Sweden* (1982) 5 EHRR 35, para 69.
37. *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.
38. Such as *McCann v United Kingdom* (1995) 21 EHRR 97.
39. Such as *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335.
40. *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653.
41. *Napier v Scottish Ministers* 2005 1 SC 229.
42. *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
43. *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385.
44. *Starrs and Chalmers v Procurator Fiscal, Linlithgow*, Appeal Court, High Court of Justiciary, Appeal No 1821/99.
45. *EM (Lebanon) v Secretary of State for the Home Department (AF (A Child) and others intervening)* [2008] UKHL 64; [2008] 3 WLR 931.
46. *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55; [2007] 2 AC 105.
47. *R (Baiai) v Secretary of State for the Home Department (Nos 1 and 2) (Joint Council for the Welfare of Immigrants intervening)* [2008] UKHL 53; [2008] 3 WLR 549.

Opening of Law Term Dinner

An address delivered by Chief Justice Spigelman AC at the Law Society of New South Wales Opening of Law Term Dinner 2009 on 2 February 2009

In August last year, the third Corporations Law Conference organised jointly by the Supreme Court and the Law Society was held on the topic of 'The Credit Crunch and the Law'. It is difficult to imagine a conference theme that was more timely. As the universal response to the quality of the papers presented at that conference attests, the conference made a significant contribution to the understanding of the profession in this state, and beyond, to the range of important corporations law issues that have arisen as a result of the global economic downturn.

In April last, the [NSW] Supreme Court initiated the first Asian Judicial Seminar on Commercial Litigation. It was attended by senior commercial judges from China, India, Japan, South Korea, Singapore, Hong Kong, The Philippines, Malaysia and Papua New Guinea. I am pleased to say that the seminar was such a success that it will be repeated in Hong Kong next year, again to be jointly organised by the High Court of Hong Kong and the Supreme Court of New South Wales.

I circulated the published papers of our Credit Crunch Conference to the attendees at that commercial seminar. They universally expressed their admiration for the publication. We have begun planning for next year's joint Supreme Court/Law Society Conference and I have no doubt it will be equally well received, both in Australia and beyond.

This downturn of the economic cycle is of such prospective severity that, on this annual occasion, I wish to address my remarks to the implications of this global development for the legal profession. Our focus must be on the quality and efficacy of the services that the legal profession will be called upon to provide for the resolution of the disputes that necessarily arise in such a context. The downturn is already having an effect on the flow of litigation.

Proceedings instituted in the Supreme Court to enforce obligations under mortgages reflect the economic stress of the times. Our monthly figures for matters entered into the court's Possession List are sought as an economic indicator by the Reserve Bank of Australia. The governor of the bank has told me that the bank appreciates our co-operation in this regard.

The major increase in Possession List filings occurred in 2005 and 2006, i.e., before the current nationwide downturn. In 2007 and 2008 they plateaued, (see below). Analysis of the figures indicates

Companies entering external administration – number and per cent from each state and territory

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total
2007	3764	1945	1103	269	275	43	15	107	**7521**
(% of Aust total)	(50%)	(26%)	(15%)	(4%)	(4%)	(1%)	(0%)	(1%)	
2008	4172	2472	1541	322	393	44	24	145	**9113**
(% of Aust total)	(46%)	(27%)	(17%)	(4%)	(4%)	(0%)	(0%)	(2%)	
% change within state/ territory from 2007 to 2008	up 11%	up 27%	up 40%	up 20%	up 43%	up 2%	up 60%	up 36%	**up 21%**

These statistics show the number of companies entering administration for the FIRST time, based on documents lodged with ASIC in the given period. A company is only included in the statistics ONCE, regardless of whether it enters another form of external administration. The only exception occurs where a company is taken out of external administration, e.g. by a court order, and at a later date re-enters external administration. Voluntary windings up are EXCLUDED.

Insolvency appointments in Australia – number and per cent from each state and territory

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total
2007	5691	2986	2076	475	490	81	36	183	**12018**
(% of Aust total)	(47%)	(25%)	(17%)	(4%)	(4%)	(1%)	(0%)	(2%)	
2008	6287	3831	2553	525	648	69	30	230	**14173**
(% of Aust total)	(44%)	(27%)	(18%)	(4%)	(5%)	(0%)	(0%)	(2%)	
% change within state/ territory from 2007 to 2008	up 10%	up 28%	up 23%	up 11%	up 32%	down 15%	down 17%	up 26%	**up 18%**

This is the number of insolvency appointments recorded by ASIC. As a company can be under more than one form of insolvency administration at any one time and can progress from one type to another, a company can be included in these statistics MORE THAN ONCE. For this reason, the number of insolvency appointments will always be greater than the number of companies going into external administration for the first time. Voluntary windings up are EXCLUDED. Source: Australian Securities and Investments Commission – figures available as at 2 February 2009.

that in the first six months of 2008 there was a decline of some 11 percent in Possession List filings (2519), when compared with filings for the first six months of 2007 (2834). However, the second six months of 2008 were completely different: filings (2953) were up by 13 percent on the previous corresponding period (2620). Although overall, on an annual basis, there was no increase, it does appear from the figures for the second six months that difficulties are emerging and they are emerging notwithstanding the substantial decline in interest rates that occurred during that period.

One of the reasons why what have come to be known as sub prime mortgages – which we used to call 'low-doc loans' – never reached the dimensions that they have overseas is because of the particular legal regulation available in this state. The Supreme Court of New South Wales has on numerous occasions exercised the powers conferred upon it under the Contracts Review Act to set aside as 'unjust' aspects of low-doc loans where a mortgage, often by an elderly person over the family home, had been advanced without any consideration of the capacity of the borrower to repay.

One of the foundational judgments of this character,[1] frequently applied subsequently, led to significant change in the practice of lenders with respect to controlling their brokers who originated such loans. As the *Financial Review* reported under the heading 'Court ruling forces overhaul of low-doc lending', the judgment led to warnings to members by the Mortgage Industry Association of Australia and to a change of practice by what was described as a $5 billion mortgage finance company owned by major banks with respect to its brokers, leading to some 20 per cent of the brokers being removed from their panel.[2]

This line of authority has received considerable publicity in the financial media leading to another article in the *Australian Financial Review* which said:

> Public awareness about the plight of families caught in the debt trap through low-doc lenders is only starting to emerge as consumer groups raise their concerns. But judges in NSW have been on to it for several years. As the number of mortgage defaults escalates, courts have closely examined the conduct of loan intermediaries in the low-doc industry – solicitors, accountants and brokers – and made a number of critical findings. Judges are increasingly prepared to look at the circumstances behind the loan documentation …[3]

I think it likely that the regulatory regime as enforced in this state has played a role in limiting the exposure of Australian banks and other lenders in the manner which has proven to be so disastrous elsewhere.

The second area of the court's jurisdiction which will reflect economic conditions to a significant degree are filings for insolvency. Statistics on these matters are kept for Australia by ASIC and reveal an interesting comparison between this state and other states.

In New South Wales the number of companies entering external administration for the first time were up by 11 percent from 2007. However, the national average was up by 21 percent. This was because of a 27 percent increase in Victoria, a 40 percent increase in Queensland, a 20 percent increase in South Australia and a 43 percent increase in Western Australia.

It does appear that in 2008 stress in the corporate community was greater in other states than in New South Wales. This state may have been affected by adverse conditions before other states, but the effects of last year's global credit crunch has not yet impacted quite as significantly here as in other states.

I wish to emphasise the long-term significance of the global shift in the economic tectonic plates which will lead inexorably to social tremors and quakes. These effects will test many aspects of our social infrastructure, including our legal infrastructure.

One of the reasons why what have come to be known as sub prime mortgages – which we used to call 'low-doc loans' – never reached the dimension that they have overseas is because of the particular legal regulation available in this state.

As many of you are aware, from the time of my swearing-in speech in May 1998, I have consistently emphasised the significance of the professional dimension of legal practice and, in particular, the need to resist recasting the profession solely in terms of its commercial dimension. My swearing-in speech has recently been reprinted as the opening chapter of the collection of my speeches, of which the Law Society sponsored the launch, attended by the recently retired senior law lord, Lord Bingham. Please accept my gratitude for the support the society gave on that occasion.

It is appropriate to reiterate some of the themes I raised at my swearing-in and which I have consistently repeated in the decade since. The salience of commercial values in discourse about legal practice, which threatened to overwhelm all other values, is now in secular retreat. We will, I believe, as a direct result of the extraordinary events we are now experiencing, re-emphasise the central significance of the professional dimension of legal practice.

Permit me to commit the sin of self-quotation and repeat some observations from my swearing-in speech:

> The independence and integrity of the legal profession, with professional standards and professional means of enforcement, is of institutional significance in our society. …
>
> The ideology of the free market forces, which I do not doubt has a significant and appropriate role in many spheres of discourse, has been elevated by some to a universally applicable orthodoxy. It should not be accepted to be such.
>
> Economic rationalism has its place. In the administration of justice that place is a limited and subsidiary one. A plurality of organising principles for our social institutions is as important to the health of our society as biodiversity is to our ecology.'[4]

In subsequent addresses I elaborated on that last proposition by emphasising that a society which adopts a single organising principle for its basic institutions is inherently unstable. That is why I adopted the analogy of biological diversity.

In every sphere of discourse, including the law, the end of an era which treated commercial values as of overriding significance will lead to the reassertion of more traditional values.

It is a tribute to the strength of the traditions of our profession that so few chose to abandon, or to significantly qualify, those traditions in accordance with the values of the era that has now passed. Multi-disciplinary partnerships have not become significant. Incorporation has not become the norm. Only one or two firms have taken the ultimate step of listing on the Australian Stock Exchange. Furthermore, the large firms definitively asserted their connection with the profession. A special constitutional provision was adopted at the level of the Law Council of Australia and those firms continued their involvement with the state law societies. This is symbolised notably by you, Mr Cantanzariti, in your many years of involvement on the Executive culminating in your ascendency to the presidency of this society.

As many of you will recall, a few years ago, in an insightful address on the subject of 'Lawyers and Money',[5] Bret Walker SC raised the possibility that the major commercial law firms should, in effect, leave the profession and join their business clients. Now, of course, the idea that law firms should reinvent themselves as merchant banks would not be high on anyone's agenda.

[I]n an insightful address on the subject of 'Lawyers and Money', Bret Walker SC raised the possibility that the major commercial law firms should, in effect, leave the profession and join their business clients. Now, of course, the idea that law firms should reinvent themselves as merchant banks would not be high on anyone's agenda.

At the time of the last recession, following the economic boom of the 1980s, my corporate law practice turned into a criminal practice. I was briefed by the Australian Securities Commission, as ASIC then was, and the Commonwealth director of public prosecutions, to pursue criminal charges against a number of accused, including Laurie Connell in Western Australia. I remember a delightful exhibit that had been tendered at the royal commission into what became known as 'WA Inc'. It was a tombstone ad that read:

'ROTHWELLS LIMITED

ONE DAY ALL MERCHANT BANKS WILL BE LIKE OURS.'

And so it has proved.

Reassertion of the conduct of a profession as the basic paradigm for the practise of law, rather than the adoption of a business paradigm, will be an important structural effect of the present crisis.[6] The business paradigm regards the lawyer/client relationship as primarily a commercial relationship. The professional paradigm emphasises that the lawyer/client relationship is a personal bond created in the context of a high degree of personal responsibility, with an overriding ethic of service to clients and to the public. There will now be renewed emphasis on the moral code that underpins the traditional authority of our profession, so that that ethic of service, which emphasises honesty, fidelity, diligence and professional self-restraint, will now resume its salience over the pursuit of commercial gain at the core of legal practice. In this our profession will reflect changes that affect all other professions.

The second matter to which I wish to refer this evening is closely related to the reassertion of professional values. As this audience is well aware, I have over a number of years emphasised the need to control legal costs. As I have said on previous occasions, the legal profession is in danger of killing the goose.

Economic adversity will increase cost consciousness at all levels and the profession must be prepared to respond to the demands of its clients and of the public at large in this respect. Unless the profession recognises that the period of economic adversity we are entering requires a significant reduction in the cost of legal services it will be marginalised.

When, five years ago, major reforms were instituted to change the culture of personal injury litigation, they were driven to a substantial degree by the significant proportion of damages awards that were taken up by the costs of administering the system. No one should assume that there is any sphere of legal practice that is immune from similar intervention.

There are signs that other areas of practice are already being affected by the need to minimise costs. Even one of the few

growth areas – corporate insolvency – will be more cost conscious. It is noticeable that in the case of some of the biggest examples of corporate stress – Centro, Allco, Babcock and Brown – major creditors who trust the existing management are letting them liquidate the assets rather than appointing receivers or liquidators with the additional level of costs and delays, including legal costs, that appear to be endemic with external administration.

The warning signs are clear.

Over the last decade or two substantial progress has been made in reducing delays in the courts and some progress has been made in controlling costs. However, we must continually re-engineer the process of dispute resolution because the pressures on the process are in a continual state of flux. The scope and speed of changes in the economy and in society, which the law is designed to serve, will never permit us to declare victory and sit back content. We must proceed on the basis that there is always scope for improvement. The period of economic adversity which we are entering makes this constant endeavour more pressing than it has been in recent decades.

Judges are able to contribute to the process of controlling legal costs, especially in terms of delay and length of trial. However, there are limits to the degree of supervision and intervention which are consistent with the continuation of an adversary system. Although that system has been modified in many respects, it remains the case that the principal role in controlling costs lies with the profession.

I recognise of course that there may be a perception of a conflict of interest in this respect. What a client regards as costs, a lawyer, in large measure, regards as income. It is here that the re-emergence of a professional paradigm over a business paradigm for legal practice is of potentially great significance. Recognition of the centrality of the ethic of service for our profession is the most effective means to ensure that this conflict of interest is satisfactorily resolved.

The judiciary and the profession have to co-operate to ensure that all of the areas in which costs can escalate unreasonably, areas that have been well identified over the years, are controlled even more strictly than we have come to do in the past. [7] That is not only in the public interest, it is in the enlightened self-interest of all legal practitioners. If the profession is too greedy it will end up with less and, in some fields, with nothing.

This requires careful attention to the matters of which we are all aware such as:

- Minimising the number of times matters are brought before the court by maximising agreement on procedural and evidentiary matters that would otherwise involve interlocutory motions and attendances, together with the more extensive use of telephone and electronic directions hearings;
- Minimising the length of trials by exercising professional judgment as to what the chances of success on particular points of evidence and law are, and abandoning those in which the chances are low;
- Maximising co-operation on expert evidence to reduce the scope of disputation, recognising that a biased expert does your client harm;
- Further and more extensive use of the Supreme Court's practice in commercial disputes of a chess clock or stopwatch system for trials so that litigants have a higher degree of certainty about their costs exposure;
- Focussing the issues so that extensive discovery is not required and recognising that the faint hope that a smoking gun may exist to revive a weak case is simply not worth the costs involved;
- Applying with renewed vigour the test of proportionality, expressed in s 60 of the *Civil Procedure Act 2005*, to the effect that costs to the parties of dispute resolution must be proportionate to the importance and complexity of the subject matter in dispute.

Primarily through its series of committees involving the profession, on which the representatives of the Law Society serve, the court has well-established mechanisms for ensuring that its practices remain responsive to the changing needs and concerns of legal practice. The court remains open to changing its structures and practices in accordance with the ideas thrown up in these consultations.

The court has a range of powers that are now almost a decade old and which more recent legislative reform in other jurisdictions has by and large replicated. Similarly, we have a series of specialist lists which ensure judges of particular skill and experience deal with particular cases, including in commercial matters for the best part of three decades and in corporations matters for about a decade. The use of ADR has long been encouraged, and for over two decades, we have successfully operated a system of external referees.

The court is determined to ensure that the costs of legal proceedings are minimised. It remains ready and willing to continue to pursue changes in our practices in consultation with the profession.

In one area, in my opinion, legislation is required. The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes. Our uniform legislative scheme for domestic arbitration is now hopelessly out of date and requires a complete rewrite. The national scheme implemented in 1984 has not been adjusted in accordance with changes in international best practice. Of course, in our federation, agreement on technical matters such as this in multiple jurisdictions is always subject to delay. The delay with respect to the reform of the Commercial Arbitration Acts is now embarrassing. This is not an area in which

harmonisation based on the lowest common denominator principle is appropriate.

In my opinion, the way out of the impasse is to adopt the UNCITRAL Model Law *as* the domestic Australian arbitration law. It is a workable regime, itself now subject to review at the Commonwealth level. Its adoption *as* the domestic Australian arbitration law would send a clear signal to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration. Our competitors in this regard, such as Hong Kong or Singapore, do not create a rigid barrier between their domestic and international arbitration systems. Nor should we.

It is of course difficult to predict the future development of the current economic crisis. Nevertheless its implications will clearly be profound. In the short term one can expect a significant increase in commercial litigation, but the scope and intensity of the current downturn is such that this may prove to be short-lived, as more and more parties realise they are in no position to undertake the costs and risks of full litigation. As a profession it is our collective duty to minimise this barrier to access to justice. Lawyers are not immune to the effects of such a development. Many of you will already be feeling the pain. All of you will be apprehensive. The ethic of service obliges us to respond despite the commercial pain that practitioners will inevitably suffer during this period.

The one thing we cannot do is to rely on the traditional lawyer's instinct that nothing must ever be done for the first time.

Guiseppe di Lampedusa, in his great novel, *The Leopard,* crafted these words for a perceptive aristocrat facing the oblivion of the Sicilian aristocracy: 'If you want things to stay the same, you have to change.'

Not all societies or social groups prove capable of changing their practices, often with disastrous results. As Jared Diamond noted in his book *Collapse: How Societies Choose to Fail or Succeed,*[8] a form of intellectual paralysis may emerge which leads to doom. What, he legitimately asked, was in the mind of the Easter Islander, when he chopped down the last tree on that island upon which the whole society had long depended? A similar question could be asked of some legal practitioners. It is our mutual task to ensure that we avoid this state.

Endnotes

1. See 'Court ruling forces overhaul of low-doc lending' *Australian Financial Review* 20 December 2006 p1.
2. See 'Buyer beware: Home truths about low-doc loans' *Australian Financial Review,* 10 August 2007 pp.84-85; see also 'Buyer beware? Now its seller play fair' *Australian Financial Review*, 20 December 2006 p4.
3. See (1998) 44 NSWLR xxvii, reprinted in Tim D Castle *Speeches of a Chief Justice: James Spigelman 1998-2008*, Sydney, 2008 p3.
4. See 'Lawyers and Money' (2005) Lawyers Lectures, St James Ethics Centre, 24 October 2005 accessible at www.ethics.org.au
5. For discussion of these matters see my address 'Are Lawyers Lemons? Competition Principles and Professional Regulation' (2003) 77 *Australian Law Journal* 44 reprinted in Tim D Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008*, Sydney, 2008 at p138.
6. See generally my address 'Access to Justice and Access to Lawyers' (2007) 29 Australian Bar Review 136; (2007) 14 Australian Journal of Admin Law 158.
7. Diamond J, *Collapse: How Societies Choose to Fail or Succeed* (Viking, New York, 2004).
8. *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41.

Bench and Bar Dinner 2009

The 2009 Bench and Bar Dinner was held at the Hilton Sydney on 8 May.

Mr Senior Phillip Boulten SC, Ms Junior Anne Horvath, Chief Justice French, Anna Katzmann SC, the Hon Tom Hughes AO QC

Top row, L to R: Anna Katzmann SC, Anne Horvath, David Jackson AM QC and Justice Ruth McColl AO. Bottom Row, L to R: Phillip Boulten SC, Chief Justice French.

Left: Robert Newlinds SC and Sera Mirzabegian

Right: Louise Clegg, the Hon Justice Margaret Beazley AO and Kristina Stern

Left: Richard Weinstein and Robert Titterton

Right: Natalie Adams, Chrissa Loukas and Paresh Khandhar

Left: Sally Dowling, the Hon Justice Arthur Emmett and Michael Izzo

Right: Jim Poulos QC, Kate Williams, and Patrick Flynn

Left: Mark Speakman SC and Lachlan Gyles SC

Right: Justine Beaumont, Michael Christie and Brenda Tronson

Don't you know who I am? – ego and identity in the administration of justice

An address delivered by Chief Justice RS French at the Bench and Bar Dinner, Sydney, 8 May 2009.

The title of this short reflection is 'Don't you know who I am? – Ego and Identity in the Administration of Justice'. The question it poses has been asked in many parts of the world, and recently in New South Wales. Its common consequence when put by a public figure to some apparently lesser mortal is scornful dismissal in the short term and public ignominy in the medium to long term.

'Don't you know who I am', is not a question I need to put to you tonight. I have been more than adequately introduced by your President and subjected to detailed life review by Ms Junior. Indeed, for the past few weeks she has pursued my family, friends, former law partners and secretaries with frightening persistence trying to determine whether I have a past. She has demanded evidence, including photographic evidence, of my prior existence. Photographs from the 1980s were offered but rejected as too recent. Her excellent denouement is now behind us. But while awaiting it I felt a little like a one person native title claim group required by a ruthless inquisitor to prove the continuity of my existence back to my birth date.

As a general rule, the question 'Don't you know who I am?' is fraught with difficulty because in the circumstances in which it is usually posed it carries the implication that the person asking it stands outside a framework of rules or conventions applicable to the ordinary run of humanity.

There is a useful website called Youfool@don'tyouknowwhoIam.com which collects 'Don't you know who I am?' stories. One of those stories illustrates quite well the problem that the question throws up. A celebrated game show host boarding a United Airlines flight at Los Angeles International Airport tried to take with him a bag which exceeded the maximum size for carry on luggage. A United Airlines employee asked him to put it into a metal template to see whether it fell within the size limits. The game show host refused her request and began passing his luggage straight through into the x-ray machine. He said to the employee 'Don't you know who I am?' She replied, 'I don't care who you are, these are the rules'. She later sued him for serious hand injuries sustained during the conversation. How her injuries were caused does not appear from the web site.

'I don't know who you are, these are the rules' identifies the issue with precision. The questioner's public office or celebrity status derives from functions and achievements not relevant to the preference they seek.

A kind of 'Don't you know who I am' question was put by King James to Sir Edward Coke, chief justice in the Court of Common Pleas in 1612. 'These are the rules' was the substance of the response that the chief justice gave to the king. The king claimed to govern by divine right, that the judges were his delegates, and that he could decide any case for himself. According to Bracton, Coke said:

> True it is, that God has endowed your Majesty with excellent science and great endowments of nature. Your Majesty is not learned in the laws of your realm of England and causes which concern the life, or inheritance, or goods, or fortunes of your subjects, are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it.

Coke was subsequently removed from office, but the sentiment lingers on and informs our understanding of the separation of judicial and executive powers.

'Don't you know who I am?' is plainly not a question to be asked by judges or by members of the bar, however prominent. Indeed, outside the framework of the judiciary and the profession the general response is likely to be a blank stare and the perfectly reasonable answer, 'No I don't'. This is particularly so of the High Court. In the last survey which I read, albeit it was some years ago, a very large percentage of the population did not know that Australia has a High Court.

In preparing this talk I undertook some research to see whether or not there was anything on the web which could cast light upon current public awareness of the High Court. I discovered a web site called Product Review. It posts descriptions of products and invites commentary upon them. It gives the products a star rating out of five. One of the products it has posted is the High Court of Australia. This product has attracted a user rating of two stars out of five, based on two votes: one posted on 20 June 2006, the other on 10 July 2007. The 2006 vote lists as a 'Pro' – 'Really nice inside. Has a kind of old Englandy feel about it'. And as a 'Con' – 'Boring as. Not much to do and see there.' The 'Overall' conclusion offered by this voter was 'Pop in for a squiz … then head for the pub' . The more recent voter of July 2007 concluded:

> Overall: a great place to go to enjoy the towering monument but it doesnt really have much features. (sic)

Coke's riposte to King James spoke of the long study and experience necessary to understanding the art of law. With that understanding

come certain attributes. Those who are long in years at the bar and those of any longevity on the bench will include in their suite of professional attributes a certain harsh modesty even if it be well concealed beneath apparently impregnable self-confidence and persuasive authority. It is a modesty which will have been tempered in the character-building fires of the adversarial furnace, fanned by the sometimes not so light breezes of judicial rebuke or irony. It will have been informed by an understanding of the inescapably human dimension of legal institutions and their limitations as well as their aspirations to do justice according to law. It is part of our common lot.

For me the character building process began quite early. I discovered the limits of my powers of persuasion with respect to the most fundamental of propositions when addressing a magistrate on the burden of proof in the Court of Petty Sessions in Perth in the 1970s. He observed in the course of my submissions, 'Well your client wouldn't be here if he hadn't done something'. This was my first encounter with legal realism at work. In a practical sense, he was right. Nevertheless, I regarded my inability to divert him into a serious consideration of the golden thread as a significant forensic failure.

Such tales could be multiplied into the usual dinner talk sequence of war stories, but I shall mention only one other in which I was the victim of what I regarded at the time as an inappropriate display of judicial emotion. I tell this story because it is relevant to a slightly larger theme.

It was my first civil trial in the Supreme Court of Western Australia. It was probably about 1974 or 1975. It was a dispute, the details of which I have repressed, about the ownership of a horse. I was acting for the plaintiff, a horse owner who had entered into an arrangement with a trainer, the details of which I have also repressed. The trainer, a feisty and articulate spirit, represented himself in the proceedings. The evidence disclosed that the horse had come from East to West. The trip across the Nullarbor had not treated it kindly. It arrived in Western Australia on the verge of classification as a broken down hack fit for the glue factory. Despite its unpromising condition, the horse flourished under the skilful care of the trainer and began to look like a money earner. It was this conjunction of circumstances, having nothing much to do with the merits of the case as I saw them, that excited his Honour's moral passion. In an ex tempore judgment, with significant emotional content, he described the trainer as having 'lavished love' on the horse. He dismissed the claim. My client, who was not completely attuned to the real world at the time, asked me that most difficult of questions – what happened? I gave him the only possible answer – you lost!' The sting of losing my first civil case in a superior court to an unrepresented horse trainer did not break my spirit. It did, however, contribute to the harsh modesty of which I spoke earlier.

This all leads into a question for those on the bench and those at

the bar which is larger than the question 'Don't you know whom I am?' That is 'does it matter who you are?' To what extent do personality and personal values have a legitimate part to play in the administration of justice, both on the Bench and at the Bar table. If before a trial, the question were asked about the judge or counsel – 'Do you know who he or she is?' – is it right to say that the answer should be irrelevant?

We regard it, and rightly regard it, as fundamental that judging requires the reality and appearance of impartiality on the part of the judge. There should be no basis upon which a reasonable person could say that a judge's conduct or decision in a case is affected by personal interests or agendas or extraneous influences.

There is a step beyond that standard, however, which is perhaps linked to the depiction of justice as a blind goddess indifferent to the circumstances of those who appear before her. Legal realism has dispensed with the caricature that brings that symbolism to an extreme. Judges true to their oath or affirmation try to do justice according to law within boundaries which are not easily defined but are generally understood. They appreciate that every now and again the law will diverge from the justice of the case as they see it and that the divergence will be intractable. They appreciate that, even then, their duty will be to apply the law. There is nevertheless room in judging for choices to be made which are informed by what might popularly be called moral values. Such choices may arise when a judge is required to decide whether conduct is reasonable, in good faith, unconscionable, careless or reckless. Sometimes different judges acting properly within their judicial function will make different choices.

Within the limits of the judicial discipline there is room, as there must be, for judicial diversity. The institutions of the law are human and so long as they are, diversity is inescapable. Sir Anthony Mason in an article published late last year and entitled 'The Art of judging' said that having sat with many judges over the years

he had not encountered any two who shared an entirely identical outlook. He said:

> There are judges who tend to be conservative in some areas of the law, notably property, commercial and taxation, and less so in relation to matters where social issues are involved. There are other judges who interpret statutes in the light of the pre-existing common law and others who are more disposed to give the words of the statute full value, uninfluenced by what was the common law. Then there are literalists and others who are more inclined to draw meaning from context or purpose. And there have been judges who were known to give generous awards to plaintiffs in personal injury cases and others who were reputed to be niggardly. The list of potential points of difference does not stop at this point.[1]

He added however:

> Despite these differences in outlook, common to all the judges with whom I have been associated has been a keen sense of the common law tradition of judicial decision-making and a dedication to that tradition and to judicial integrity.[2]

It is therefore useful for advocates to ask about the judges before whom they appear: 'Do you know who he or she is?' The law is a human institution and advocacy is the human art of communication and persuasion. It can properly take account of the person to whom it is addressed.

What then of the advocates? Does it matter who they are? The answer is plainly yes. Their personalities and personal attributes cannot be detached from their advocacy.

We have all seen examples of advocates we have admired for their capacity to engage the court with argument and submissions not necessarily reflective of their personal views but somehow informed by their personality. Tom Hughes, whom you have honoured tonight, is one such. The late Sir Maurice Byers, formerly a member of this association and formerly solicitor-general for the Commonwealth, was another. In the early 1980s he appeared for the Commonwealth intervening in a matter in the High Court in which I appeared for an applicant in Federal Court proceedings under Pt V of the Trade Practices Act. With my good friend, Geoffrey Lindell, I was defending my statement of claim against a constitutional challenge. Fortunately, the Commonwealth, and therefore Sir Maurice, was on our side. I made submissions on the validity of provisions of the Act imposing accessorial liability for misleading or deceptive conduct. Justice Dawson, formerly solicitor-general for Victoria, taxed me with the hypothetical case of the office boy who might be held liable as an accessory to a contravention for bearing a misleading message from the managing director of one company to the managing director of another. I offered conventional and rather unimaginative responses about the nature of the incidental power under the Constitution. When Sir Maurice rose to put the Commonwealth's argument in support of validity he said nothing about Justice Dawson's interventions until the end of his submissions when he remarked:

> And as for that wretched office boy who probably hails from Victoria, I have nothing to say.

For those of you who did not know Sir Maurice it is sufficient to say that the comment was quintessentially his. I do not think that anybody else could have said it as he did.

Assuming the essential requisites of legal knowledge, high integrity, diligence and good oral and written communication skills, who you are as a person can properly inform your advocacy. There is however a caution which I would add. There are some advocates who have a strong belief in the justice of the case in which they appear because it reflects their personal values. That of itself is not necessarily a bad thing although it can be an impediment to critical judgment. But there is a small subset of such advocates who seem to think that it is enough to be on the side of the angels and that rigorous consideration of the law is a 'black letter' approach which somehow pollutes the moral purity of their case. They are seldom of much help to anyone. For those who are tempted down that path may I paraphrase briefly the closing words of a truly engaging sermon on the life of St Paul which I heard at Gray's Inn in London in 2006. The sermon was delivered by a worldly-wise clergyman who had worked as a tea planter and a wine buyer. He said:

> What the life of St Paul shows us is that God helps the meek and the humble. He also helps the articulate and the pushy – and particularly the competent.

In conclusion, who we are is relevant because it properly informs our advocacy and our judging. How we do the job, according to well established standards of integrity and excellence, is much more important.

Endnotes

1. Mason, 'The Art of Judging', (2008) 12 *Southern Cross Law Review* 33 at 38.
2. Ibid., p.39.

Carolyn Davenport SC

Photo by Mark Tedeschi QC

Former crown prosecutor, now at the private bar, Carolyn Davenport SC, was photographed by Mark Tedeschi QC in the laneway between Darlinghurst Court and the old Darlinghurst Gaol (now the National Art School), up against The Wall.

Carolyn Davenport was called to the bar in 1977 and began practising in criminal and family law at Wardell Chambers. In 1985 she was appointed as a crown prosecutor.

In 1991-1992 Ms Davenport was on secondment as general counsel with the Independent Commission Against Corruption.

In 2001 she left the ranks of the crown prosecutors and joined Samuel Griffith Chambers. In 2004 Ms Davenport was appointed senior counsel.

A tribute to Tony Parker

In August 2008 the *Northern Daily Leader* reported on a ceremony to dedicate a lectern in memory of Tony Parker. The following is an edited version of the story by Simon Chamberlain

A man who dedicated his legal career to assisting the underprivileged and down-and-out was remembered in a simple but moving ceremony with the presentation of a lectern in Tamworth Court. Peter Hamill SC made the presentation to the court to honour the memory of Tony Parker, who succumbed to cancer in May, 2006.

He said Mr Parker began his Tamworth court career in 1996, practising until 2005, and stood in 50 criminal trials. He described Mr Parker's career as being distinguished and the man as being a great teacher and mentor. Mr Parker graduated as a solicitor from Sydney University in 1970 and worked in private practice from 1971 until 1974 before joining the Aboriginal Legal Service in 1975 at Grafton. Mr Parker was the founder and longest serving principal solicitor of the Western Aboriginal Legal Service. He tirelessly represented Aboriginal people in city and country areas throughout his career and established procedures to ensure high quality representation for Aboriginal clients. He also worked for the Legal Aid Commission for a number of years and represented many Aboriginal clients as a private solicitor.

'It's difficult to imagine the sacrifice the solicitors for the service undertook,' Mr Hamill said.

'Sometimes these solicitors worked without pay, travelled untold miles through the west and often stayed with their clients to save money. They worked with courage and compassion.'

Hamill said Mr Parker moved to Adelaide where he played an important role in the Royal Commission into Aboriginal Deaths in Custody.

His Honour Judge Chris Geraghty, Rae Parker, Legal Aid NSW and Peter Hamill SC at the lectern dedicated to Tony Parker. Picture: *Northern Daily Leader*.

Ethical settlement negotiation

By David Higgs SC

> A barrister should not deploy or rely upon expert reports at a mediation which are known to contain incorrect assumptions in respect of material facts.
>
> A barrister is duty bound to both protect his/her client's secret *but '...not knowingly make a false statement to [an] opponent in relation to [a] case (including its compromise).'* [Barristers' Rule 51]

At the same time, our legal system is adversarial. There is no general common law duty of care owed by counsel to opposing parties.[1] Parties in arms length commercial negotiations are assumed to have conflicting interests. Generally there is no obligation for one party to reveal to the other information of which they are aware, which, if known to the other might cause that party to take a different negotiation stance. Failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice[2]:

> Rule 51 does not mandate full disclosure. Rather, it forbids 'false statements.'
>
> Silence or concealment can be 'a false statement' within the meaning of Rule 51.

Misrepresentation by silence or concealment can be problematic as discussed by Bowen CJ[3] where His Honour said:

> Dealing with the question of misrepresentation constituted by silence, there are cases which show, for example, that an omission to mention a qualification, in the absence of which some absolute statement made is rendered misleading, is conduct which should be regarded as misleading. So too is the omission to mention a *subsequent change* which has occurred after some statement which is correct at the time has been made where the result of the change is to render the statement incorrect so that thereafter it becomes misleading. This also may be regarded as constituting misleading conduct. However, the general position between contracting parties has been expressed in the following way:
>
> The general rule, both of law and equity, in respect to concealment is that mere silence with regard to a material fact, which *there is no legal obligation to divulge*, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.
>
> ...Under the general law it is important to consider whether there is a legal obligation to divulge. There are particular relationships which have been held to raise an obligation of disclosure...However, the court will not be restricted to cases where such a relationship has already been held to exist at common law or in equity. The court is likely to be faced with situations under s 52 (Trade Practices Act) between particular parties, where it will feel bound to hold that such an *obligation to disclose arises from the circumstances*. (emphasis added)

In *Legal Services Commissioner v Mullins* [2006] LPT 012, Mr Mullins, barrister, acted for a plaintiff who became a quadriplegic as a result of a motor vehicle accident in April 2001. Before the tribunal he was found guilty of professional misconduct described in the judgment as:

> [31] ... [the] fraudulent deception [he practised on the defendant's counsel and insurer which] involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to amount to professional misconduct.

This 'fraudulent deception' was the barrister's 'silence' leading up to and during mediation on 19 September 2003. In preparation, Mr Mullins conferred with his client on 16 September so as to draft an outline of damages. The plaintiff in conference revealed he was receiving chemotherapy for lung cancer which had only been diagnosed on about 1 September. This cancer was unrelated to the motor vehicle accident. Previously reports had been obtained through Evidex Pty Limited ('Evidex') including an occupational therapist's and accountant's evaluation of the respective care and cost of that care. Those calculations were based on a medical report which assessed a reduction in the plaintiff's life expectancy of 20 per cent.

This 'fraudulent deception' was the barrister's 'silence' leading up to and during the mediation on 19 September 2003...The silence positively misled the defendant and its counsel about life expectancy.

Soon after this conference, Mr Mullins gave the defendant's barrister the outline. At the time he knew the life expectancy assumption in the Evidex reports of 80 per cent normal life expectancy was very probably no longer sound. Nonetheless, he never disclaimed this assumption. Instead, in negotiations he asked the defendant's counsel to have regard to the Evidex reports stating that:

> The claim for future care set out in the [Outline] was very reasonable; and
>
> the claim for future economic loss was based on the [Evidex] report'.

As Mr Mullins knew and intended, the defendant's counsel communicated the substance of that telephone representation to his client/insurer.

The problem of disclosure was discussed between Mr Mullins and his client. The client's instructions were that information about his cancer should not be disclosed unless he was 'legally obliged to

do so'.

The silence positively misled the defendant and its counsel about life expectancy.

Context or circumstances influence the extent of legal and equitable obligations of disclosure.

The relevant context here is, firstly the mediation (ancillary to the curial process) and, secondly, the current standards of conduct expected of counsel of good repute and competency.

It did not matter that the uncorrected material advanced by the barrister was a mere assumption rather than evidence of a primary fact. Nor did it matter that the representation when made originally was correct. By the time this material was deployed by the barrister at mediation, it was known to be untrue.

The overarching consideration is probably the proper administration of justice. The current standards expected of counsel are ancillary. Otherwise it may be that clients in these circumstances should be advised to represent themselves at mediation. Such a result is counterintuitive as it would defeat the promotion of the administration of justice by encouraging legal representation.

In any event, the most significant circumstance or context giving rise to the obligation of disclosure is the negotiation involving representations about sworn evidence to be adduced in court. A representation about intended sworn evidence is no trifling matter. It is more than a mere commercial negotiation. To suggest otherwise is contemptuous of the curial process. The natural expectation is for parties to be honest about any representation concerning sworn evidence they intend to adduce. A duty to disclose usually only arises where there exist facts, the non disclosure of which would effectively misrepresent material aspects of the negotiation – such as anything which has taken place that was 'not naturally to be expected in the transaction.' Put another way – '…[t]he necessity for disclosure only goes to the extent of requiring it where there are some unusual features in the particular case relating to the particular…[circumstances].'[4]

The natural expectation is that if a topic is dealt with in a statement intended to be adduced as evidence, all aspects of that topic have been disclosed. Otherwise it is a half-truth and thus misleading. It is the duty of a legal representative to avoid any such half-truths in any proposed statement. In the event of legal representation, such circumstances would not only give rise to a natural expectation but also a duty of full disclosure. For example, in personal injury litigation, one cannot rely on reports of a doctor in situations where the reports are selectively served. Either all reports (both good and bad) are served or none at all.

The barrister, Mr Mullins knew the previously correct assumption of life expectancy no longer applied. He intended for the defendant's counsel and the defendant to be influenced by it – which happened.

It did not matter that the uncorrected material advanced by the barrister was a mere assumption rather than evidence of a primary fact. Nor did it matter that the representation when made originally was correct. By the time this material was deployed by the barrister at mediation, it was known to be untrue.

At the heart of the barrister's misconduct was his use of material he knew to be false. The problem for him would have been avoided if he expressly withdrew these reports (containing the incorrect assumption as to life expectancy) or refrained from referring to or relying on them. From a practical point of view it is difficult to imagine how he could have avoided referral or implied reliance on these reports without expressly withdrawing them.

Also, he should have so advised the client. If the client refused to follow this advice, he would have been duty-bound to return the brief.

Endnotes

1. *Orchard v South Eastern Electricity Board* [1987] 1 QB 565.
2. *Lam v Austintel Investments Australia Pty Limited* (1989) 97 FLR 458 at 475.
3. *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Limited* (1986) 12 FCR 477 at 480-490.
4. *Westpac Banking Corporation v Robertson* (1993) 30 NSWLR 668 at 687-8.

The ABA's Third Residential Advocacy Course

Kylie Day reports on the latest bootcamp for barristers, held on Monday, 19 January 2009 to Friday, 23 January 2009

Junior barristers commonly express concern that they are not getting enough 'speaking parts', and sometimes judges and senior barristers are heard to lament the decline of oral advocacy. Whether or not that is a fair assessment, the Australian Bar Association's residential advocacy course provides a valuable opportunity for anyone who is keen to practise and hone their craft, with the benefit of some intensive feedback. The course is well-suited to someone who has been at the Bar for a few years or more. This year's cohort of participants (42 people) ranged from those who had been at the Bar for about two years, through to the first silk to attend the course as a participant.

The design of the course was thoughtful and practical. It was based on the residential advocacy course run at Keble College, Oxford University (without being identical to it). So, what exactly did we do? All coaches and participants were provided with the same brief, and were required to work it up before the course began. Each participant was allocated to a small group (of about seven participants), and was designated as counsel for one of the parties. The week was structured around the stages of a trial, and generally a day was devoted to each of them (case analysis, opening addresses, examination in chief, cross-examination, re-examination, and closing addresses). Each evening there was a short lecture about the skill that would be the focus of the next day, and a demonstration was given by the coaches (which was also good theatre, as you might imagine). It was great to have a room full of people (both coaches and participants), from a variety of backgrounds and levels of experience, who had all worked up the same brief, and were all in a position to discuss it. I learnt a lot from the frank exchanges of views in those evening discussions alone. We generally then had a little free time before drinks and dinner, and the opportunity to revise what we had prepared, before the next morning's exercises.

For every group of participants, there were usually three coaches – one played the role of the judge, and gave some feedback directly following a participant's performance. One of the other coaches would then go out with the participant, and review the performance in more detail (with the assistance of a DVD recording of the performance). Painful as that sounds, it was very helpful. Personally, I was very impressed by the standard of the coaching that was provided during the course, and the goodwill

...there was a real benefit in having a more holistic and inter-disciplinary approach to the coaching (with the inclusion of judges, senior counsel and specialists in voice and performance studies).

Coaches. Back row, L to R: Ian Robertson SC, Ian Temby AO QC, Paul Menzies QC, Will Alstergren, Rodney Garrett QC, Josh Wilson SC, David Boddice SC. Middle Row L to R: Jo O'Reilly, Julia Baird SC, Chris Shanahan SC, Peter Riordan SC, Lisa Schouw, Lucy Cornell, Ross Ray QC. Front row L to R: Sharise Weiner SC, Tom Bathurst QC, the Hon Justice James Douglas, the Hon Justice Megan Latham, the Hon Justice Tim Anderson, Edwin Glasgow CBE QC, Phil Greenwood SC.

of all involved. After each performance, there was a real focus on giving constructive feedback, and on identifying one or two concrete things that could help the particular advocate-participant to improve. I also thought that there was a real benefit in having a more holistic and inter-disciplinary approach to the coaching (with the inclusion of judges, senior counsel and specialists in voice and performance studies). The coaches also regularly rotated through the small groups, so that participants could benefit from the feedback of a variety of people, with different experience and perspectives. Again, that was a helpful and enjoyable aspect of the structure of the course.

Phil Greenwood SC and Chris D'Aeth deserve our thanks for their hard work and commitment to excellence in the running of the course – as does the Australian Bar Association, and all of the coaches. They were – Justice Megan Latham (NSW), Justice Tim Anderson (SA), Justice James Douglas (Qld), Edwin Glasgow QC (United Kingdom), Sharise Weiner QC (South Africa), Ross Ray QC, Rodney Garratt QC, Peter Riordan SC, Josh Wilson SC and Will Alstergren (all from Victoria), David Boddice QC (Qld), Chris Shanahan SC (WA), Ian Robertson SC (SA), Paul Menzies QC, Tom Bathurst QC, Ian Temby QC, Phil Greenwood SC and Julia Baird SC (all from NSW), as well as Lucy Cornell, Jo O'Reilly and Lisa Schouw (voice and performance coaches). Our sincere thanks must also go to the Hon Michael McHugh QC, who attended the final course dinner as our special guest and speaker. Among other things, he reminded us that one of the finest tributes an advocate might receive is that which was paid to Jack Smyth QC – when the jury crowded around him at the end of a case, and told him that they just wanted to hear more from him.

In the heat of January, undertaking an intensive advocacy course is not what most of us would be prefer to be doing (coaches or

Back row, L to R: Andrew Bulley, John-Paul Redmond, David Logan, Gerard Dalton, David Pritchard SC, David Rayment, Vahan Bedrossian, Don Farrands, Alex Foel, Richard Wison.

Third row, L to R: Tracy Fantin, Nicolette Bearup, Hugh Stowe, Terry Ower, Philip Davies, Daniel Star, Greg Sarginson, Susan McNeil, Kylie Day, Gary Doherty.

Second row, L to R: Jodi Truman, Rick O'Gorman-Hughes, Nicholas Newton, Heather Gordon, Christian Bova, Michael Holmes, Levente Jurith, Dee Brooker, Susan Anderson, Anne Healey, Andrew Maryniak.

Front row, L to R: Madeleine Avenell, Reg Graycar, Emma Swart, Sitesh Bhojani, Craig Harding, Patrick Over, Mark Richmond, James Gibson, Theresa Baw, Angelina Gomez.

participants). As the date of the course approaches, and the reality of the commitment sets in, you may find yourself wishing you had not enrolled. But particularly if you are a junior barrister, and you are not getting into court as much as you would like to (or if you would like to work on aspects of your performance), then 'just do it'. I am grateful for the people who encouraged me to do the same – and I doubt that you'll regret it.

Verbatim

Garsec Pty Ltd v His Majesty Sultan of Brunei Darussalam & Anor **[2009] HCATrans 21 (13 February 2009)**

Mr Hutley: I accept that, your Honour. Can I take your Honours to Article 84B(1) - - -

Gummow J: I have not finished yet.

Mr Hutley: It gets worse, does it?

Agricultural and Rural Finance Pty Limited v Gardiner & Anor **[2009] HCATrans 12 (12 February 2009)**

Mr Smith: Simply this. As it would be obvious from the submissions in a sense the summons has been filed out of a sense of neurotic caution. It is pretty clear that any file - - -

Gummow J: Neurotic caution?

Mr Smith: Neurotic caution, yes.

Hayne J: That will make an interesting catchword, I think, in the reasons.

Lane v Morrison & Anor **[2009] HCATrans 1 (13 January 2009)**

Mr Street: Your Honour, could I just supplement that oral outline by these propositions. We say in relation to ground 3 that we have put forward that that raises the existence of what I will call the parallel universe. Your Honour will recall that the theory of military disciplinary law being advanced on a proposition that it is subordinate to the existence of criminal law. That parallel universe and its existence is what we have raised in ground 3. What grounds 4 and 5 do are raise the physical laws, or physical constitutional principles in existence in that - - -

His Honour: Sorry, what is a physical constitutional principle?

Mr Street: I am seeking to use the analogy, if I may, in this way, your Honour. We say ground 3 challenges the existence of the universe.

His Honour: Let us not get lost in metaphor.

....

His Honour: Thank you. Yes, Mr Solicitor.

Mr Gageler: Your Honour, there are, of course, degrees of arguability, but once you get to the point of challenging the existence of the universe, you must have crossed the line.

High Court silk ceremony

The senior counsel appointees of 2008 took their bows in the High Court on Monday, 2 February 2009.

Black and White

MM Park considers a recent journal article and the happy coincidence of its authors' names.

Consider the recent article[1] by the Hon Michael Black AC and Dr Michael White QC regarding Australian Constitution and the Don Braben painting of the steam yacht *Lucinda* commissioned by the Federal Court. Black is, of course, the chief justice of the Federal Court of Australia and White is adjunct professor, Marine and Shipping Law Unit and the Centre for Maritime Studies, University of Queensland. Should the two Michaels be cited as Black and White?

Were the authors conscious of the relationship of their names? If so, should they have considered enlisting the assistance of (or even co-opting) Justice Peter Gray of the Federal Court to permit the authors being cited as Black, White, and Gray? Better still, Justice Malcolm Gray of the ACT Supreme Court would have allowed the continuation of the Black, White, and Gray, MM citation.

If this were the case, the authors would be following in the 60 year old path of Alpher, Bethe, and Gamow (*The Physical Review*, April 1, 1948). In physical cosmology, the Alpher-Bethe-Gamow paper, or αβγ paper, was created by Ralph Alpher, then a physics PhD student, and his advisor George Gamow. The work, which would become the subject of Alpher's PhD thesis, argued that the Big Bang would create hydrogen, helium and heavier elements in the correct proportions to explain their abundance in the early universe. While the original theory neglected a number of processes important to the formation of heavy elements, subsequent developments showed that Big Bang nucleosynthesis is consistent with the observed constraints on all primordial elements.

Bethe's name was included when Gamow (a notorious prankster) decided to add the name of his friend—the eminent physicist Hans Bethe—to the paper in order to create the whimsical author list of Alpher, Bethe, Gamow, a play on the Greek letters, α, β, and γ. Bethe was listed in the article as 'H Bethe, Cornell University, Ithaca, New York.'[2] The publication date of the paper appears to be a felicitous and fortuitous incident of the publishing process and uninfluenced by the mischievous Gamow.

Endnotes

1. The *QGSY Lucinda* and the Constitution: The Federal Court's painting of the '*Lucinda* at Farm Cove, Easter Day 1891', 30 *Aust Bar Rev*, pp 24-32 (2007).
2. The αβγ paper information was taken from Wikipedia.org

Black casts light on court refurbishment

Now in his twentieth year as chief justice of the Federal Court, Michael Black AC has overseen a stunning transformation of the Federal Court buildings throughout the country. The refurbishment of the Federal Court floors of the Joint Law Courts Building is still underway but to mark the opening of the first stage of the refurbishment – Level 18 and the new Principal and District Registry – Andrew Bell SC interviewed and was given an insider's tour by Black CJ.

Andrew Bell SC and Chief Justice Black

Bell: What was it that sparked your original interest in a major assault on the architecture of the Federal Court buildings?

Black CJ: I've always been interested in architecture. It may be in my genes – there are some ancestors who are architects – I just like creative things and when I became chief justice the conditions of the court in Melbourne were quite appalling. Sydney had already been built and was excellent and I developed a huge enthusiasm for getting the Melbourne project underway, and the other projects have followed. In the case of Sydney, it is probably worth mentioning that the building is now over 30 years old, the facilities had to be restored, whatever you did with the rest of it. I mean the lifts had to be replaced, the asbestos had to be removed, all the services had to be restored, so that was a must. It couldn't have been delayed any longer so we've taken good advantage of the opportunities that that necessity presented.

Bell: And with your interest in architecture must have also come an interest in shrewd negotiation with the Department of Finance?

Black CJ: Others would have to be the judge of that.

Bell: You know better than to answer that. Has there been an underlying design philosophy?

Black CJ: We articulated a number of important values such as respect for the dignity and importance of the courts and the rule of law in some of the design briefs, but basically what you're trying to do is to have a building that is functional, that emphasises the importance of what goes on there without being overbearing. It has to have a nice balance between dignity and not being overbearing. I mean it has to have a degree of authority but that shouldn't be heavy.

Bell: And each of the Federal Court buildings around Australia now has distinctive qualities but also some unifying characteristics.

Black CJ: Yes they do. And I think the unifying characteristic is this notion of light and access and of course there is the symbolic affinity between light and justice which I'd like to think is reflected architecturally.

Bell: From my point of view, having appeared quite often recently in Perth and Melbourne, courtrooms with natural light are very pleasant to work in.

Black CJ: Yes, and I mean the objection to them is that people get distracted. Well, people get distracted looking at the ceiling so if you're going to be distracted, you might as well look at Sydney Harbour – a nice way to be distracted. But in truth it's not a problem. I should also say that there's been a lot of collegiate involvement in this. I mean there were committees, judges – smallish committees – but these are collegiate ideas. That's very important.

Bell: No doubt drawing on experience of running large trials as well as small trials.

Black CJ: Yes, but as well as that, I mean the philosophy that has been developed for these courthouses is a collegiately developed philosophy.

Bell: What have been some of the influences on your own attitude

The building is now over 30 years old, the facilities had to be restored, whatever you did with the rest of it... It couldn't have been delayed any longer so we've taken good advantage of the opportunities that that necessity presented.

to court architecture?

Black CJ: One of the great influences on my own thinking about architecture was that I had the privilege, as a very young silk, of being at the opening of the High Court and that is a superb building. It's very, very important architecturally. It got rid forever of the notion of those restrictions of space that used to characterise some of our architecture.

Bell: And also those courtrooms in the High Court, Courtroom No. 2 in particular, but also Courtroom No. 1 to a certain extent, must have been some of the first court buildings in Australia with natural light.

Black CJ: Yes they were. And that's always influenced my thinking about courtrooms. There were some other examples, of course. The Court of Appeals for the Second Circuit in New York has wonderful views of mid-town Manhattan. It's not unique for courts to have views and of course the High Court has the wonderful precedent or non-precedent of that natural light and the creative use of large spaces. And interestingly, in colonial times, there was a lot of natural light because the artificial light was not very good.

Bell: An example of that is the courtroom in Norfolk Island, which looks straight out through big picture windows to the Pacific.

Black CJ: One of the aspects of court architecture, which is exemplified in Melbourne and Adelaide, and also historically here in Sydney, is a sort of a 'procession' into court. I mean you shouldn't go straight off the street straight into the courtroom. There's a transition, in this case, from Phillip Street …

Bell: The precincts of the court.

Black CJ: The precincts of the court. You go across Queens Square, you see St James, you get into the lift; now in our court you'll come up to see the harbour and then you're in court, so it's not an instantaneous thing, it's almost a progression rather. And we find that also in Melbourne and Adelaide, and I think that's important. You see it also in the Royal Courts of Justice, too.

Bell: Speaking of Adelaide, the Adelaide courtroom, the ceremonial courtroom has a distinguishing feature in that the bench and the bar table are both constructed from the trunk of a single tree.

One of the great influences on my own thinking about architecture was that I had the privilege, as a very young silk, of being at the opening of the High Court and that is a superb building. It is very, very important architecturally.

A courtroom with a view from level 18 of Queens Square, Sydney.

Black CJ: From a single ancient river red gum *Eucalyptus camaldulensis* and the story of that is actually rather interesting. When the building was being planned, we wanted one beautiful courtroom and we said to those who were funding it, well don't fit out all of the smaller ones to the same scale, spend the money to make the No. 1 Court absolutely wonderful, and they did and it's a great credit to the Department of Finance that it agreed to that. And we commissioned an artist in wood to do the tender. He found an ancient river red gum that had lost its crown in a storm a couple of hundred years ago in the Coonawarra. It was at the end of its days so he harvested that – we've got photographs of this great beast being harvested – and he brought it back to his workshop, which is just behind the Supreme Court in Adelaide in the centre of the city, and crafted the woodwork. The bench and bar table are quite beautiful.

Bell: And there's obviously significant symbolism there with the connection between the bench and the bar.

Black CJ: Yes, oh yes, absolutely, and we've always thought in our court architecture that the bar table is an object of particular significance and you'll find that in Perth where it's jarrah, Hobart where it's made of Huon pine, Melbourne where it's a red gum, and Adelaide.

Bell: Are there any features of the timber in Sydney of note?

Black CJ: Not particularly, although a lot of the timber that's been used in this refurbishment has been recycled from the old court rooms and when this time next year I show you over the new number one court, that'll be something very special.

Bell: So what stage has the refurbishment in Sydney reached?

Black CJ: We're about half way through, I'd judge. We've got now

one fully operating floor of courtrooms – Level 18 – the jury court and a large litigation court and there are two 'smaller' ones, and this year we'll be fitting out some of the judges' chambers and doing another court floor – two court floors this year – and we've also already fitted out the District and Principal Registry.

Bell: Is there a particular philosophy underpinning the Sydney refurbishments?

Black CJ: The philosophy that's informed this part of the renovations is that it's the best courtroom site in the world and we should make use of it to give a shared access to the public, profession, judges and staff to the view, to the natural light and to the general ambience of this part of Sydney. If you have a look at Level 18, which is the first of the refurbished floors, you'll see that's exactly what we do. You come out of the lift and there is a large public waiting area with a quite unsurpassable view across the harbour up to the heads. There are interview rooms which are both private and allow access to the light and the views. Courtroom 18B is one of the two medium sized courtrooms. I mean they're not actually small. This is 140 square metres which is, I think, a fair sized courtroom on any view. It has two rows of bar tables, plenty of room for the public, high quality electronic facilities and a magnificent use of the site. The other thing is that these have double blinds so that you can turn the lights off, black them out completely for audio visual purposes.

Bell: And do you need to do that for the video link to be effective?

Black CJ: We don't need to but we do. We don't actually need to. It's just a modern state of the art court making terrific use of the site.

Bell: This courtroom would accommodate a bench of five?

Black CJ: It will but it probably won't ever need to. But it certainly can accommodate a bench of five.

Bell: And are all of the new courtrooms capable of constituting a full bench or are some smaller in dimension?

Black CJ: No, this is 140 square metres, and none of the other courtrooms are smaller.

Bell: That's a huge difference to some of the older smaller courtrooms.

Black CJ: We have small ones in Melbourne that have an extra view looking out into the gardens and so you can actually have a small courtroom if you've got the right outlook. But here we're lucky we've got both. All have views like this.

There is also on this floor a large jury courtroom of 260 square metres with a separate jury deliberation facility of substantial size, with usual modern facilities: kitchen and so forth, and that's also, of course, usable for any other sort of litigation, including large commercial litigation. The jury retiring facility doubles as it will most of the time as a mediation suite. The size alone is not the criterion but it's big and it will be suitable for big litigation.

Court 18D is the large litigation court for *C7* type cases. We have sat a full court in here already, it will take a full court, but for really big litigation, that wall just slides back. The other day for the shareholder class action seminar, which we jointly did in Sydney and Melbourne and linked it by video, we used it for that. It has excellent acoustics, is fully wired, it has superb audiovisual facilities and it will take six bar tables.

Bell: So will this be the principal courtroom?

Black CJ: No. The principal courtroom is being constructed this year on the site of the old 21A. It's a two-storey facility. It's very large and it can and will double quite easily as a public lecture theatre.

Bell: So the courtroom we're in, which is 18D, is an enormous room with a removable wall which would be at least as big in size as the current 21A downstairs, but it won't be the principal court room in the building.

Black CJ: Yes.

Bell: Will there be more courtrooms than in the previous building?

Black CJ: There will be about the same number.

Bell: No doubt a lot more flexibility, given the design.

Black CJ: Absolutely. And really much better facilities for the public.

Bell: In courtrooms in the Federal Court, do judges have a typical courtroom in Sydney, is that the plan, a typical court in which they sit, or just depending on the size of the cases?

Black CJ: Ideally, they just depend on the size of the cases. I mean, judges tend to like their own courtrooms, but we have rejected the American federal idea where you have your courtroom, and your

chambers are virtually outside it. That mould was broken some time ago.

Bell: So Sydney is the last of the main capitals to have a major court refurbishment in the Federal Court?

Black CJ: Yes, we haven't got a Federal Court in Darwin. We have very good facilities there. We have an arrangement with the Supreme Court. We've got our own registry.

Bell: The Supreme Court in Darwin, as I remember, is reasonably modern.

Black CJ: Oh yes, it's excellent. It's a superb building.

Bell: Were you tempted to follow here in Sydney the model of some of the court rooms in the Federal Court in Melbourne which have etching, do they not, on their windows?

Black CJ: In Melbourne we have the Constitution etched on the windows: Chapters 1 and 2 in summary – short parts of Chapters 1 and 2 – and a lot of Chapter 3, as you'd expect.

Bell: That's etched on the windows of a number of the courtrooms?

Black CJ: Yes, and indeed in some of the judicial chambers. It was an idea of the architects. They said the law is about words and it's revealed in words so let us reveal some words for you and we selected the Constitution, as you might expect.

Bell: Have you seen the portrait of Mary Gaudron in the Bar Common Room which employs the same technique?

Black CJ: I have. It was independently conceived and if you look at some of the great public buildings in history, such as in Washington DC, they have words incorporated into the architecture.

Bell: I suppose you wouldn't want to ruin the view in Sydney with the Constitution?

Black CJ: How does one answer that? The Constitution as we've got it on the wall in Melbourne is transparent.

You asked about a national idea of court architecture, well, there are a lot of similarities. In Perth, which was one of the first of the modern federal courts, all the judges chambers have views of Perth water, as it happens; so do the staff have views, the registry has views over the Swan River, the No. 1 Court there has a lovely view over towards the old brewery site which has been litigated in our court more than once. So that's Perth. Brisbane was the purpose built building opened also in 1993. It hasn't made full use of its site but it's a very fine building. Melbourne, of course, you know.

Bell: When was Melbourne opened?

Black CJ: Melbourne was opened in 1999 and it had a consciously articulated design philosophy of light, access and, indeed, equal

access to the views, that is to say, both to the public, the litigants, counsel, solicitors and the judges.

Bell: And has excellent interview rooms and preparation rooms.

Black CJ: Yes. It does, it does. And it was designed to take advantage of its site, which is a difficult site – it's above an underground railway – but it was also designed to take advantage of its position on Flagstaff Gardens. It also was designed as it could be there with a philosophy of encouraging the public to come into the building. That was, of course, before metal detectors, but it still has that effect. And it has an outdoor area where people have lunch, it has a café, has trees that people can sit under, and they do, and a water terrace which Ginger Meggs style kids, if they still have them, sometimes jump into, and more sedate people eat their lunches by.

The court in Melbourne follows the Victorian practice derived from the Irish practice of the attorneys sitting opposite, which actually is architecturally very space efficient if you think about it. As counsel, it has it's own problems if you're going badly, of course, you can see the look on your attorney's face. Conversely, if you're going well, you can see the admiring looks as well. But when we did the Melbourne building, we followed the Irish practice. I'm not sure in retrospect whether we should have but we did.

Bell: And you say that in part because a national court should have a national practice?

Black CJ: It should and it shouldn't. I mean there are differences – not large.

Bell: But Melbourne is the only court building where the solicitors sit opposite counsel?

Black CJ: They do sometimes in Hobart, I think.

Bell: But Melbourne and sometimes Hobart.

Black CJ: Yes. Of course in Hobart they wear rosettes as well but I shouldn't mention that, should I?

Bell: No, you shouldn't. Back to Sydney, what will happen to the tapestry that used to hang in Court 21A?

Black CJ: There are two tapestries. There's one of the trial of Ned Kelly and the other is that large tapestry that appears in Court 21A. You'll be pleased to know, Andrew, that the large tapestry has been carefully removed and restored and cleaned and is ready to be shown to the many people who love it. I've no doubt yourself included!

Bell: That's right. Some of the other court buildings, for example, in Adelaide, have some sculpture and some art in the public precincts. Does that form part of the planning and thinking behind this building?

Chief Justice Black AC.

Black CJ: It does. That's at the end of the project. The court at the moment has some art on loan from Art Bank, a Commonwealth agency, and we hope there'll be some money in the project for some artwork which I think, frankly, is important. I don't regard artwork as add-ons.

Bell: Does your thinking involve artwork in courtrooms or only in the public areas outside?

Black CJ: I hope it involves artwork in courtrooms. Certainly that's been our practice in Melbourne and Adelaide. We don't have any artwork in the courtrooms in Perth. We certainly do have in Melbourne – quite superb.

Bell: Some of the large law firms in Sydney have named rooms after distinguished retired partners. Is there any possibility that distinguished retired Federal Court judges might have courtrooms named in their memory? The Beaumont Courtroom, for example, would be very neat.

Black CJ: It would be neat, it would be learned. But we have no such plans.

Bell: Can I suggest that one of the many great benefits of this extensive refurbishment is to cement the Federal Court's place in the Queens Square precinct and the traditional legal precinct of Sydney?

Black CJ: Absolutely. That is fundamental. I mean you could do other things, very exciting things, with a brand new building and this building has its restraints because of its structure and age and so forth. But it would have been a catastrophic mistake to move from the home of legal Sydney, the centre of legal Sydney with the Bar and the Supreme Court, and of course it's the most exciting precinct architecturally with the old Supreme Court, Hyde Park Barracks, St James and the Square itself, and St Mary's and of course the old Sydney Hospital and the parliament.

Bell: And chambers.

Black CJ: All of those. I mean it is a wonderful legal precinct that actually lives and it lives in a way that is actually quite different from the other legal precincts.

Bell: In what way?

Black CJ: Well, for example, if there's, heaven forbid, a funeral, the profession in Sydney all go to it, and St James' and St Mary's, as the case may be, is packed. There's a very strong sense of legal community in Sydney which although it exists elsewhere, is fostered by the particular nature of the Sydney legal precinct. And of course it's got wonderful views as well.

Bell: And of course this will no doubt be putting a lot of pressure on the Supreme Court of New South Wales to maybe engage in a similar refurbishment, but that would be no bad thing.

Black CJ: We wouldn't dream of putting pressure on anyone, Andrew!

Bell: Just can we get on the record, when is it expected that the number one court will be completed?

Black CJ: It will be completed in time to be used on 18 March 2010.

Bleak House in Australian courts

By the Hon Leslie Katz SC

Herman Goering is said once to have remarked, 'Whenever I hear the word culture, I reach for my revolver.'[1] In similar vein, whenever one sees the words 'Bleak House' in reasons for judgment of courts in the English-speaking world, one's natural disposition is to reach for one's perpetual calendar, since it seems likely that a tale of gross delay in legal proceedings is about to be unfolded.

References to *Bleak House* are not lacking in reasons for judgment of Australian courts, although, so far as can be told by using electronic searching facilities, they have occurred almost as frequently in reasons for judgment of the courts of New South Wales as in reasons for judgment of the courts of all other Australian law areas combined. (It would be invidious to suggest a reason for that statistic.)

Of the references in Australian reasons for judgment to *Bleak House*, made in the context of discussions about delay in legal proceedings, one example will be discussed. In *Tyler v Custom Credit Corp Ltd & Ors*,[2] Atkinson J wrote (footnotes omitted),

> [3] Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and to decrease the chance of there being a fair and just result. The futility and self-perpetuating nature of some litigation was viciously satirised by Charles Dickens in *Bleak House*. In referring to a case (fortunately fictional) in the Chancery Division of the Courts in London called *Jarndyce v Jarndyce*, Dickens wrote:
>
> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.
>
> Jarndyce and Jarndyce has passed into a joke.

One may ignore the anachronistic description by Atkinson J of the court in which *Jarndyce* was supposed to have been proceeding, but what of her reference to the fact that the case was 'fortunately fictional'? Was her Honour implying that what Dickens wrote about *Jarndyce* was not, in essence, an accurate representation of the

characteristics of Chancery proceedings at the time of which he was writing?

If so, she may have Australian judicial company, since, in *Lemoto v Able Technical Pty Ltd*,[3] McColl JA wrote,[4] 'The days when the suit of *Jarndyce v Jarndyce* wound its apocryphal way through the pages of Dickens' *Bleak House* are long gone—if they ever were.'

Others, however, haven't doubted that those Jarndycian days did exist, among them, Sir William Holdsworth. Sir William, having located in the year 1827 the date of the action of the story in *Bleak House*, wrote,[5]

> … I do not think that it can be alleged that his statements of fact in that book are erroneous. He says in his Preface that 'everything set forth in these pages concerning the Court of Chancery is substantially true and within the truth.' That is not wholly true if he meant, as I think he did, to refer to the date when the book was written [which was 1851-53]—though much of it was then still true. It would have been wholly true if he had meant to refer to the date of the action of the story. In fact, I am sure it would be possible to produce an edition of *Bleak House*, in which all Dickens's statements could be verified by the statements of the witnesses who gave evidence before the Chancery Commission, which reported in 1826.

Not surprisingly, no one seems to have taken up since the challenge of producing such an edition of *Bleak House*.

If, as Holdsworth held, *Bleak House*'s description of the characteristics of Chancery proceedings in 1827 had been accurate, had Dickens based that description on some particular real case?

In her reasons for judgment in *Tyler*, Atkinson J, in a footnote,[6]

mentioned that *Jarndyce* was 'reputed to be loosely based on *Re Jennens, Willis v Earl of Howe* (1880) 50 LJ Ch 4: see Hurst, G. (1949) *Lincoln's Inn Essays*, Constable & Co Ltd at p 116-118.' No doubt, what was meant was that it was reputed to have been loosely based on legal proceedings involving the Jennens inheritance, to the extent to which such legal proceedings had already occurred by the time that Dickens wrote *Bleak House*.

However, that reputation seems to be unjustified.

Patrick Polden's conclusion on the matter,[7] after an exhaustive treatment of it, was as follows (footnotes omitted):

> The frequently expressed view that the Jennens case was fictionalized by Dickens as *Jarndyce v Jarndyce* is seriously misleading. When he began writing *Bleak House* in November 1851 the Jennens litigation had been dormant for fifteen years and it is highly improbable that the cases of the 1830s had lodged in his memory. There is no warrant for the assumption that because he mentioned (not by name) the Jennens and Day cases as examples of Chancery scandals when defending his attack on the court after publication, he had those in mind when planning the novel.
>
> There is, it is true, one important similarity: as in *Jarndyce* there was a host of potential inheritors irresistibly fascinated by their elusive dream of wealth only attainable through the court. But there is a crucial difference too: *Jarndyce* has the characteristics of an administration suit, with a fund trapped in court and relentlessly eaten away in costs until entirely consumed. Neither it, nor the innumerable parties, could escape the court's clutches, though really strong-minded men like John Jarndyce could ignore it. In Jennens there was no such fund, no ongoing case and the deadly refrain of 'costs in the cause' did not echo down the years.

Polden's reference, in the passage just quoted, to the defence by Dickens, after publication, of his attack on the Court of Chancery was a reference to Dickens's preface to the version of the novel in book form, that form only appearing after the novel had finished appearing in serial form. The relevant part of that preface, referred to, not only by Polden, but also by Holdsworth, was as follows:

> [E]verything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth. The case of Gridley is in no essential altered from one of actual occurrence, made public by a disinterested person who was professionally acquainted with the whole of the monstrous wrong from beginning to end. At the present moment (August, 1853) there is a suit before the court which was commenced nearly twenty years ago, in which from thirty to forty counsel have been known to appear at one time, in which costs have been incurred to the amount of seventy thousand pounds, which is A FRIENDLY SUIT, and which is (I am assured) no nearer to its termination now than when it was begun. There is another well-known suit in Chancery, not yet decided, which was commenced before the close of the last century and in which more than double the amount of seventy thousand pounds has been swallowed up in costs. If I wanted other authorities for Jarndyce and Jarndyce, I could rain them on these pages....

While Dickens did not include in the passage that I've just quoted the names of the parties to the two suits that he mentioned, there's no doubt that the suits were (in reverse order) those that Polden called 'the Jennens and Day cases'.

Though Polden gave much information about the Jennens case, he gave no information about the Day case. I'll therefore supply some.

First, I've said that there's no doubt that Dickens was intending to refer to the Day case when mentioning the first of his two authorities. That intention's established by a letter that Dickens wrote on 7 August 1853 to his right-hand man at Household Words, W Henry Wills. Dickens wrote as follows:[8]

> … Will you [at] once make an enquiry into the Day Chancery Cause, As—when was it instituted?
>
> How much nearer is it now to its completion[?]
>
> What has been spent in costs?
>
> How many Counsel appear—about—whenever the Court is moved[?]
>
> You did ask this for me before, but I made no note of it. I should like to glance at it in the Preface. Of course I will in no degree whatever, commit your informant; nor shall I even mention the cause by name.

Wills's answers, noted on Dickens's letter, formed the basis of Dickens's reference in the preface to the first of the two authorities that he mentioned.

Secondly, the Day case involved the will of Charles Day. Day had amassed a large fortune in blacking manufacturing, as a principal of the famous firm of Day and Martin.[9]

Thirdly, the first decision relating to Day's will that was reported in the traditional law reports occurred in 1838, while the last such decision occurred sixteen years later, in 1854, the year after Dickens's preface.[10] However, if one is prepared to move beyond the traditional law reports, one can find the judges being bothered about Day's will as early as November 1836, within a month of his death, and as late as March 1870, over thirty-three years later.[11]

Fourthly, the Day case was no more likely to have been used by Dickens as the model for *Jarndyce v Jarndyce* than was the Jennens case. The whole tenor of Dickens's request in August 1853 for information from Wills about the case militates against the conclusion that it was so used.

Turning now from references to *Bleak House* made in the context of discussions about delay in legal proceedings to references to it made in other contexts, *Bleak House* has been referred to in discussions of the evidentiary privilege for 'without prejudice'

communications.

In *Lukies v Ripley [No 2]*,[12] Young J referred[13] to the fact that, 'Between 1820 and 1850 there was great growth in the significance of the words 'without prejudice' which by 1850 [written thus; no doubt, 'the 1850s' was meant] was able to be satirised by Dickens in *Bleak House*.'

In *Jumitogad Pty Ltd v Garraway*,[14] Kearney ACJ dealt with that matter as well, although offering some elaboration. He pointed out that, 'It is as sensible and effective to use 'without prejudice' in relation to the provision of particulars of a Statement of Claim, as it was for the lawyer's clerk in Dickens' *Bleak House* to make a 'without prejudice' proposal of marriage.'

Finally and not unexpectedly, Dickens's scarifying prose in *Bleak House* about lawyers and the legal system[15] has been mined to support propositions about the technicality to be required of pleadings. I'll give two examples.

First, in *DPP(SA) v B*,[16] Kirby J wrote[17] that, 'On the brink of the twenty-first century, we can leave an approach of excessive technicality in pleading to the legal history of the nineteenth century where it properly belongs.' As a description of legal procedure in the nineteenth century, Kirby J chose[18] the following passage from *Bleak House*:

> [I]t's being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains.

Secondly, in *Burrows v Knightley*,[19] Hunt J wrote[20] (first set of bracketed words added; second set of bracketed words in original),

> If the point taken by the defendants in the present matters is correct, … pleadings [in defamation proceedings] have … become as complicated as a quadrille. I am reminded somewhat of Charles Dickens' description of lawyers as 'tripping one another upon precedents, groping knee-deep in technicalities [and making] mountains of costly nonsense': *Bleak House* (Ch 1).

Endnotes

1. Whether Goering ever made the remark is doubtful. According to the Columbia World of Quotations, 'the only recorded source of this remark is the play *Schlageter* (1933) by Hanns Johst (1890-1978), Nazi playwright and President of the Reich Chamber of Literature. The line is spoken by a storm trooper in act 1, sc.1: 'When I hear the word culture, I cock my Browning.''
2. Unreported, [2000] QCA 178.
3. (2005) 63 NSWLR 300.
4. At page 322, paragraph [95].
5. *Charles Dickens as a Legal Historian*, 81
6. Footnote 16.
7. 'The Jennens Inheritance in Fact and Fiction', (2003) 32 CLWR 211 (Pt 1) and 338 (Pt 2) at page 363.
8. Graham Storey, Kathleen Tillotson and Angus Easson (eds), VII *The Letters of Charles Dickens*, at pages 128-129. See also Dickens's letter to Wills of AUG 09 1853, at page 129.
9. See John Strachan, *Advertising and Satirical Culture in the Romantic Period*, at pages 118 and 124, note 20.

   So famous was the firm of Day and Martin that, on 28 December 1844, it was said in *Chambers' Edinburgh Journal* (at page 401):

   > No one can deny that the names of those very respectable blacking-makers of High Holborn, Messrs Day and Martin, are quite as well known to the public at large as Scott of Abbotsford, and Wellington of Waterloo.

   It's my belief that Dickens's choice of the case involving Day as one of the two to mention in his preface was a private joke by him, given the fact that he'd been forced, when a boy, to work in the blacking manufacturing business. I've dealt with that matter at length in an appendix to the electronic version of this paper, which version is available from http://ssrn.com/abstract=1315862. Space constraints have prevented the reproduction in *Bar News* of my discussion of the matter.
10. See *Croft v Day* (1838) 1 Curt 782 [163 ER 271] and *Day v Croft* (1854) 19 Beav 518 [52 ER 452].
11. See respectively *The Gentlemen's Magazine*, January 1837, at page 101 (available here), and *The* [London] *Times*, March 31 1870, at page 11.
12. (1994) 35 NSWLR 283.
13. At page 286.
14. Unreported, NTSC, 9 October 1998.
15. Did the ghost of Chancery past smile when, over sixty years after his death, Dickens's own will came to be construed in the Chancery Division and then in the Court of Appeal? See *In re Dickens. Dickens v Hawksley* [1935] Ch 267.
16. (1998) 194 CLR 566. An electronic report of the case is available here.
17. At page 608, paragraph [69].
18. At footnote 189.
19. (1987) 10 NSWLR 651.
20. At page 654.

Supreme Court judges in the First World War

By Tony Cunneen BA MA Dip ED

Recent research into the role of the New South Wales legal profession in the First World War has revealed how support for the conflict became a corporate enterprise for the families of the eight New South Wales Supreme Court justices of the period and a number of their colleagues in the High Court of Australia. This article will explore some of their actions and activities throughout the war.

Motivated by a potent combination of an ingrained loyalty to the British Empire and a deep sense of social obligation the sons, wives and daughters of New South Wales' justices Cullen, Street, Gordon, Pring, Simpson, Sly, Harvey and Ferguson supported the national cause whether through enlistment in the armed forces, involvement in charities or the personal encouragement of those affected by the fighting. It would be hard to find a professional group that displayed more personal commitment to the First World War world than these judges and their families. During the period of the war (1914-18), six out of the eight judges had sons who enlisted. Twelve out of sixteen eligible sons joined up.[1] We do not know the circumstances of those who did not enlist. It may well be that they offered themselves for service, but were not accepted, as appears with Claude Simpson, the youngest son of Justice Archibald Simpson.[2] The service of those who went overseas was by no means tokenistic.[3] Nearly all the judges' sons saw action. Most were wounded. They were either gassed, shot, maimed by high explosives or suffered debilitating illness. Three were killed. While the other two judges did not have sons able to enlist, this did not stop them and their families assisting in other ways. The experiences of all these eight families make for a fascinating and as yet untold story. The inflammatory accusation made by workers' organisations such as, the Industrial Workers of the World (IWW), that judges and the prosperous classes were shirking their duties and allowing others to do their fighting was totally wrong and unjust.[4]

HAR Snelling QC in J M Bennett's *A History of the New South Wales Bar* wrote that like those who had fought in the Boer War, the legal fraternity who joined up 'were inspired by a mixture of patriotism, daring and the elements of chivalry and pilgrimage that had characterised the Crusades.'[5] We may add to that mixture an all-pervading sense of social obligation and shared values of service and loyalty. Families, churches, the press and the legal profession itself inculcated such values. Judges' close social networks also created a mutually supportive environment.

The inflammatory accusation made by workers' organisations such as, the Industrial Workers of the World (IWW), that judges and the prosperous classes were shirking their duties and allowing others to do their fighting was totally wrong and unjust.

Australian war graves in France. Photo: iStockphoto..

For the most part the judges lived in either the Eastern Suburbs around Darling Point or at Hunters Hill on the Lane Cove River. Mosman was also becoming a desirable location. Most of their sons went to either Sydney Grammar School, The King's School at Parramatta, or Shore at North Sydney. Their daughters often went to Ascham or Abbotsleigh. They formed close-knit communities. Hunters Hill residents had nicknamed one early morning departure from their Alexandra Street Wharf, the 'Judges' Ferry'.[6] There were many social and professional opportunities for judicial families to share their ideas and experiences. The close connections of the families extended to their sons serving overseas. There were multiple references to the sons of judges in the letters to Justice Ferguson from the soldiers serving overseas. But the war did not simply involve the men.

Women at the time endured the tight expectations of limited public involvement as uncomfortably as they wore the hideously impractical whalebone corsets which fashion dictated for them. Charitable activity had been a long tradition for judges' wives. The war gave them an opportunity to extend such charitable support into wider and more formal areas of public life, particularly the Red Cross and the various charities generically labelled as 'Comforts Funds'. These highly effective organisations became prominent features of the social and political landscape. They attracted the support of a range of legal families, including those of judges.[7]

The first recorded meeting of any formal Red Cross organisation

in Australia was in 1911 when the Lane Cove Branch of the Red Cross had its first gathering in the Hunters Hill Town Hall.[8] Mrs Alice Simpson, the wife of Justice Simpson, was president. Justice Simpson actively supported the first calls to establish an Australian Branch of the Red Cross during 1912 and 1913. The initial aim was to give girls experiences and opportunities similar to those that the army gave to boys. The outbreak of the war galvanised those people already interested in the organisation into a vigorous promotion of its ideals and provided them with the opportunity to put these ideals into action. Originally the Red Cross was to train women and girls in First Aid and other volunteer work. However, the war stimulated the extension of its activities into a variety of areas. This exponential expansion of the scope, personnel and budget of charitable activities entailed the development of complex organisations, which were held publicly accountable for everything they did. In addition, all people involved had a profound emotional investment in the activities. The wives of the Supreme Court judges were among the leaders of these bodies.[9]

When the First World War broke out the chief justice was the Honorable Sir William Portus Cullen KCMG. His wife, Lady (Eliza) Cullen, had an important public life. She was a foundation vice-president of the New South Wales division of the British Red Cross Society and remained a keen supporter of the society throughout the war years. In 1916-1917 she was president of the Australian Red Cross Society. She was also active in the Comforts Funds. Lady Cullen adopted a strong leadership role. In 1917 she inspected and addressed the quasi-military parade of 1,200 Voluntary Aid Nurses (VADs) assembled in the Sydney Domain. It was an important role for anyone. Her speech contained the simple exhortation to 'Carry on'.[10] This comment became the motto for the Red Cross in the last years of the war – a time when any glamour in dealing with the torn and shattered soldiers had well and truly evaporated. Her appearance at the parade in front of so many ladies, crisp and neat in their starched white uniforms, marching with military precision reflected her important position in the Red Cross, which had become one of the most high profile non-government organisations in the country. Women were on the march, literally and figuratively speaking. One feminist writer at the time, Elsie Horder, mentioned the belief that the work of women in the Red Cross 'had entirely demolished the anti-feminist arguments against our usefulness'.[11] Many women hoped that their war related activities would be a platform to greater community involvement after the conflict. While the Red Cross expanded, their sons went off to war.

Young Laurence Whistler Street went ashore at Gallipoli in the opening days of the attack. His actions in battle over the first two week earned him some recognition in divisional orders for 'acts of conspicuous gallantry or valuable services'.

Both the Cullen sons, William Hartford Cullen and Howard Clifford Cullen, left the comfort of their landmark family home, *Tregoyd,* in Mosman early in 1915 to enlist in the army.[12] William served on Galliopli from August 1915 with the 19th Battalion. He then served in a variety of front line and training units in France and England for the remainder of the war. Howard suffered severe illness on Gallipoli then was transferred to very eventful frontline duty in Europe. He survived being gassed in 1917 and later in that year was awarded the Military Medal[13]. The Cullen family experience was not unusual among the other Supreme Court justices.

The extended family of Justice Philip Whistler Street, the judge in Bankruptcy and Probate during the war, similarly displayed a compelling sense of duty to the empire. The Streets' second son, Laurence, left Sydney University Law School and his position as his father's associate to join up on 14 September 1914. His older brother, Kenneth Whistler Street[14], was also in the law but was in England when hostilities broke out. Many families such as the Streets had strong English connections through family and/or education. Kenneth Street joined the Duke of Cornwall's Light Infantry in England about two weeks after Laurence signed his papers. Their cousins, Humphrey Scott, of Wahroonga and Geoffrey Austin Street, from Elizabeth Bay had joined up around the same time.

Young Laurence Whistler Street went ashore at Gallipoli in the opening days of the attack. His actions in battle over the first two weeks earned him some recognition in divisional orders for 'acts of conspicuous gallantry or valuable services'. On 19 May he was leading his men in their defence against a powerful Turkish attack which began around 4.00 am. At one stage the Turks were standing over Laurence Street's trench and shooting directly into it. Bean describes the moment as one of 'tense excitement' with the Australians under Street and his major 'standing their ground.' As dawn came the Australians fought the Turks off, often sitting high above the trenches to gain a better shot at the fleeing enemy. In the early light, this practice made them targets to other Turks who had crept forward in the scrub. Street had bravely kept his men steady to repel the attack but left himself in an exposed position and was shot dead at around 4.30 am.[15] Gallipoli was a place that was geographically confined in the extreme, and in the claustrophobic atmosphere news of friends and relatives travelled fast. Thus, Laurence Street's death was communicated to his cousin, Captain Humphrey Scott, on a nearby position soon after the event, as was typical of the close family and social connections operating amongst the men on Gallipoli.

Humphrey Scott would have heard the cacophony of battle engulfing his young cousin on the next ridge. He wrote the following letter to Justice Street within a week of Laurence's death:

> My Dear Uncle Phil,
>
> It is with deepest regret I am now able to write to you to give what few details I have been able to gather about poor Laurence's death . . . I am told that Laurence – in keeping his men in good spirits and directing their fire – was exposing himself and not in the least worrying about any danger.[16]

Such willingness to lead from the front was typical of Laurence Street's contemporaries.[17] Condolences flowed to the Street family from Laurence's fellow officers and eventually the king and queen.

Meanwhile, in England, Kenneth Street learnt that an old football injury precluded him from active service with the British Army. He returned to Australia and served on the staff of the German internment camps in New South Wales, then in a variety of staff positions throughout the war.[18] When he married, Kenneth named his son Laurence, in honour of his dead brother. Both would later become chief justices of New South Wales.

Kenneth and Laurence's cousin, Geoffrey Street, had a very eventful war during which he won the Military Cross.[19] Two other close Street relatives lost their lives: Lieutenant Colonel Humphrey Scott, was killed by a sniper on 1 October 1917 near Polygon Wood, and a more knockabout member of the extended family, John Rendell Street of Bathurst, was killed at Pozieres in 1916. A number of other families related to the Streets also lost sons in action.

Mr Justice Rich was one of four justices of the High Court of Australia who lost a son in action.[20] He had been a judge on the New South Wales Supreme Court from 1911 to 1913. His son, John Rich, was killed at Festubert, fighting with the British Army on 17 May 1915 around the same time as Laurence Street was killed, and in remarkably similar circumstances – leading his men from the front. Both boys had been to Sydney Grammar School. Justice Street was the chairman of the trustees of the school during the war. As such

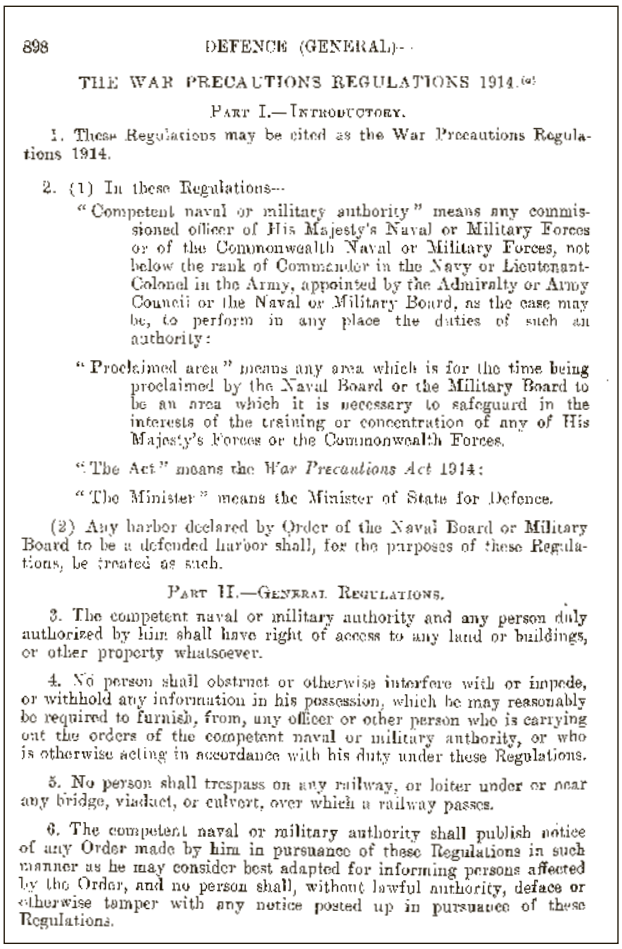
Mr Justice Rich was one of four justices of the High Court of Australia who lost a son in action. He had been a judge of the New South Wales Supreme Court from 1911 to 1913. His son, John Rich, was killed at Festubert, fighting with the British Army on 17 May 1915 ... leading his men from the front.

Photo: iStockphoto

he was a regular attendee at a variety of functions for Old Boys and students. On occasion, the names of those Old Boys killed in the war, referred to as *Fallen Sydneians*, were read out to the assembly. John Rich was the eighth name on the list. Laurence Street was the ninth. Justice Street would regularly address the assembly, often exhorting them to enlist.[21] He led by the example of his own sons. This sense of public service through support for the war permeated the Supreme Court and the High Court at the time. Their sons and associates enlisted at a rate far out of proportion to other sections of the population.

Despite the deaths and wounds to the members of the Street family, and others of his close acquaintance, Justice Street's youngest son, Ernest filled in his attestation papers in mid 1917. He needed his parents' permission to enlist as he was only eighteen at the time. Both parents duly signed notes giving their consent to Ernest's enlistment. Ernest Street left the sweeping harbour views from the family home, *Liverynga* in Darling Point, to follow his brothers and cousins to war. He was wounded in action in October 1918, barely three weeks before Armistice Day.

Justice David Ferguson's experience of the war was as poignant as any of his fellow judges. His son, Arthur Gardere Ferguson survived Gallipoli then was transferred to the Western Front. Justice Ferguson became absorbed in the Gallipoli campaign to such an extent that he constructed a detail model of the Gaba Tepe and the beaches. The historian, Charles Bean was one of Justice Ferguson's many correspondents during the war, and he used the model in his later *Official History* of the conflict. Justice Ferguson corresponded with all manner of people, from private soldiers to generals, including his clerk, Cecil Lucas, who served for the duration. On 14 June 1916 Justice Ferguson's son, Arthur, fell in action during the battle of the Somme in France, as his other son, Keith[22], was sailing over to join his brother in war. Arthur Ferguson had seen hard fighting after and was to be recommended for military decorations for his actions rallying his troops under fire in early May – in much the same way as his fellow *Old Sydneians*, Laurence Street and John



898 DEFENCE (GENERAL)--

THE WAR PRECAUTIONS REGULATIONS 1914.(a)

PART I.—INTRODUCTORY.

1. These Regulations may be cited as the War Precautions Regulations 1914.

2. (1) In these Regulations—

"Competent naval or military authority" means any commissioned officer of His Majesty's Naval or Military Forces or of the Commonwealth Naval or Military Forces, not below the rank of Commander in the Navy or Lieutenant-Colonel in the Army, appointed by the Admiralty or Army Council or the Naval or Military Board, as the case may be, to perform in any place the duties of such an authority:

"Proclaimed area" means any area which is for the time being proclaimed by the Naval Board or the Military Board to be an area which it is necessary to safeguard in the interests of the training or concentration of any of His Majesty's Forces or the Commonwealth Forces.

"The Act" means the *War Precautions Act* 1914:

"The Minister" means the Minister of State for Defence.

(2) Any harbor declared by Order of the Naval Board or Military Board to be a defended harbor shall, for the purposes of these Regulations, be treated as such.

PART II.—GENERAL REGULATIONS.

3. The competent naval or military authority and any person duly authorized by him shall have right of access to any land or buildings, or other property whatsoever.

4. No person shall obstruct or otherwise interfere with or impede, or withhold any information in his possession, which he may reasonably be required to furnish, from, any officer or other person who is carrying out the orders of the competent naval or military authority, or who is otherwise acting in accordance with his duty under these Regulations.

5. No person shall trespass on any railway, or loiter under or near any bridge, viaduct, or culvert, over which a railway passes.

6. The competent naval or military authority shall publish notice of any Order made by him in pursuance of these Regulations in such manner as he may consider best adapted for informing persons affected by the Order, and no person shall, without lawful authority, deface or otherwise tamper with any notice posted up in pursuance of these Regulations.

Rich. A few weeks later Arthur Ferguson was at an orders group with other officers in the front line when a shell came howling into the dugout. He was killed instantly. Letters of condolence again flowed into the judicial community, including one from the prime minister, William Morris Hughes.

Keith Ferguson was not aware of the death of his brother, and the family received breezy letters about his life on board the transport ship while they also dealt with letters of condolence from Europe. Keith Ferguson could have been kept from the front line but his father insisted this not be the case. [23] Accordingly, Keith was severely wounded in action himself. He survived the war but had a long period of recovery. Justice Ferguson and his family fostered a strong network with soldiers, particularly those who were lawyers or who had legal family connections. They were all indefatigable letter writers and gave practical support to the soldiers through their energetic leadership of the 20th Battalion's Comforts Fund. Justice Ferguson also found time to act as an official visitor to internment camps for those designated as enemy aliens. One photo in the Australian War Memorial Collection shows him visiting Holsworthy Camp with Kenneth Street in the background. Justice Ferguson had a busy war. He was royal commissioner inquiring into the Wheat Acquisition Act in 1915, and into the cost of production and distribution of gas in 1918.

Another judge to act as an official visitor, in addition to his duties on the bench was Justice John Musgrave Harvey. As such he travelled long, hard distances. He visited Berrima, Holsworthy and Trial Bay camps and collected photographs of the daily lives of the internees.[24] Justice Harvey visited Holdsworthy Camp once a month, and Trial Bay and Berrima every three months. He listened to their troubles and 'made enquiries as to what had happened to their personal belongings, their farm implements, their stores of grain and produce, which, owing to their owners having been carried off to concentration camps, were left absolutely unprotected up and down the length and breadth of the country. Indeed, much of this property had become the prey of good Australians who were still at large'.[25] He was the subject of a unique appeal from the Swiss government to facilitate the visit to Liverpool camp by 26 alleged fiancés of the same number of internees.[26] Harvey's attitude to the romantic request is not recorded in Scott, but the appeal was unsuccessful. A later incident involving Justice Harvey and internees was not so lighthearted. In 1918 he headed an inquiry under the War Precautions Regulations into the internment of seven men of Irish descent trying to elicit support for the Irish Republican movement. He found that 'the phase of the movement with which they were concerned involved collaboration with German interests against those of the Empire'.[27] The government continued the internment. Justice Harvey led later inquiries into the Irish Republican Brotherhood (also known as the Fenians). Justice Harvey's only son, Charles, enlisted in July 1916, but his health was not sufficiently robust for overseas duty and he was invalided out of the army. Justice Harvey was chief judge in Equity and probate during the war and was known for his high workload and speed of work.

On 20 October 1914 the transport, *Euripedes*, took two sons of Justice Archibald Simpson, the chief judge in Equity, to war. Lieutenant Adam James Simpson was a 26-year-old law clerk. His brother, George, was a 27-year-old grazier. When they left, their mother was continuing her work with charities and was on the first General Committee of the newly formed Australian Red Cross. Mrs Simpson remained active in a very practical manner serving on the War Chest committee, which sent 'Comforts' to the Sydney based 4th Battalion. She was particularly close to this unit. Her son, George, was killed fighting with it in the savage battle at Lone Pine in August 1915. Her other son, Adam, served with the battalion throughout the war. The 4th Battalion Comforts Fund met weekly throughout the war and maintained a constant stream of welcome, practical supplies to the men at the front.

Another family to be very active in the support for the war was that of Justice Sly. He had no sons. Justice Sly's wife, Constance, was another foundation member of the executive of the State Division of the British Red Cross Society. Constance Sly was also co-editor of

a significant book, *The War Workers' Gazette*, published in January 1918.[28] Young Edith Sly was one of four Sly daughters and she is recorded as having worked in the Red Cross in a variety of roles.[29]

Also very active in the Red Cross was the then well known singer, Margaret Jane Gordon, the wife of Justice Alexander Gordon. Their children were only two and six years old when war broke out – obviously too young for any direct involvement. Justice Gordon's associate in 1914, William Kenneth Seaforth Mackenzie had a distinguished military career. Margaret Gordon commenced a lifetime of work with a variety of charitable causes, including the Red Cross. Her entry in the *Australian Dictionary of Biography* describes how she:

> aided the Red Cross Society and regimental and battalion comforts funds, by singing at concerts and matinées, helping at innumerable fêtes, playing in bridge tournaments and running a flower stall on Saturday mornings. On 23 June 1915 she was chief organizer of a concert at the Town Hall featuring Antonia Dolores, and herself sang 'some melodious little Welsh songs'; over £1000 was raised for the Red Cross. As the 'singing voice', she and Ethel Kelly, as the 'speaking voice', staged Henri Murger's 'La Ballade du Désespéré', set to music by Herman Bemberg, on several occasions.[30]

The wives of the Supreme Court judges expended enormous energy throughout the war and proved to be the organisers of one of the most effective institutions in the home front. They were able to deal with the talented but imposing Lady Helen Munro-Ferguson who took charge of the Red Cross and chose women of a certain style and calibre, who she found both effective and comfortable to deal with. Prominent legal families were just the sort of social context that she found suitable for the leaders of the Red Cross. They did not let her down.

Women in the Red Cross had to deal with entrenched discrimination. One prominent lawyer active in the Red Cross was Adrian Knox KC.[31] He served on a number of their committees. These committees often involved both men and women and Knox was not comfortable with the mix. He lamented in a letter to James Murdoch, the commissioner in the London Branch of the Red Cross, of having to serve on what he termed 'Cock and Hen' committees. His reference was clearly to the necessity of having to work with women. He was keen to avoid it if possible.[32] James Murdoch expressed similar sentiments. Their private opinions were not necessarily shared with everyone. In 1918 the passing of the Women's Legal Status Act by the New South Wales Parliament provided that a person should not by reason of sex be deemed to be under any disability or subject to any disqualification to be appointed a judge of the Supreme Court or of a District Court, a chairman of Quarter Sessions, a stipendiary or police magistrate, a justice of the peace, or to be admitted and to practise as a barrister, solicitor or conveyancer.[33] It was a long time before this law actually resulted in women being appointed to these positions.[34]

One prominent lawyer active in the Red Cross was Adrian Knox KC. He served on a number of committees. These committees often involved both men and women and Knox was not comfortable with the mix. He lamented ... of having to serve on what he termed 'Cock and Hen' committees.

Photo: iStockphoto.

There were a number of high profile cases to exercise the judicial skills of the Supreme Court justices during the war. It is impossible to detail them here, but one in particular was that of the IWW. The experience of the defendants in front of Justice Pring was one of the more controversial cases during the war. The trial gives an opportunity to profile the intersection of political, personal and social vectors operating on judges during the war.

At the time of the IWW trial Pring was also a governor of The King's School, and president of its Old Boys' Association. As such he was party to the universal grief, which met the flurry of tragic telegrams, which came after Gallipoli, Fromelles and Pozieres. He had attended memorial services to ex-students killed in action, including the barrister, Charles Edye Manning who had been secretary of The King's School Old Boys' Association at the same time as Pring was its president. Two other lawyers from The King's School had also been secretaries of the Old Boys' Union: the charismatic Ernest Ambrose 'Nulla' Roberts and Alan Mitchell. Both of these men had died at Gallipoli. Pring had attended Roberts's memorial service

in the atmospheric stone chapel at The King's School. Charles Manning's brother, Guy, had been killed accidentally while serving in New Guinea. Pring would certainly have known about these and many other deaths.[35]

Pring had been a fine barrister and had a great reputation but he was a world away from the earthy, boiling world of labour politics, which centered on the Sussex Street area and the Darling Harbour Docks down the hill from the law courts. In the midst of the first part of the controversy Pring's son, Philip, enlisted in the Field Artillery in November 1916, right at the height of the publicity surrounding the trial. He sailed for war in 1918. Pring's younger son, Sydney, enlisted in early 1917 and sailed to the front at the end of that year. He was wounded but survived the war. Pring's other son, Percy, is not recorded as having enlisted in Australia. Pring's clerk, Edmund Beaver did enlist in the beginning of 1916 and won the Military Cross in the last months of the war. He was wounded in action on three occasions but survived the war.

As for the IWW, theirs and related cases went on for years and involved a variety of Supreme Court judges, including Sir William Cullen, Justice Sly and Justice Gordon. Public outcry led to a further review by Justice Street, which basically confirmed the bulk of Pring's judgment. The IWW accusations of the unfair burden of the war on the working class would not have elicited much sympathy from any of these gentlemen, so affected were they by the loss of friends and loved ones in the conflict. Eventually, after much agitation the 'IWW Martyrs', as they were called, were released after a review by a judge from Tasmania in 1920. Their supporters promptly gave them a reception in Sydney Town Hall.

The deaths of those men connected with the legal profession took away many who had the potential to go on to high positions. The lost sons of justices Street and Ferguson had every chance of following their fathers into high legal office – just as their brothers were to show through their own careers. Many other talented lawyers also fell. Charles Edye Manning, the son of the deceased Justice Manning, was killed in action in 1916. Charles Manning was the only soldier who served in the war who had already been a judge, having had the distinction of being the first British judge in New Guinea during his time there with the Australian Naval and Military Expeditionary Force. As with so many of his position he did not wish to spend the war doing work he could have done in the law. His desire to see action cost him his life. His death was marked with great public services. The legal community supported each other in their grief.[36] The deaths spread into all levels of the law. Many of the tombstones in the vast cemeteries devoted to the First World War have a special significance to the New South Wales legal community. Similarly, the imposing marble monument to the conflict, looming over the hallway in the Supreme Court must have been particularly poignant to those men dispensing justice just next door.

Note: The author teaches English and History and is the Senior Studies Co-ordinator at St Pius X College at Chatswood. He has published two books, *Suburban Boys at War* and *Beecroft and Cheltenham in World War I*, in addition to numerous articles. This article includes new research as well as information contained in two working papers on the legal profession in World War One, which may be accessed on the web site for the Forbes Society for Australian Legal History at www.forbessociety.org.au. The research is ongoing. There is certainly much more material available than has been currently accessed. People with information or interest concerning this topic are keenly invited to contact the author at: acunneen@bigpond.net.au

Acknowledgement: The author would like to express his gratitude to the Forbes Society for Australian Legal History for supporting this research and in the preparation of this article, as well as to Brian Williamson for his valuable advice concerning the final draft.

Endnotes

1. Figures are based on the judges' family records from the New South Wales Registry of Births Death and Marriages, available online at: http://www.bdm.nsw.gov.au/familyHistory/search.htm
2. Sydney Grammar School's *The Sydneian* started publishing in 1918 lists of Rejected Volunteers to prevent a 'reasonable feeling of contempt' for those who had not served. Claude HG Simpson is on the first list.
3. There are a number of letters in the personal files of the sons of judges and in other collections such as the letters of Justice Ferguson in which there are specific requests to have their sons placed in the frontline unit of their choice and not be put into safe units in the rear.
4. A popular motif in the IWW programme was that the working class carried the bulk of the fighting. On 22 August 1915 Tom Barker, who was later imprisoned had said: 'Let those who own Australia do the fighting. Put the wealthiest in the front ranks; the middle classes next; follow these with the politicians, lawyers, sky pilots and judges.' Reported in Verity Burgmann *The IWW in International Perspective*. Available on http://www.historycooperative.org/proceedings/asslh2/burgmann.html
5. In Bennett, J.M (1969) Editor *A History of the New South Wales Bar*. The Law Book Company Limited. Sydney
6. Family documents of Justice Manning's held in the archives of the Hunters Hill Historical Society, describe the close relationship in the peninsula's legal community. HTE Holt in *A Court Rises* comments that at one stage there were sufficient judges to 'constitute a Full Court on the ferry each morning to Circular Quay.' The Law Foundation of New South Wales. 1976. Page 161.
7. The activities of the First World War charitable organisations are not yet fully profiled, nor are the social lives of the legal families at that time.
8. The early years of the Red Cross in Australia are not completely documented. The date of 1911 was supplied to the author by the archivist for Red Cross Australia and is taken from a description of the meeting by one of the participants. The description is held in the Red Cross archives in Melbourne.

9. A number of other wives of legal professionals, including Lady Hughes and Mrs Langer Owen, were also very active in the Red Cross and Comforts Funds. This paper concentrates on the families of Surpeme Court judges.

10. *The Red Cross Record.* 8 January 1918. This wartime record is the primary source of information concerning the Red Cross in World War I

11. Elsie Horder. 'Women and the War' in *The NSW Red Cross Record* I, 11 Feb 1915. 47.

12. Unless otherwise stated, details regarding the careers of the sons of judges come from the ir individual Service Records held in the National Archives of Australia, series number B2455, and the Australian War Memorial Databases and Collections.

13. The details of the recommendation for this award are not recorded on the website of the Australian War Memorial, although it is gazetted.

14. Later Sir Kenneth Whistler Street, Chief Justice and Lieutenant Governor.

15. Bean C.E.W. (1921) *Official History of Australia in the War of 1914-18 The Story of Anzac Volume I* Sydney: Angus and Robertson 143, 156.

16. Sir Kenneth Whistler Street (1941) *Annals of the Street Family of Birtley*. Private Publication. Sydney. Courtesy Sir Laurence Street. pp. 182-183.

17. School magazines from the Greater Public Schools of the period repeatedly exhort their ex-students to fulfil their obligations as leaders.

18. Sir Kenneth Whistler Street, ibid. Pgs 176-178

19. After the war he eventually went into politics and became the minister for army and defence in World War II. He was killed in an air crash in Canberra in August 1940.

20. Sitting High Court justices to lose sons in the war included justices Gavan Duffy, Richard O'Connor, George Rich and Henry Bournes Higgins. There were a number of District Court judges to also have sons involved in the fighting.

21. Details of these occasions are taken from the archives of Sydney Grammar School, especially its magazine, *The Sydneian*, which has multiple references to the Street and other families. Information is reproduced here courtesy of Sydney Grammar School.

22. Later Sir Keith Ferguson, a Judge on the Supreme Court.

23. There are letters on file in the State Library Ferguson Family Collection, written to the Military authorities by Justice Ferguson expressing his wishes that his son Keith not be held back..

24. These photographs may be viewed on the Australian War Memorial web site, in the Collections section.

25. Justice JM Harvey, 'A Note on the Duties as Official Visitor for the Australian Government to Prisoners of War Camps in New South Wales during the War 1914 – 18' in *The Australian and New Zealand Society of International Law - Proceedings.* Melbourne University Press. Melbourne, 1935. p156.

26. The incident receives a tongue-in-cheek representation in Ernest Scott's *Australia During the War* Angus & Robertson. Sydney 1941 on pages 161 to 162.

27. Ernest Scott, ibid. 462n.

28. Basic details on Constance Sly's life come from the entry in the *Australian Dictionary of Biography* for Richard Meares Sly by John Kennedy McLaughlin Vol 11, Melbourne University Press, 1988.

29. Details of her war work come from *The Weaver*, the magazine of her school, Abbotsleigh, in Wahroonga and are reproduced here courtesy of that institution.

30. Martha Rutledge. Margaret Jane Gordon in *Australian Dictionary of Biography* Vol 9 Melbourne University Press 1983.

31. Later Sir Adrian Knox KC, a Chief Justice of the High Court.

32. Correspondence between Adrian Knox KC and James Murdoch.1916 Archives of the Australian Red Cross. Melbourne.

33. HTE Holt op cit 151.

34. The attitudes of the New South Wales legal profession towards this Bill are not canvassed in this paper, but it is worth noting that the chief justice, Sir William Cullen was a regular attendee at the Friday salons conducted by one of the feminist supporters of the Bill, Rose Scott.

35. Details of Justice Pring's school connections are taken from *The King's School Magazine*, 1914 to 1919, and are reproduced here courtesy of the King's School.

36. The New South Wales Bar Association sent letters of condolence to both Justice Rich and Justice Street on the loss of their sons.

District Court judges at war

By Brian Herron QC

The article in the Summer edition of *Bar News* relating to Judge Storkey VC was, I think, most apt in that it brought to the notice of members of the association firstly that Judge Storkey VC had been a judge of the District Court and secondly that he had been one of Australia's most distinguished soldiers. Both these facts I fear would sadly have been unknown to the majority of members. The actions of other members of the court, who distinguished themselves in war service should also in my view be brought to mind, so that the contribution they made to Australian life and the community is not forgotten. I do not attempt to provide an exhaustive history and my intention is to draw attention to some figures with whom, incidentally, I personally came into contact albeit in some cases this was but transient. I recommend Judge H T E Holt's *A Court Rises* (1975) for an excellent and fascinating account of the members of the court (who however had passed on at the time of his writing (a deliberate course which he took)).

Judge Storkey was the first District Court judge to whom I was formally introduced and at of all places upon the railway platform of Coffs Harbour in the early hours of a morning in late 1954. I was then a clerk with the crown solicitor instructing B F F Telfer, the northern crown prosecutor, in a civil matter to be heard by the judge at Lismore. We were travelling on the Brisbane express, which had stopped for breakfast. Telfer led me along the whole length of the train to a carriage from which the judge emerged and from his sleeping compartment. I have never forgotten this meeting. The judge wore a stiff white shirt (without collar) immaculately pressed trousers, but all partly covered by a scarlet silk dressing gown. In his hand he held a cigarette in an extremely long holder.

He was a remarkably handsome man exuding aplomb and dignity of the first order. The photograph in the article shows his good looks as does the one in Anthony Staunton's book *Victoria Cross: Australia's Finest and the Battles They Fought* (2005). I saw a portrait of him by Max Meldrum some years ago hanging in the Australian War Memorial, the whereabouts of which I am now unable to ascertain although it may be in the New Zealand archives, but it more than emphasises the point I am making. If I had not been on Coffs Harbour railway station I could have imagined myself being on the legendary Orient Express being presented to nobility. It is somewhat ironic that photographs of the actor Clark Gable appear in the same issue of *Bar News*. Storkey VC would have held his own against the actor so far as the physiognomy stakes are concerned.

The details of the events which led to his gaining the Victoria Cross are set out in the article and also in Judge Holt's book. Les Carlyon in *The Great War* (2006) refers to a contretemps which occurred between Storkey and his battalion commander immediately after 'his day in Hangard Wood' and his incredibly courageous actions there. This officer ordered him to go back and hold the position which Storkey thought was impossible. 'He would not take them (his men) back. He would go himself, if ordered, but only after he had explained the impossibility of the objective to his brigadier. Storkey's fifty-three prisoners appeared on a nearby slope as the

Photo: iStockphoto

argument continued. According to Bean, this saved an 'awkward situation'. Storkey eventually saw his brigadier. He was not ordered back' (ibid p.602).

Judge Holt (ibid p.225) refers to an occasion, just after Japan had declared war, when the judge was travelling by train with the then crown prosecutor F W Berne (later Judge Berne). He was dressed more casually then 'wearing a very old Harris tweed lounge coat but looking very young and fit enough to be in the armed forces' (these were Judge Berne's words and in fact are to found in a letter dated 11 December 1962 addressed to Judge Holt which is in the State Library). Judge Berne, at Storkey's request, managed to expel an arrogant colonel with two other army officers from the judge's compartment, who in effect had tried to commandeer it. The gossip at the bar always was that when the colonel was told whom he had been confronting he attempted to tender his abject apologies which the judge refused to accept. It was not quite like that. Freddie Berne having got rid of them, the judge was content. The judge, although formidable when occasion demanded, was an exceptionally courteous man. This was obvious to me as a young man when I was first introduced to him.

[Storkey VC] was a remarkably handsome man, exuding aplomb and dignity of the first order...If I had not been on Coffs Harbour railway station I could have imagined myself being on the legendary Orient Express being presented to nobility.

Judge Storkey VC (so far as I can determine) is one of only two judges in the British Commonwealth to have received the VC. The other was Lord Justice Sir Tasker Watkins VC, who became a High Court judge, then a lord justice of appeal and deputy lord chief justice of England. He received the award as a lieutenant in the Welch Regiment on 16 August 1944 in Normandy.

'The Victoria Cross is awarded for supreme courage in battle' (to quote General de la Billiere in his *Supreme Courage* (2004) and it is invariably awarded for a single outstanding action. Lord Leonard Cheshire VC, the British bomber pilot and philanthropist, was an exception. His act of bravery consisted of exceptional courage over a period of four years 1940-1944 (See Jolliffe in *English Catholic Heroes* (2008).

Lieutenant-Colonel Judge Stacy DSO and Bar CMG was appointed a judge of the court in March 1939. But during the First World War he was a soldier who for nearly four years showed more than 'exceptional courage'. To find an equal I think would be difficult. Judge Holt supplies the details (ibid at 220ff). The judge was mentioned in dispatches on six occasions, in November 1915, January and June 1917, May and December 1918 and July 1919 (which of course must have been in respect of service before 11 November 1918). It would appear that, so far as the Australian Army is concerned, Brigadier-General Henry Gordon Bennett holds the record, having been mentioned in dispatches on eight occasions during the First World War. He incidentally became a brigadier general at the age of 29, making him then the youngest brigade commander in the British Empire armies (see Carlyon ibid. p.754).

Judge Stacy was awarded the DSO in June 1917 and a Bar to that Order in February 1919. In January 1919 he was awarded the CMG. After January 1917, the DSO, originally established as an order, was generally awarded for gallantry and leadership in battle (see Wikipedia entry). I do not know who holds the record so far as the number of DSOs won. Lieutenant-General Baron B C Freyberg VC, the New Zealand commander is said to have been the only man to have won four (see Wright: Freyberg's War (2005)), this being as the result of service during the course of the two wars.

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Judge Stacy had enlisted in the AIF in 1914 at the earliest opportunity. The *Dictionary of Biography* gives the date as 6th August. He enlisted as a private but was commissioned as a lieutenant in the 4th Battalion in September. He was with that battalion in Gallipoli and in France when he was its commanding officer and in March 1917 he became the commanding officer of the 1st Battalion. He was then only 30 (having been born on 7 December 1886). I appeared before the judge in my very early days at the bar. He was a courteous and dignified judge and most generous to junior members, such as myself. He was always known by the bar as 'the Baron' a soubriquet bestowed upon him by his men who referred to him as 'Baron von Stacy'.

I think that it is appropriate to refer to the fact that his brother Dr V O Stacy had a distinguished career as an army medical officer rising to the rank of lieutenant-colonel. For his war service he was appointed OBE in 1919, awarded the Croix de Guerre and was twice mentioned in dispatches (see *Australian Dictionary of Biography* - online edition).

I have been unable to discover how the judge came to have his second name 'Vandeleur' despite enquiries made of the family (who can claim a very ancient lineage). Sir John Ormsby Vandeleur came to command the whole of the British cavalry at Waterloo and for many years had been a distinguished cavalry man with many decorations including a Knight-Commander of the Order of the Bath. (20 T*he Dictionary of National Biography* p.97). *The Australian*

Photo: iStockphoto

Dictionary of Biography (Vol 9) reveals that Robert Vandeleur Kelly (1843-1913) a medical practitioner and army officer served in the Boer War and his son Robert Hume Vandeleur (1878-1951), a soldier, eventually became a lieutenant-colonel in 1917 being attached to 1 Anzac Corps AIF.

Judge Charles Vincent (Mick) Rooney was appointed as a judge of the court on 4 February 1954. He however received the Military Medal in respect of the courage he had shown on 26 August 1917. The gazettel notice (*Commonwealth Gazette* No 31) is as follows:

> On 26th August 1917 at about 5.30 pm near Potjze an ammunition dump of the 13th Aust. F.A.Brigade became heavily shelled by the enemy and was set on fire causing the ammunition in the dump to explode….Corporal Rooney who was in charge of the dump immediately set to work to extinguish the fire. This was successfully accomplished and by his initiative, bravery and disregard of risk he succeeded in extinguishing the fire and in saving a large quantity of valuable ammunition required for the immediate use in Batteries.

I did not know the judge had received this award although it is shown in the 1955 *Law Almanac*. From the rest of the information I have seen in relation to his army service however I think he did not like army life that much. As Tedeschi QC stated in his address to the Forbes Society relating to the history of crown prosecutors the judge had been a 'coal lumper' on the Sydney waterfront when he decided to study law. He was admitted to the bar in 1923. He became a crown prosecutor in 1941. I always had taken him to have been an Irishman. In fact he had served for six months in Royal Field Artillery, Fermoy and had 'purchased his discharge'. He obviously came to Australia and enlisted in the AIF in September, 1915 in Brisbane.

I have mentioned Judge Berne. He is recorded in *AIF Project* (UNSW) as having been in the artillery. Sir Leslie Herron once informed me that the judge had had long and incredibly arduous service in the First World War and had never really recovered from his war experience. He had known him for many years. A photograph of a Sydney Law School rowing eight taken in 1921 (see *A Century Down Town* (1991) p.63) shows Judge Berne (whose surname apparently was not quite known to the authors) wearing what obviously is a returned soldiers' badge from the First World War (a common sight when I was a youth at least) with Sir Leslie two behind him, Sir Adrian Curlewis being the stroke. Judge Berne had the reputation, so far as the bar was concerned, of being somewhat eccentric. A story which circulated was that he claimed that he personally had shot down the German air ace Baron Manfred von Richthofen on 21 April 1918. This claim or what was said to have been such was met with a great deal of scepticism at the bar, but the judge, it would appear, had never made such a claim. There is no doubt that von Richthofen was shot down on the day mentioned. After a great deal of controversy and argument the probabilities are that he was shot down from the ground rather than by the Canadian pilot, Captain Brown, as had been claimed. An Australian gunner was probably responsible. It seems that it was Sergeant Popkin but not Sergeant Berne (see Dr Miller's paper on the matter first published in *Sabretache* in 1998 and which can be found online; Carlyon ibid at p.604ff and the entry under von Richthofen in the Wikipedia encyclopedia). His claim, however was that he was at the scene, which cannot really be a matter of dispute. Judge Brian Wall QC (retd.) informs me that Bill Macdonald of the bar told him that he had had morning tea with the judge together with Michael Helsham (later chief judge in Equity (who incidentally held the DFC)) at the Campbelltown Court and probably in the late '40s or early '50s when the judge said that he was at the scene and in effect had joined the numerous souvenir hunters who mobbed the crashed plane. It does seem that 'Richtofen's aircraft was dismembered by souvenir hunters' (see the Wikipedia piece online). Carlyon states 'the Australians rushed the plane' (ibid p.606). I think that the details of the judge's failure in this souvenir expedition which were said to have been related by him need not

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be discussed here.

Judge Holt himself had a most impressive war record. He, together with Merle Loxton QC, (as he became) and a country friend Keith Mckay went to England to enlist. His son Judge W J (John) Holt (retd.) tells me that this was due to their age. Loxton QC, whom I remember well, was awarded the Military Cross. The judge himself served with Royal Field Artillery in Gallipoli, Sinai, Palestine and France. He was severely wounded at Cape Hellas and spent some time recovering in Cairo. He resumed active service however.

So far as the Second World War is concerned, many if not most of the judges who were of an age to serve in the forces did so. Judge Cross (later Cross J) had a distinguished career in the Air Force as a fighter pilot. He was severely wounded when his plane was attacked whilst he was landing. All fighter pilots, one would have thought, deserved a decoration. Judge Sam Ross was also a fighter pilot. Judge RJM (John) Newton QC re-enlisted under a false name having been discharged because of injuries sustained whilst on service. Judge Sir Adrian Curlewis was renowned for the work he did for fellow prisoners of war in Japanese hands. Judge Philip Head was made a Member of the Order of the British Empire for military services he performed also as a prisoner of war with the Japanese.

Judge Thomas Alfred Milton (Mick) Boulter MM QC, having been taken prisoner, after the fall of Crete escaped from the German prisoner of war camp at Corinth on 7 June 1941. Single-handedly he made his way to Turkey and eventually back to Palestine, bringing much valuable information. He was commissioned and ended the war as a Captain in 9th Divisional HQ.

I commenced this piece with some observations concerning Judge Storkey VC but also to bring to the notice of members some of the other judges of the District Court, especially Judge Stacy, who had performed magnificently as soldiers. I hope I have not made any obvious omissions. Before concluding however may I say that Buck Telfer became the longest serving crown prosecutor in NSW. The rather unseemly circumstances of his enforced retirement were discussed by Tedeschi QC in the paper to which I have referred. Frank Telfer did however see service in the 35th Field Artillery, being a staff sergeant. He enlisted on 1 September 1916. He was admitted to the bar on 17 November 1916 and I was told that he was actually in uniform at his admission which was on the eve of his embarkation. If his date of birth had been recorded by the Attorney General's Department as 1 April 1899 rather than the 1 April 1889 as stated by Tedeschi as being the position, this should have been an obvious error, as the recorded date would have meant that he had been admitted to the bar and had gone upon military service when he was under 18! Buck was a very well educated man. He was an accomplished cellist and organist and had a knowledge of languages, especially French. He was what I would call a true Edwardian.

The Hon Justice Virginia Bell

The Hon Justice Virginia Margaret Bell was sworn in as a judge of the High Court on 3 February 2009

Her Honour is the 48th High Court judge and the fourth woman to be appointed to the High Court. At the special sitting to welcome her to the High Court, Commonwealth Attorney-General Robert McClelland, paid tribute to Justice Bell's broad legal career spanning three decades – as a community lawyer, barrister, public defender, senior counsel, law reform commissioner and judge.

In other interviews the attorney-general has referred to her Honour as bringing a 'social conscience' to the High Court and 'real criminal law expertise'. Cheryl Saunders, Professor of Constitutional Law at Melbourne University said in relation to her Honour that it was 'a good appointment for a diverse community' and described it as bringing a 'critical mass of women' onto the High Court (three out of seven of the High Court judges are now women).

Anna Katzmann SC on behalf of the NSW Bar Association hailed her Honour's appointment, noting in relation to the increased number of women on the High Court that '[t]he surge appears to be working.'

Other media sources have referred to her Honour's colourful background and journey from 'barrel girl' and rumoured go-go dancer (although never a go-go dancer, it is reported that her Honour played 'Ginger de Winter', the president of the fictitious Australian Barrel Girls' Association on the 1986 Channel Nine programme *Golden Years of Television*), to a stint in the 1980s as a *Late Night Live* host on ABC Radio. She is rumoured to still be the artistic director of the Glebe Supper Club and on her Honour's 50th birthday she was carried into the celebrations by 'Nubian slaves' where a chorus of persons dressed as cans of Sirena tuna sang 'I'm in the mornay', in reference to her Honour's favourite dish.

At the special sitting the attorney-general referred to Justice Bell's early years as a naval 'brat' on Garden Island in Sydney, where her father, a naval officer, was then general manager. A childhood, her Honour has described as 'conspicuously happy', something which her criminal practice has made her 'very, very conscious is a real form of privilege'. Other sources referred to Justice Bell and her brother has having had a unique, in a strict sense, Sydney Harbour frontage experience of exploring rocks and waters with which she was surrounded. It was said that Justice Bell's strong sense of public duty was shaped by this, being a trait of our armed forces.

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Photo: Newspix

Educated at SCEGGS Darlinghurst where her Honour excelled academically and in theatrical pursuits, her Honour and two friends declared that they would '[r]esist by force of argument and instinctive cunning, participation in the Thursday afternoon activity frequently referred to as sport.'

Notwithstanding a contemporaneous graduation from Dame Doris Fitton's School of Dramatic Art at the Independent Theatre in Sydney at the same time as her graduation in law from the University of Sydney, Justice Bell chose to pursue a career in the law and this was said to be 'the stage's loss and the law's gain'.

The attorney-general noted, however, that throughout her legal career Justice Bell had a strong connection to the arts and theatre, and to demonstrating that there is always a life to live beyond the confines of the law.

Justice Bell's legal career started in 1978 at the newly established Redfern Legal Centre. After initially working as a volunteer, Justice Bell was finally honoured with a wage.

Justice Bell in her seven years at the legal centre was involved in a number of landmark civil liberties cases and was a driving force behind establishing the Prisoners' Legal Service.

Justice Bell joined the bar in 1984, practising from Frederick Jordan Chambers. In 1986 she was appointed a public defender, returning to private practice in late 1989.

Her Honour was said to have consolidated her reputation while with the public defenders' office as a strong advocate, with a sharp legal mind and an engaging sense of humour.

The attorney-general referred to an incident when Justice Bell met before court with her client, a reputed hitman charged with murder, and was heard to remark, 'Look at you Chris, dressed to kill'.

Tribute was made to Justice Bell's 'ability to run a flawless trial and conduct incisive cross-examinations' and to 'tie a witness in knots'. Her Honour's 'skills of persuasion, both with judges and juries, reflected [her] deep interest in, and respect for, people from all walks of life'.

In 1995 Justice Bell was appointed counsel assisting in the Royal Commission into the NSW Police Service. In November 1997 her Honour was appointed senior counsel. Between 1997 and 1999 her Honour also served as a part-time commissioner with the NSW Law Reform Commission.

In 1999 Justice Bell was sworn in as a judge of the Supreme Court of NSW. One colleague at this time said she was admired for her 'clear-eyed approach to defending the underdog'. Ian Barker QC, the then president of the NSW Bar Association, described her as 'the attorney for the damned'.

Her Honour was somewhat fittingly sworn in as a judge of the Supreme Court on 25 March, which marked the ancient Roman Festival of Hilaria. Her Honour said at the time that she was mindful of the latent ambiguity in that, which she proposed to view as a favourable portent.

At Justice Bell's swearing in, her Honour said:

> I bear in mind that the Chief Justice of Australia when Chief Justice of this state said words to the effect that if a judge is burdened by a sense of humour, it would be rather a good thing if he or she did not demonstrate that fact from the bench.

'Mrs Judge', as Justice Bell is known to her friends, was never able to mask her humanity as a judge (or happily, her sense of humour).

When first sworn in as a judge of the Supreme Court Justice Bell also commented on the lack of women on the bench when she was a young lawyer and quipped that it 'had the capacity to make women advocates feel somewhat exotic, even if they weren't rumoured to be go-go dancers.'

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Justice Bell was farewelled from the Supreme Court of New South Wales at a special sitting on 19 December 2008.

Despite being a self-described 'very, very private extrovert', her Honour was much sought after as an after-dinner speaker and is reported once to have said that 'the essence of after-dinner speaking is to be inconsequential', adding 'I've always managed that'. Anna Katzmann SC noted that her Honour's well known, and often self-deprecating, sense of humour was never used to belittle others, perhaps proving the truth of that old English proverb: 'Women in mischief are wiser than men.'

Appointed a judge of the Court of Appeal in 2008 her Honour's elevation to the High Court has quickly followed.

Chief Justice Spigelman of the Supreme Court of NSW in an address given on Justice Bell's retirement from that court described her Honour as being a person 'who simply lights up your life', a 'wonderful companion' and someone who over nine years had made an important contribution to the sense of collegiality of the NSW Supreme Court. After reviewing the many important judgments that her Honour had given while on the Supreme Court of NSW, Chief Justice Spigelman welcomed Justice Bell's appointment to the High Court as a judge with real experience of criminal trials and great expertise in criminal law.

At her Honour's retirement ceremony from the Supreme Court Justice Bell referred to being 'deeply conscious of the great honour of being appointed to the High Court' and that it need hardly be said that she would do her best to acquit herself in her new role.

The Hon Justice Robert Allan Hulme

On 2 March 2009 his Honour Judge Robert Allan Hulme SC was sworn in as a judge of the Supreme Court of NSW.

His Honour commenced his legal career in the Local Courts, before completing the Solicitors Admission Board course and qualifying as a lawyer. His Honour was admitted as a solicitor in 1984 when he was secretary to the Justice Wood Inquiry into the convictions of the Ananda Marga trio, Paul Alister, Tim Anderson and Ross Dunn, and then began work with the Criminal Indictable Section of the Legal Aid Commission, before moving to the Office of the Director of Public Prosecutions.

His Honour studied criminology at the University of Sydney, and was called to the bar and appointed a crown prosecutor in 1990, before becoming a deputy senior crown prosecutor. His Honour was appointed silk in 2002, deputy senior public defender in 2003, and a District Court judge in 2005, and was an acting Supreme Court justice in late 2008.

The attorney general spoke on behalf of the NSW Bar and Joe Catanzariti spoke for the solicitors of NSW. His Honour responded to the speeches.

The attorney said of his Honour:

> You bring to the position a wealth of experience from an extensive and varied legal career. You also bring an immaculate reputation for diligence, aptitude and consideration and the unqualified confidence of the legal profession. I am certain that you will serve the State of New South Wales with the remarkable capability you have brought to all stages of your professional life thus far.
>
> …
>
> Your Honour has a reputation for superhuman efficiency – no one has ever seen you exhibit signs of stress or disorganisation. This efficiency may be attributable, in part, to your early training as a Clerk of the Court, where you learned to type at phenomenal speeds, and more accurately that the professionals at the time. I am told that you can be typing a brief on the left whilst engaging in conversation about something completely unrelated on the right. Information management is one of your great strengths, and your colleagues describe you as knowledgeable, prolific and punctual.
>
> As a barrister, you were of great assistance to the bench in that regard, intimidating opposing counsel with your terrifying ability to bend technology to your will. Apparently, you always have the law at your fingertips, while others fumble for a textbook. You have been known to email for advice mid-way through a trial, allowing you to remain two steps ahead of even the most organised counsel.

The attorney said of his Honour's appointment as silk 'it seems that as the stakes got higher, you not only rose to the occasion, but performed better and better'.

> You managed to distinguish yourself both as Crown Prosecutor and as Public Defender. Yet you are known for your humility: one former adversary tells a story of a time you advised your client that his appeal had no merit, only to exceed even your own expectations by succeeding in having the Crown case dismissed. It was at the Court of Criminal Appeal that you thoroughly distinguished yourself as an outstanding legal mind, impressing with your superb grasp of the law and extremely well-founded arguments.

The attorney referred to his Honour's 'unfailing courtesy and respect, from the outset the very model of the benign and fair judge' and said 'There are some who say you displayed the judicial demeanour long before you were appointed as a judge, with your level-headedness, even-handedness and serious mind'.

> Your District Court brethren hold you in very high regard and report that you are the perfect sounding board for difficult legal questions: they say they always leave your chambers more informed than when they went in. They have appreciated your thoughtful insights and dignified company.

Joe Catanzariti said in relation to his Honour's time as secretary to the Ananda Marga Inquiry:

> Following the conclusion of the Inquiry's formal hearing, your Honour made a critical discovery with respect to the envelopes containing the press releases that allegedly were to be sent to the media after the bomb went off, a discovery that gave further credence to evidence submitted during the inquiry that the documents were not the work of Ananda Marga.
>
> Your Honour's discovery was noted in Tom Molomby's 1986 publication entitled *Spies, Bombs and the Path of Bliss* as follows:
>
> > It had always been a curiosity that the names on the envelopes 'had been surrounded by the type of quotation marks used in France and Spain'. Police informant, Richard Seary denied at the trial ever having used these…Secretary Bob Hulme was tidying up the voluminous papers when his sharp eyes noticed among records produced by the police a page of notes in Seary's handwriting which contained the quotation marks. [ref p359]

The attorney doubted that his Honour would be troubled by the civil work in the court despite concerns his Honour apparently held:

> A friend disclosed that you have a secret terror of the civil applications list, though it will be beyond anyone here to understand why, given your incredible organisational skills, intellectual capacities and ability to turn your mind to any legal question. You take everything in your stride and your resilient calm is legendary in the sometimes unwieldy District Court morning list. No doubt you will bring this sagacious perspective to the Supreme Court workload. I have every confidence that you will overcome your terror and embrace the challenges of the broader common law.

The Hon Justice Rachel Pepper

On 1 May 2009 the Hon Justice Rachel Pepper was sworn in as a judge of the Land and Environment Court of New South Wales.

Her Honour grew up in Ontario, Canada to the age of 15, when her family moved to Perth where her Honour attended Swanbourne Senior High School. She briefly returned to Canada and commenced a pre-med science degree before returning to Australia, to study arts and law at the Australian National University, graduating with first class honours in law in 1994.

Her Honour was admitted as a solicitor in 1995 and worked at Allen Allen & Hemsley until taking up the position of associate to McHugh J in the High Court. Her Honour came to the bar in August 1997, and read on Seven Wentworth Chambers with Justin Gleeson SC and John Marshall SC, moving to 12 Wentworth/ Selborne in 2002. The president of the Bar Association, Anna Katzmann SC spoke on behalf of the bar and Joe Catanzariti spoke for the solicitors of NSW. Pepper J responded to the speeches. Katzmann SC described her Honour's appointment as

> a fitting tribute to your prodigious talents and your commitment to the rule of law. Having wreaked havoc in Fiji, where, with Bret Walker SC, you appeared for the deposed prime minister, Laisenia Qarase, against the coup leader, Commodore Bainimarama, the Land and Environment Court must seem like a very safe haven. It will be a long time, I am sure, before we see a Pepper's Resort within cooee of Suva.

Katmann SC noted that her Honour's practice was diverse from the start:

> You accepted briefs in commercial law, equity and professional negligence, but there was a heavy emphasis on public law, particularly constitutional, administrative and discrimination law, as well as local government, environment and planning. You also branched out into criminal law, most recently working with Peter Hastings QC in the inquiry into the murder conviction of Phuong Ngo. In the finest traditions of the profession, you took on a significant amount of pro bono work.
>
> From time to time your work took you to the High Court. Usually you were led, but on occasions you enjoyed a speaking part. On one such occasion, when dumped by the solicitor general for New South Wales … you thought you could get away with relying on the written submissions but you were stopped in your tracks by Kirby J, who cheekily asked what you had to say about the position in Canada. Despite your assistance, however, the Canadian position never even made it to the footnotes in the judgment.

Joe Catanzariti referred to her Honour's briefs from Peter Moran of Colin Biggers & Paisley, who, he said:

> remarked upon your professional, methodical and thorough approach which ensured you were always on top of the brief and that cases were run smoothly and without controversy. Well – almost. Retained by Colin Biggers & Paisley with regard to a negligence claim, I understand your Honour called the client in for an interview on a Saturday because the evidence was due. This rather emotional client came to the conclusion that your Honour had deliberately seated her in a position of disadvantage so that the sun was in her eyes. The said client would no doubt have again felt disadvantaged in the courtroom upon noting that the seating of some individuals are more elevated than others.

Her Honour replied to the speeches, referring to her increasing trepidation about her swearing in

> No doubt to assuage my apprehension the chief judge has promised me an all singing and dancing version of the court song. I have diligently scoured the court web site and can find no mention of such a ditty. Perhaps, and there will be a capella rendition of that Kermit the Frog classic, *It's Not Easy Being Green*, green being the official colour of the court's stationery, just in case anyone is concerned that they may have detected bias, apprehended or actual, in a judge of twenty minutes standing. The promise did, however, cause me to reflect on what musical piece I would nominate, sitting here, that would best represent my current state of mind. … my formative years were in the eighties and in this regard the song *Once in a Lifetime* by Talking Heads seems most apposite. The verses that resonate most audibly for me are as follows. I have taken the liberty of modifying them slightly for context:
>
> > And you may find yourself in another part of the world …
> >
> > And you may find yourself in a beautiful [court]house with a beautiful wife
> >
> > And you may ask yourself 'well, how did I get here?
>
> I 'got here' by two means. First, as a direct beneficiary of the enduring support and love of others, and, second, as a result of fate.

Her Honour paid tribute to her family and friends, and to her mentors: the Hon Michael McHugh QC, Michael Slattery QC and Peter Garling SC. The former, her Honour said:

> ensured that I did not renege on the obligatory promise given by all of his putative associates during their interviews, particularly the women, that they would go to the bar and be quick about it … [and] willingly made the necessary and critical introductions which resulted in me reading on Seven Wentworth Chambers

Her Honour referred to her great privilege of serving on Bar Council, under the Hon Justice McColl, then the president of the Bar Association who urged her Honour to run as an under five representative, the Hon Justice Ian Harrison, Bret Walker SC, Michael Slattery QC and Anna Katzmann SC.

The Hon Justice Robert Forster

On Monday, 4 May 2009 the Hon Justice Robert Forster was sworn in as a judge of the New South Wales Supreme Court.

Mr Catanzariti on behalf of the New South Wales Law Society described Justice Forster as a 'diligent, reserved, quiet, reflective and family-oriented man'. He also noted that Justice Forster's colleagues on Eleventh Floor Selborne/Wentworth Chambers had nicknamed his Honour, 'Rowdy'. Tom Bathurst QC on behalf of the Bar Association referred to his Honour as an unassuming and steady practitioner and said that the Supreme Court's reputation for excellence surely will be reinforced by the appointment of a widely respected advocate who, over 30 years at the bar, has built up a prodigious practice in commercial law and equity.

Justice Forster was born in Hungary and came to Australia with his family in 1957 at the age of ten. He told those gathered in the Banco Court:

> I was born in Hungary on the wrong side of the iron curtain, at a time when that curtain was at its coldest and most unforgiving. My parents, young brother and I took advantage of the 1956 Revolution and escaped to neutral Austria.

Justice Forster expressed his gratitude to Australia for the opportunities it afforded him. He said:

> It was then that this country opened up its arms to me and to thousands more like me. It provided me with schooling and an opportunity to go to University to become what I hope has been, and will hereafter be, a productive citizen. I have enjoyed a freedom that so many people in this world have never known.
>
> But it was not only that. From the word go, I felt accepted in my new country. I never recall being called names that are sometimes used to stigmatize new arrivals. I never felt discriminated against. On the contrary, I often felt that there was, if anything, a desire by those around me to level the playing field.
>
> One particular aspect of life in this country deserves special mention, if only because it does not receive the recognition it should have. We tend to take our freedom and democracy for granted. We grumble about our politicians but in doing so, we lose sight of the importance of being able to do so. We lose sight of the phenomena of free elections and the peaceful transitions of political power that follow. We lose sight of the significance that on election night, power either peacefully stays where it was, or peacefully shifts. Nobody calls in the army, there are no riots in the streets and there are no retributions. The next morning, when we wake up, life goes on as before, no matter who wins.
>
> The vast majority of people on this planet do not enjoy such privileges. For them it is but a dream that may at some future time, or may never, come true.
>
> Whatever may divide us in this country, when compared with what unites us, is miniscule. We are really very fortunate and I myself never take our liberty and way of life for granted. Nor do I take for granted that which I have received from this country of ours

His Honour attended Neutral Bay public school and then North Sydney Technical High School. Mr Bathurst QC noted that Justice Forster had set his sights on becoming a barrister from the age of 12.

His Honour attended the University of Sydney and graduated with a Bachelor of Arts and then in 1970 with first class honours in a Bachelor of Laws. He was admitted to practice in 1970 and completed his articles with Allen, Allen and Helmsley, as it was then known. Employed by Baker and McKenzie his Honour worked in the Sydney, Chicago and Hong Kong offices for the next five years. Justice Forster subsequently completed a Master of Laws at Stanford University in 1972. His Honour was called to the bar in 1978 and read with former Court of Appeal judge, the Honourable Keith Mason AC. His Honour initially had chambers on the 9th Floor of Wentworth Chambers, and then from 1993 on the Eleventh Floor Selborne/Wentworth chambers.

Justice Forster said that he had benefited greatly from various junior counsel with whom he had worked in more recent years. His Honour noted that as they say, the perfect junior is one who is smarter than you are, but does not know it. His Honour said that he had had the assistance of many such juniors, who he suspects did know but were polite and diplomatic enough not to let on.

Mr Bathurst QC referred to Justice Forster's love for and devotion to, his (Scottish) wife, children and grandchildren. Mr Bathurst QC said that the obvious joy and strength that Justice Forster derives from his children and the growing brood of grandchildren is proof for the profession, if any was ever needed, that work / life balance should never become a zero sum game.

Appealing to the Future: Michael Kirby and His Legacy

Sir Anthony Mason AC KBE delivered the following address at the launch of *Appealing to the Future: Michael Kirby and His Legacy*, at the State Library of New South Wales, on 5 February 2009

This is an unusual book. It is a book about Michael Kirby, but it is not written by Michael Kirby. It is a celebration of a charismatic celebrity who is, by any standard, a most unusual person.

Almost 200 years ago, in his essay 'The Old Benchers of the Inner Temple', Charles Lamb wrote, 'Lawyers, I suppose, were children once'.[1] Had Charles Lamb lived in our time, and known Michael Kirby, he may have had cause to revise that opinion because the book records that Michael said on one occasion 'I don't think I was ever young'. By that I do not think he meant to say that he was ancient, as I am, but that he was of serious disposition. Certainly, in all the time I have known him, he has projected an aura of authority and wisdom, a gravitas that I have envied.

This book is by far the heaviest book that I have launched. It is 996 pages in length, 1100 if you count in the introduction and extras. It is almost as long as a Michael Kirby judgment. So weighty is it that I feel like a NASA official at Cape Canaveral at the launch of a space satellite heavily laden with combustible rocket fuel. I don't think that the launch will be endangered by a loose tile. But perhaps I am over-confident. With all that has been said by and about Michael in the last week, maybe there is a risk of over-heating.

The book contains more than 35 essays by various contributors covering various aspects of Michael's life and work. Although I have had a fairly clear appreciation of Michael's activities over the years, reading the book brought home to me the extent and scope of his achievements. Reading the book also brought home to me the regard and affection which all the contributors, in common with many other people, have for him.

At the same time Michael has his critics, as you would expect of a judge who has been outspoken on controversial issues and has nudged the so-called conventional 'boundaries' relating to judicial speech. But I have no doubt that his admirers and supporters outnumber his critics, certainly in this gathering.

Michael became a celebrity as a law reformer and a judge – by no means an ideal launching pad for the attainment of celebrity status – by speaking and writing about the law and many other things – but mainly about the law and matters related to the law. In doing so, he succeeded in bringing the law to life and enabling both law students and non-lawyers, as well as lawyers, to appreciate its vitality and the importance it has for all of us. More than anyone else in our generation, a generation in which there have been persistent attempts to marginalise the place of law in our society, he has consistently proclaimed that law can and should be seen as a key to the attainment of a just and humane society.

Michael's abiding interest in the law became evident to the public when, at the age of 35, he became foundation chairman of the Australian Law Reform Commission (ALRC). He served in that capacity for almost 10 years. As David Weisbrot points out, in that time, he not only gained acceptance for institutional law reform in Australia, he was also instrumental in establishing a law

Michael Kirby accepts life membership of the Australian Bar Association.

reform methodology and technique which set new standards and became influential with other law reform agencies overseas. In this respect Lord Scarman, whose name was synonymous with law reform in England, paid a handsome tribute to him. Critical elements in the ALRC approach were the use of surveys, public hearings and interdisciplinary consultations as well as an insistence on high standards of research and scholarship and wide-ranging consultation with stakeholders and the community. In these activities Michael's acute sense of public relations and his skills as a publicist and communicator played a large part. Invariably the commission's review of the existing law was of invaluable assistance to judges concerned to ascertain what the law was on a particular point.

A feature of the commission's work at that time was the quality of the discussion papers and the reports in which the relevant policy considerations were clearly identified and evaluated. This aspect of the commission's work clearly had an impact on Michael's work as a judge. As a judge he was always concerned to ascertain – and rightly so – what was the policy underlying a rule or principle of law.

This influence was apparent in his early years as president of the NSW Court of Appeal where his very strong emphasis on the necessity of identifying policy and his evaluation of policy considerations in his judgments came as a surprise to professional lawyers unaccustomed to such an overt policy-oriented approach to judicial work.

There was some scepticism (a scepticism which I shared) about Michael's appointment as president of the Court of Appeal on the strength of his previous experience as chairman of the ALRC, as a deputy president of the Commonwealth Conciliation and

Arbitration Commission and as a Federal Court judge. But by the time Michael left the court to take up his appointment to the High Court, he had earned a reputation in the legal profession as a fine judge and president of the court. His energy and industry were legendary, his administration of the court made it an effective working unit which delivered timely judgments, and his unfailing courtesy meant that for responsible practitioners it was a pleasure to appear in the Court of Appeal.

To those of you who are less ancient than I am – in other words, all of you – you should read Ian Barker's chapter on 'Judicial Practice' and Dennis Mahoney's comments as recorded in that chapter. They convey the message that at an earlier time, courtesy was neither an essential nor an often-encountered, judicial quality. Indeed, the chapter resonates with a sense of injustice that one tends to associate with the Spanish inquisition rather than an Australian court. As you would expect, Michael emerges from this discussion as no threat to Torquemada. Michael's sense of fairness and courtesy contrast mightily with the striking lack of those qualities on the part of some of those who have seen fit to criticise him. Unlike Michael, they seem to have been unaware that civil discourse and respect for the opinions of others are the hallmarks of a civilised society.

Some contributors in the book point up a contrast between Michael's career on the Court of Appeal and his career on the High Court where he was frequently in dissent. But he was also a dissenter, though less notably so, in the NSW Court of Appeal.[2] I do not think that it is right to contrast the two experiences as instances of influence and non-influence respectively. In the Court of Appeal, Michael's leadership took the form of facilitating a working régime in which the talents of all members of the court – and they were at the time an extremely talented group of lawyers – were encouraged to flourish individually and collectively. In the High Court he did not have an opportunity for leadership.

Sir Owen Dixon and Sir Frederick Jordan were two judges of whom, it can be said, that they influenced the thinking of other judges. Otherwise, commentators all too readily speak of the influence one judge may have on others. Appellate courts are collective, collegiate institutions in which it is the decision of the court rather than the judgment of the individual judge that is important. And the individual judgments as well as the decision of the court are very often the outcome of the interaction between the members of the court in response to argument and discussion. So, when we speak of judicial leadership in a collegiate court, we should be thinking not so much of influence, as fostering a climate in which the talents of the group can thrive and generate decisions and judgments of high quality.

And while he appreciates the importance of history in the development of legal principle, he is no legal antiquarian. Nor is he a legalist, using that term in its sense of signifying a legal formalist. To my mind, he is a legal realist, as you would expect of someone who was a law reformer.

The chapters of the book, designated by reference to subject matter, present a series of discussions of Michael's judgments. Needless to say, I shall refrain from summarising them and from presuming to evaluate the judgments which the contributors discuss at some length. But I shall offer some general comments.

The Kirby judgments are eminently readable, even if, at times, they are rather long. They do not exhibit the heavy, grinding style which has been a feature of some High Court judgments. More so than other High Court judgments they meticulously set out the arguments presented to the court. It has been said that, if you want to find out what a High Court case is about, you should first read the Kirby judgment.

Next, the Kirby reasoning is transparently open. This characteristic of the judgments is the product of the author's willingness to identify and discuss relevant policy considerations and to trace the way in which they shape or contribute to the formulation of legal principles. Michael is not a judge who seeks refuge in the discussion of arcane and esoteric doctrine in preference to examining issues of policy and substance. And while he appreciates the importance of history in the development of legal principle, he is no legal antiquarian. Nor is he a legalist, using that term in its sense of signifying a legal formalist. To my mind, he is a legal realist, as you would expect of someone who was a law reformer. Americans might describe him as a legal pragmatist, a description which, in the American sense of that expression, might be accurate; to others, however, it may inaccurately convey the notion of a sailing ship that puts out to sea, while leaving its anchor, compass and sextant on shore.

Michael has generally been regarded as a 'progressive' judge. This impression is no doubt correct. A reading of the book, however, reveals that in some matters – notably property rights, parliamentary supremacy, commercial matters and in expanding the principles of criminal law[3] – he is quite conservative. And we know, of course, that he is a monarchist. I can see him in my mind's eye as viceroy of India, some time after Lord Curzon, a benevolent imperial pro-consul leading the sub-continent towards independence, democracy and the rule of law, in the declining years of the British Raj.

An integral element in Michael's transparent approach to the law has been his willingness to take advantage of international and

comparative law and of academic writings, a topic discussed by Judge Weeramantry in his chapter. One of his colleagues in the NSW Court of Appeal described Michael's research into these materials as 'awesome'. For Michael, Australian law is not a legal counterpart to Fortress Australia in which foreign ideas are to be resisted lest they contaminate the pure waters of Australian law. It is indeed a curious idea that, in of all things law (a heritage we derived from England), we should be reluctant to profit from the learning of others on the basis that the home-grown product is necessarily superior to any import. The jurisprudence of human rights is not a national discipline; its origins can be traced back to natural law, the United States Constitution and international law. Certainly we need to be circumspect in what we import and make sure that it 'fits' with what we have, but that is all.

Constitutional interpretation is another matter. The relevance of international and comparative law and legal materials to constitutional interpretation was the subject of a robust debate between Michael Kirby and Michael McHugh, as it was between Justice Scalia and his colleagues on the United States Supreme Court. This is not the occasion to adjudicate that debate, except to say that I would probably dissent from both Michaels. On the other hand, I have difficulty in understanding how it can be said that international and comparative law have no relevance at all to constitutional interpretation. That is a wild and unsustainable notion.

Michael's use of international law is, of course, very much associated with human rights. The protection of the rights and the dignity of the individual has been one of his abiding concerns. Much of his jurisprudence revolves around the tension between legislative supremacy and the protection of human rights, including the right to due process. His dissenting judgment in *Al-Khateb v Godwin*[4] speaks eloquently on this score. Michael's interest in human rights is a central element in his concern for justice which is, or should be, one of the elements at the very heart of the judicial formulation of legal principles.

Roderic Pitty tells us that Michael is a supporter of a statutory bill (or charter) of rights, that is, a bill that is not constitutionally entrenched and can therefore be amended specifically by statute. The strident opposition to the introduction of a federal bill of rights, and the grounds on which that opposition is based, explain why such a bill is desirable. The opposition is led by political commentators and politicians who idealise the existing political process, notwithstanding its evident weaknesses, notably in matters concerning personal liberty and due process and its failure adequately to protect freedom of information and expression. The opponents of a statutory bill continue to assert that it would limit the powers of our democratically elected representatives, notwithstanding that their capacity to override or qualify the statutory provisions would be expressly preserved. The thrust of a statutory bill is that it would require our politicians to specifically consider clearly identified human rights, in particular

Appealing to the Future: Michael Kirby and His Legacy, by Ian Freckleton and Hugh Selby, Lawbook Co., 2009

due process rights, and override or qualify them, if they be so minded. In this way, a bill would not dictate or impose outcomes but would enhance the political process and improve the quality of our democracy. A bill would help to ensure that human rights violations could not be swept under the carpet. Of course, very careful attention must be given to identifying those rights which should receive statutory protection.

The title of the book *Appealing to the Future* is a reference to Michael's reputation as 'The Great Dissenter' – a label he evidently views with distaste – the notion being that a dissenting judgment is an appeal to the future, written in the hope (even the expectation) that it will be vindicated by a later decision of the court or of a higher court or even by statute. Although there is certainly support for this romantic notion, I doubt that many dissenting judgments are written with that end in view. Judgments are primarily written for the parties, to decide their legal dispute, and for the legal community. And the lesson of history is that the future is an unpredictable and eccentric court of appeal. The weight of precedent inhibits courts from engaging in the overruling of past decisions except on a minor scale. Far more likely, I think, that he wrote dissenting judgments to persuade that mythical beast, the well-informed and intelligent reader, that his judgment was right. If we had the equivalent of a *New York Review of Books* in Australia – and unfortunately we don't – Michael would have been writing for its readership.

All that said, one would hope that the future might look favourably on some of the major dissents with which Michael has been associated. There were three powerful dissenting judgments in *Al-Khateb* and two in *Combet v Commonwealth*[5] (where in the joint judgment a fundamental constitutional principle seems to have been rather blithely dismantled). In *Re Wakim; Ex parte McNally*[6]

(the case concerning the conferral of federal jurisdiction on state courts), Michael was a lone dissenter, but the court earlier had been evenly divided upon a cognate question in *Gould v Brown*[7], where Brennan C J and Toohey J, along with Michael, concluded that the legislation was valid.

And, in the light of statutory advances and modern developments, a similar view might be expressed about the judgment which was overruled in *Osmond v Public Service Board of NSW*[8] where Michael was part of a majority in the Court of Appeal that held that, at common law, a statutory tribunal is under a duty to give reasons for an administrative decision despite the absence of a statutory requirement so to do.

As many of you will be aware, Mary Gaudron, while acquitting Michael of the charge of omniscience, went on to pay tribute to his courage. Michael has never wavered in the face of criticism which might have deterred or discouraged a judge of lesser steel. Who will ever forget the shameful attack upon him by Senator Heffernan? And the way in which it was dealt with by those in authority who might have been expected to see that a Justice of the High Court, highly regarded both in Australia and internationally, was given the benefit of the presumption of innocence? The silence on this score was both overwhelming and dispiriting.

Although Michael's industry and energy are legendary, his writing of judgments in order to present his view was phenomenal. For any justice of the High Court the workload of the High Court is oppressive, as Sir Owen Dixon made clear. I agree wholeheartedly with that view. And I was not a Great Dissenter. For the most part I was party to, or in agreement with, unanimous or majority judgments. For a High Court justice who is not in that position, the burden of constantly writing one's own comprehensive judgment must be a labour of Hercules. Yet Michael not only did that, he continued to speak and write articles as he has always done. And he found time to do other things, such as acting as special representative in Cambodia for the UN secretary-general for human rights, a responsibility which he undertook notwithstanding the dangers which were involved.

I have spoken about the man rather than the book but the book is largely about the man and it will spell out for you in greater detail what I have sketched in outline. But the book is not only about the man. It discusses many fundamental and interesting legal issues on which conflicting views have been expressed.

What I have said this evening, together with Michael's response, marks the end of Michael Kirby Festival Week. It can take its place with the Melbourne Cup, the Australian Tennis Open and the Country Music Festival as one of the great festivals of the year.

I conclude by saying that the book is a record of conspicuous, indeed spectacular, achievement in many areas of vital concern to the community. I have much pleasure in launching it.

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Endnotes

1. *Essays of Elia* (University of Iowa Press, 2003), 189 at p.193.
2. Simon Sheller, 'Kirby, Michael Donald', *The Oxford Companion to the High Court of Australia*, p.395.
3. See: *Osland v The Queen* [1998] 197 CLR 316.
4. [2004] 220 CLR 562.
5. [2005] 224 CLR 294.
6. [1999] 198 CLR 511.
7. [1998] 193 CLR 346.
8. (1984) 3 NSWR 477.

Bullfry and the constructive trust

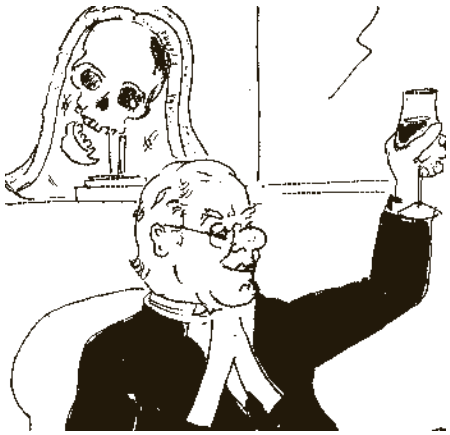
'Your Honour, I am relying on it institutionally, not remedially'.

Bullfry jerked back to consciousness, awakened by his own incipient snore, and his junior's nudge. What was all this about? How long could this bellwether continue? Even the chief judge looked bemused – she had led Bullfry frequently in her younger days but usually in matters which ran for many weeks in the Common Law Division involving allegations of peculation, fraud, and gangsters with pistols.

'Institutionally, not remedially?' Bullfry reached cautiously for *Nuggets of Equity for the Beginner* which he had artfully covered with brown paper to conceal its humble nature. All equity was rubbish really – Bullfry simply looked the client in conference straight in the eye and said: 'Well, what would your sainted mother, were she still alive, think about all this and in particular, your own conduct? If she says its all kosher, we win – if not, I had better settle it immediately.' Was it necessary to delve endlessly into judgments written by Lord Nottingham to work out the position in the year of Our Lord 2009? Bullfry usually preferred to get a quick grip of the facts, pull on his helmet and goggles and start the engine! As he always told his clients in a desperate interlocutory pass – 'You can't be any worse off being in court'. One of his leaders in his youth had said to him something that had always resonated, 'You can know too much about a case before you start it – one tale is good until another be told'.

Bullfry had frequently appeared before the masters of the craft – one, as duty judge on a quiet day, had held him up for thirty minutes on a short-service application of a mortgagor's summons by recondite questions concerning the auxiliary jurisdiction, the requirement of payment in, the 'rule' in *Harvey v McWatters*. Bullfry had staggered through, but was conscious at the end that he received barely a pass mark.

But had he acquired age with wisdom? He doubted it – and even attempting to read a judgment of the Supreme Tribunal required a wet towel and a large double scotch. Seven players, all writing to demonstrate their own cleverness, driven inexorably by the need to get a draft out before the others – then add in the two high-flying associates, each destined for a BCL and a D Phil before coming back to do discovery and make sandwiches at Blakes – then the research officers and the library staff – by Bullfry's calculation some 30 minds were devoted to each judgment. Was it any wonder that more humble counsel had the greatest difficulty in actually finding any ratio at all?



But Bullfry pined for the certitude of those Halsburyian judgments, read and reread constantly as a student, which graced the *Privy Council Reports* at the start of the last century – they didn't make them like Hardinge Giffard any more: 'A factor in Bangalore assigns a warehouse note to a syndic in Madras for value received who then executes a quasi-aval on it before transferring it to the bank etc etc' A modern reader needed a whiteboard and a dictionary just to understand the facts. Then – no CAV – ex tempore with the lapidary opening word: 'The matter is too clear for argument …' followed by four – just four!! – seamless pages – with no footnotes at all – presumably first written in long hand beside an oil lamp – in which the controlling rule with respect to the duties of a factor, the rights of the syndic, the law of quasi-avals, and the liability of the bank – are all laid out in words of one syllable for immediate application and to stand as the controlling precedent until Kingdom come!! Where had it all gone wrong?

But did academic pretensions matter at all in the long run at the Sydney Bar? Many came with their academic honours thick upon them only to sink into the oblivion of the Sutherland Local Court. Or else they were trapped permanently arguing nasty section 424 points before a federal beak. Many year before Bullfry had worked as an associate to a judge who though small in stature had, like Horace Avory, a personality which was infinitely forbidding. Bullfry had innocently suggested writing a short tome on some aspect of company practice to help garner a practice at the junior bar – the judge had looked at him coldly for a moment and said: 'Yes – by all means do that – and they will send you nothing but cases on the Dog Act'. Most counsel staggered into a practice as they staggered into matrimony – they simply awoke one morning to find themselves appearing, forensically and domestically, before a 'deputy registrar' seeking 'first access' and usually with the same success.

All equity was rubbish really – Bullfry simply looked the client in conference straight in the eye and said: 'Well, what would your sainted mother, were she still alive, think about all this and in particular, your own conduct? If she says its all kosher, we win – if not, I had better settle it immediately'.

'Mr Bullfry, what do you say about this difficult point?'

What did he say? What did he care? He looked sideways at Ms Maxine Blatly, his junior *de jour* who was a whiz on these things – the usual CV – 'starred' first at Cambridge after being dux at NSGHS and a scholarship from Sydney. She prepared brilliant submissions which he had 'settled' with some difficulty, so subtle were the points she had made. He leant over circumspectly towards her, ready to be put 'on remote' when he got to his feet. '*Baumgartner* and *Guimelli* - Deane' she whispered.

He rose slowly to his feet and without a hint of portentousness said: 'Your Honour, we say simply that the whole question is covered by the judgment of Sir William Deane in *Baumgartner v Giumelli* in a passage which my learned junior will hand up.'

The chief judge looked at him steadily – was she going to call his bluff?

He felt a sharp nudge in his left buttock – it reminded him of the mule-like kicks over snoring he sometimes attracted from the second Mrs Bullfry when he could persuade her to spend a full night with him. He glanced down – Blatly was shaking her head furiously.

'I think it may be more appropriate if I ask my learned junior, Ms Blatly, to address your Honour on this point'.

He resumed his seat. He could now continue his nap while watching Blatly in action – he had not recommended her to his instructing solicitors solely because of her knowledge of *Hopkinson v Rolt*.

G Barry Hall QC (1931-2009)

Our dear, much loved and admired, friend, colleague and exemplar, the late Graham Barry Hall QC passed away on 11 January 2009 after a thankfully short illness. Barry departed this life at home in Manly surrounded by those who loved him. He exhibited his characteristic humour and grace and his deep love for Margaret, his wife and constant companion and collaborator of over 50 years, and, enjoyed the company and deep affection of his family, to the very last, going quietly into the night.

Another great result.

On 16 January 2009, in the heat of a bright Sydney summer's morning we gathered and celebrated his life and mourned his passing at Barry's local, St Andrew's Cathedral. A day of pathos and pageant marked by the sense we had all been touched by a man of genuine, yet humble, greatness. Touched by a man who daily, quietly and sincerely lived his faith, sharing his practical and compassionate Christianity with all he met, a servant of all yet of none, a totally human being.

Barry's friends and family spoke of the man, Barry the older brother, the country boy, the father, the romantic, the paterfamilias, the soldier, the proto IT entrepreneur, the pilot and marathon runner, and, perhaps most improbably, Barry the bouncer, managing the miscreants and misbegotten at the Healing Ministry he led and chaired.

His life beyond the law was demonstrably full and complete. How many of his fellow daily toilers at the coalface of justice can say the same?

It fell to your correspondent to speak of Barry as a queen's counsel, to try to explain that the loving, rounded and grounded man, described by those who knew him best, was in fact that most resilient and groundless of optimists, that reckless gambler, the plaintiffs' senior counsel.

The facts speak for themselves, Barry was admitted to the Bar on 28 August 1959, taking silk on 2 September 1981, and thus serving the litigants of New South Wales for over 49 years. His career statistics fall just short of an arbitrary milestone but only a handful of counsel can lay claim to a longer career and an even smaller number can lay claim to a career as outstandingly generous, effective and successful.

Barry saw out the last weeks of 2008 appearing in the District Court where he had, as common lawyers will, a mixed time of it, even fretting over the provision of written submissions whilst undergoing radiotherapy!

Barry felt obliged to do them himself because the court he served had requested his assistance and because no-one took that case more seriously than Barry, not just because it might possibly be his last, not because there was, all going well, the prospect of a fee, but just because it was his. He accepted and honoured the trust placed in him by his clients. In my fifteen years of appearing with him, for all manner of clients, in triumph and in reluctantly, but ultimately, accepted defeat, no client ever left Barry with anything less than the certainty that he had done everything that could properly be done for them, that he had brought the best of his enormous experience and application to bear, and, that he had actually cared about them.

The point is Barry adhered to his retainer, forcefully but fairly advancing his client's interests, despite ultimately insurmountable difficulties. Where else but the Sydney Bar would anyone put in like that? Where else can clients rely on such commitment to their cause?

Unfashionably, Barry was holistic in his role as senior counsel. Having solved the legal issue du jour he would, at times, offer sage lifestyle advice. Surprisingly, his advice was accepted gladly by everyone, from strident sophisticates to tattooed truckies, with an appreciation of the genuine concern and goodwill with which it was offered.

Only Barry could do this and he could only do it because his own life, as evidenced by the beauty of his relationship with Margaret, with whom, remarkably, he worked daily, and on whom he relied in all aspects of everything, gave him that moral authority.

Barry left us at the peak of his game, his last outing before the full bench of the Court of Appeal was a typical *tour de force*. An arguable appeal on a narrow point was translated into a comprehensive victory on behalf of a plaintiff whom he had barely met, but who turned up at the Banco Court and saw her truly pedestrian case advocated by a master, who deftly turned defeat into victory before five justices of appeal, all before lunch.

As his casket was shouldered from the Cathedral those foregathered were struck by the incongruity of that small vessel transporting so immense a personality, and by a sense that we had collectively witnessed the closing of an era.

As a profession we can all be proud of Barry, but it was entirely mutual, Barry was proud of us.

Thank you Barry.

By David W Elliott

Anthony Peter Cook SC (1959 - 2009)

The following eulogy was delivered by Andrew Haesler SC

It is not at all surprising that Anthony joined the public defenders in 1999. It was destined. You could blame his DNA.

He was a child of 'troublemakers' and, like a number of other public defenders, he gained early experience in fighting against injustice when still at school. He learned while young that taking a stand on important matters of principle was not always popular - but always essential.

He relished the cerebral excitement of the criminal trial, the learning, the planning and the passion. He had the privilege of addressing a jury in hundreds of trials.

He chose to do good, not just because it suited his personality but because he could, and did, make a difference to people's lives.

Anthony did his job well. He excelled. He gave up a successful career based at Wardell Chambers to join the public defenders. And, if he didn't prosper as much financially, his career and the importance of the cases he took on grew and grew. His achievements received formal recognition when in 2007 he was given the title 'senior counsel.' But it was the informal recognition and the challenges of the practise of criminal law that he relished.

He experienced the triumph of the 'not guilty' verdict and the decision 'appeal upheld.'

His efforts were appreciated.

One, of many examples, is a letter we received from the North Australian Aboriginal Legal Service, after he had gone there last year to appear in a controversial murder trial:

> Thankyou for sharing Anthony with us … the … result was ... incredible and admirable …(it)… was the talk of the town here in Darwin… As a poorly funded organisation, with incredibly dedicated staff, the presence of someone with Mr Cook's experience gave a boost to all our criminal lawyers.

It should come as no surprise that the attorney general asked that I convey his personal regret, and condolences. It should come as no surprise that judges have said he was one of the finest advocates ever to appear before them. Some of those judges are here today, together with his colleagues from the profession, many of whom looked to Anthony as a role model. Many, many more, have asked that I convey their profound regret that they cannot be here today.

We are all here to say farewell. More than that we are all here to say, to Will and Ed, to Anthony's family and the friends who did not really know what he did in his day job… that he did good.

He was good. He was very good.

He did good for others; even those clients who, frankly, he didn't like one bit. He took pride in taking on cases for those who others despised – and giving them a chance for justice.

He died at the peak of his powers as an advocate.

The sort of work Anthony did was hard intellectually and hard emotionally, that work, and the commitment required to excel, took its toll. Anthony did not hide that fact.

Anthony really wanted to get well.

He was doing things to make that happen: he sought treatment; he talked about the pressures of work; he was not 'out of the loop'; he exercised regularly; he was the fittest public defender; he travelled and sought new work experiences in the Solomon Islands and Darwin.

Anthony didn't isolate himself: he surrounded himself with friends he knew cared about him.

He did things he loved; things that made him happy: snorkeling with the boys at Shelley Beach; surfing; market browsing; making curries; playing chess; photography and painting with Will and Ed.

Work was not his entire life. It should never be that. Anthony's greatest love was his family. And to them – on behalf of all who worked with him – and all the people he helped in his 26 years as a lawyer:

Thank *you* for sharing Anthony with us.

We will not forget him and we know you will never forget him and the good he did.

Paul Byrne SC (1950 - 2009)

Paul Byrne SC, the most outstanding criminal lawyer of his generation at the bar, passed away on 12 May 2009 at the age of 58 years after a lengthy battle with cancer.

Paul was born in Adelaide on 12 October 1950 to Berenice and John Byrne, the third of four children. He came to Sydney in 1954 and attended Balmoral Infants' and Mosman Public schools before his family travelled to England in 1959 because of his father's work. His family returned to Australia in 1960 and he completed primary school at Artarmon Public School and secondary school at North Sydney Boys High School.

He attended Sydney University obtaining bachelor degrees in arts and law, graduating from the Sydney University Law School in 1976. Whilst an undergraduate he obtained employment with the Legal Aid Commission's predecessor, the Public Solicitor's Office and ultimately, whilst a legal clerk, instructed in the appellate practice of the Public Defenders of New South Wales. Particularly, he worked as an instructing clerk and solicitor for Howard Purnell QC, the senior public defender, a generous mentor to all with whom he came in contact, within the Legal Aid community and throughout the private profession and author of the leading criminal law practice of the day.

Howard's generosity towards other members of the profession no doubt had a great influence upon Paul who throughout his career demonstrated generosity towards other members of the profession, perhaps equalled, but never surpassed. On admission as a solicitor in 1977 Paul continued to practise at the Public Solicitor's Office. In March 1978 he married his beautiful wife Karen. Their sons Tom and Jack were born in 1980 and 1984. In late 1979, at 29 years of age, he was called to the bar and was appointed a public defender, following in the footsteps of Reg Blanch QC, now a Supreme Court judge and chief judge of the District Court.

When Paul came to the Public Defenders the depth and breadth of ability and experience of his new colleagues was enormous. Apart from Howard Purnell other public defenders included in no order of importance, Jeffrey Miles, Peter Hidden and Michael Adams, Roger Court QC, Bill Hosking QC, Charles Luland QC, Martin Sides QC, Ken Shadbolt, Dr Greg Woods and John Lloyd-Jones QC and John Shields QC. Whilst he was there he was joined by Rod Howie, Virginia Bell and Daryl Melham. There, Paul had an unrivalled reputation for industry and preparation. Bill Hosking at the time conferred an award called the 'Ron Newham (a senior Legal Aid Commission solicitor) Trophy', for the most industrious and productive member of the floor to encourage productivity. Mr Newham allocated the briefs. Paul won that 'trophy' hands down year after year. In a galaxy of stars in the area of the criminal law Paul's light shone as brightly as anyone, notwithstanding the strict seniority system that operated on the floor.

Paul was prepared to take on the toughest cases as a public defender, approaching them with energy, complete commitment and enterprise, as well as imaginative and novel thinking. His capacity to analyse legal issues amongst the mesh of factual issues, to identify the real points to be taken and to develop creative and sometimes unique strategies emerged as hallmarks of his style developing his skills as a trial advocate. He attempted, for example, for the first time in New South Wales to use polygraph evidence in the defence case, albeit unsuccessfully. He led the charge to challenge, by independent scientific evidence, the reliability of experts in sciences usually the preserve of the police, such as fingerprint and ballistics evidence. He always had the quality of courtesy to all, which he carried throughout his career, which made him almost unique amongst great, but competitive, advocates.

In 1983, when Paul Landa was attorney general, Paul was appointed as director of the Criminal Law Review Division, succeeding Dr Greg Woods QC (also a public defender and now a District Court judge) who had been director under Frank Walker QC.

Paul brought this capacity for clear thinking and his lateral approach to issues and problems to his work as the director. He became a very close confidante of the attorney. At the Attorney General's Department he was regarded as an outstanding advisor on matters pertaining to all aspects of the criminal law.

He was appointed as a full time commissioner to the Law Reform Commission for a period of four years in 1984. There he undertook a number of projects demonstrating his imaginative approach to issues and his incredible capacity for hard work. His 'report' in relation to reform of juries, although now over twenty-three years old, contains many of his ideas well ahead of their time. Some suggestions were adopted others await their proper recognition. It amply demonstrated his intellect and his grasp of the wider picture as well as his innovative approach to the law. Paul was a real 'law reformer' not just a lawyer and that permeated every aspect of his professional career. He took silk in 1995. He modestly delayed his application for silk for several years and only lodged it when his father was dying. He was appointed on that first application, but sadly his

father passed away before he took silk. In 1983 he obtained a masters degree in law from University of Sydney (with first class honours) receiving the University Medal, his thesis being concerned with 'identification evidence'. In the 1970s and through the 1980s the inadequacy of the law in relation to both the admissibility and treatment of evidence of identification of suspects, particularly by strangers, had stood for many years both in England and Australia. The English Court of Appeal in *R v Turnbull* (from 1976) had, in part, sought to address the many difficulties that identification of suspects by strangers presented. In Australia the 1937 High Court judgment of *The Queen v Davies and Cody* considered the problem of the suspect identified alone in custody, but the jurisprudence left many aspects of identification unsatisfactorily treated. Paul's ideas in relation to the vexed issue of identification found their expression finally in the High Court judgment of *Domican v The Queen* (1992) 173 CLR 555, in which he was led by Peter Hidden QC, but for which he had obtained 'special leave'. The success of the appeal no doubt was due to Peter Hidden's great skill, but the principles that the High Court laid down in *Domican* have all the hallmarks of the ideas of Paul previously expressed in his thesis and sought to be incorporated into the law up until that time in his own advocacy in other cases. As Justice Hidden says, 'his finger prints are all over the decision of the High Court'.

Appearing for Mr Judge in *McKinney and Judge v The Queen* (1991) 171 CLR 468, Paul and Peter Hidden persuaded the court to change the law's treatment of police 'verbals' forever, paving the way for later necessary legislative reforms that largely ended the practice.

Significant decisions in which he appeared in the High Court were many. Many were triumphs. In fact, in the area of criminal law there is no advocate in Australia who had as much success as Paul in landmark decisions concerning this area over the last 15-20 years. Included amongst his successes are the decisions of *Campton v The Queen* (2000) 206 CLR 161 (on warnings for delayed complaint in sexual assault matters), *Azzopardi v The Queen* (2000) 205 CLR 50 (on the silent accused in court), *BRS v The Queen* (1997) 191 CLR 275 (appropriate warnings on non-propensity evidence and corroboration), *Smith v The Queen* (2001) 206 CLR 650 (on identification of a suspect by police from a security video), *Antoun v The Queen* (2006) 224 ALR 51 (on bias or failure of a judge to disqualify himself) and *Grey v The Queen* (2001) 184 ALR 593 (on prosecution disclosure) to name a few.

These successes of course were matched by success in the Court of Criminal Appeal and the Court of Appeal over many years and multiplied many times over on issues to diverse to summarise here. A quick search of reported judgments lists over 200 reported cases in those jurisdictions. On many occasions whilst a junior he was led by Chester Porter QC. A very formidable team, indeed! Chester referred to him, in his autobiography *Walking on Water*, simply as 'a brilliant lawyer' (at p.308).

Paul was not only a very fine appellate advocate, he was a splendid trial advocate as well. Clarity of thought, capacity to identify the real issues and industry brought him successes in many trials some of which seemed unwinnable. He appeared in too many high profile trials to detail here. His 'success' rate exceeded any reasonable rate for defence counsel.

He took cases that others could not do, or would not do, for which no financial reward was immediately available (or available at all) to prevent injustice. No amount of provocation or pressure (of work or from others) caused him to lose his 'cool', so to speak. He was unflappable, in conference and in court. He appeared at all times dispassionate, but he was passionate in his support for, and advancement of, the rights of the individual. Quirky and humorous asides whilst under pressure reflected his calm exterior. When confronted by a hostile expert wearing a bow tie, he assured his junior before cross-examination: 'Don't worry. Juries don't like experts that wear bow ties.'

He was counsel of choice in criminal matters of all types to solicitors in New South Wales, Queensland, Victoria and Tasmania. Terry O'Gorman, a nationally well-known Queensland advocate for civil liberties, frequently retained Paul for his New South Wales and Queensland cases. Leading and 'high profile' criminal law solicitors in private practice in New South Wales including David Giddy, Kathy Crittenden, Greg Walsh, Phillip Gibson and Chris Murphy also frequently briefed him. But he also took much Legal Aid work. It was the work that interested him, not the size of the brief fee. He had no interest in 'going for the ride' in long cases with multiple accused. He wanted to work, make a difference and not just 'pull' in a cheque.

Apart from trial and appellate work in the criminal law Paul also appeared frequently before tribunals, inquiries and commissions and in quasi-criminal matters in all jurisdictions. On a number of occasions he appeared before the Independent Commission Against Corruption for individuals and corporations. He had an almost invariable knack of succeeding in having his clients avoid censure or adverse comment by that organisation. He had an extensive practice in administrative legal matters that were connected to

One could not have had a finer friend. He was generous, helpful, loyal, honest, diligent, responsible and constructive. He was a modest man, yet he had much of which to be proud.

the criminal law and from time to time appeared in the Land and Environment and Industrial courts in relation to environmental or occupation health and safety offences.

He came to the re-formed Forbes Chambers in 1989. His orderliness was legendary. His accumulation of books and memorabilia from Formula 1 racing almost took over his room. Yet there were dozens of folders, briefs, and related papers stacked in neat piles, tagged by colourful post-it pads. In order to get to his desk to speak with him there one needed the abilities of an Olympic high hurdler or high jumper to bound over the many books, files, helmets, paintings and other objects strategically, but systematically scattered around his chambers.

He took cases that others could not do, for which no financial reward was immediately available (or available at all) to prevent injustice. No amount of provocation or pressure (of work or from others) caused him to lose his 'cool', so to speak. He kept his emotions under wraps in his work no matter how he actually felt at the time. He was unflappable, in conference and in court. He appeared at all times dispassionate, but in reality he was passionate indeed in his support for, and advancement of, the rights of the individual.

His generosity knew no bounds. But it was always tinged with thoughtfulness. He knew his friends well and had an encyclopaedic memory, not just of the law, but of personal information to inform the choice of gift, or its timing.

He left Forbes Chambers in late 2006 to become the head of Samuel Griffiths Chambers. For any chambers concerned with the criminal law obtaining him as a leader was the 'catch of the century'. Paul was a generous contributor to the bar in a range of ways, particularly to the Benevolent Fund and the bar's ethical work.

Whether he was leader of the floor, or a member of the floor, he was a mentor and trusted advisor and colleague, no matter what the comparative seniority was at the time. He had an insatiable appetite for work. He just could not say 'no' to solicitors. Although, on occasions, he might exasperate Peter Schell, then registrar of the Court of Criminal Appeal (now of the Court of Appeal) with some delay in filing submissions, he never let him down, nor disappointed the court with the quality of the written material provided.

Yet, as important and grand was his career as a barrister, he had many other interests. His primary interest always was his family. He was an absolutely devoted husband to his wife, a loving and supportive father to his sons Tom and Jack. He was also committed to his wider family and had a close relationship with his parents, siblings, his wife's family and his nieces and nephews. He took pride in all of their achievements. His niece, Rose Byrne (daughter of his brother Robin), is an internationally known actor whose success gave him much joy.

He attended his first Grand Prix as a child in 1960 in England. His father's passion for the sport was infectious and Paul became a devoted follower of the sport. He frequently travelled overseas to attend its races. He possessed a myriad of exotic and desirable motor vehicles, was on speaking terms with Jack Brabham and, on one occasion, was the next best thing to a dining companion with Ayrton Senna, when he, Karen and Senna's family were staying at Villa D'Este on Lake Como. Although very ill, he insisted on attending the 2009 Grand Prix in Melbourne.

He loved popular music from the 1960s including Motown rhythm and blues, the Rolling Stones and the Bee Gees. He had particular love of Roy Orbison's music. He spent many pleasurable hours watching performers such as Wilson Pickett, the Four Tops and the Temptations when they performed in Australia. He also loved the Beach Boys as a northern beaches boy of the sixties ought. His enjoyment of Brian Wilson's concert at the Opera House in 2004 is a special memory for me. He shook the hand of Levi Stubbs, the greatest male rhythm and blues singer to come out of Detroit. On one legendary occasion, always one to enjoy his time away from work, he joined Gene Pitney on the stage of the Revesby Workers' Club to help him out as he sang *The Man who Shot Liberty Valence*. I do not think Gene needed the help though. That song was a particular favourite for reasons I have not fully understood, given Paul's abhorrence of illegality, revenge and judicial or extra judicial killings.

Paul was cut down in his prime by the illness with which he was diagnosed in early March 2008. High judicial office was overdue. At the time he was briefed to appear for the chief executive officer of Pan Pharmaceuticals, Jim Selim, whose legal future appeared bleak (accordingly to the daily newspapers). With Paul's skills in play Mr Selim was acquitted of all the charges for which he was tried in the Supreme, District and Local courts. A Crown appeal to the Court of Criminal Appeal as to the Supreme Court verdict of 'not guilty' by direction was unsuccessful.

One could not have had a finer friend. He was generous, helpful, loyal, honest, diligent, responsible and constructive. He was a modest man, yet he had much of which to be proud. Within the area of law within which he practised he was a true giant. His modesty and his lack of hubris was reflected in his wishes on his death. He desired no funeral service whatsoever and was privately cremated in the presence of his sons. He is survived by Karen, Tom and Jack (on the cusp of graduating in law), his mother, his siblings, Robin, Meredith and Belinda, their families, and Karen's. He had the dream of opening chambers called 'Liberty Chambers'. It would be a good thing for our society and our profession if, sometime in the future, his dream could be realised by someone else from the bar.

By his Honour Judge Stephen Norrish SC

Posse

Kate Welshman | Random House Australia | 2009

Barristers and judges are in the business of straw houses. They build them. They fan them. Then they blow them down. Or not. Depending. It is these things, specifically, which marks them for stamping 'not natural novelists'.

A novelist, after all, is in the business of permanence. Not an Ozymandian permanence, to be sure, but something of the bricks and mortar variety, and never mind the odd clay foot. But – as barristers and judges well know, it being the cliché upon which their bread is both-sides buttered – every rule admits of an exception.

One example is the late Sir John Mortimer, whose Rumpole stories were only a portion of his output. As for the Americans, I logged into the 'Our people' section on the webpage for the US firm Sonnenschein Nath & Rosenthal, where I found that one of its Chicago partners was a Harvard graduate with the professional area 'Litigation – White Collar Criminal Defense'. The rest of us know him as Scott Turow, with Grisham at the fore of the legal thriller market.

The Melbourne Bar boasts Elliot Perlman. Nicholas Hasluck was putting out excellent fiction well before his elevation to the Western Australian Supreme Court. For the High Court, there is of course Ian Callinan. Hasluck himself, in his 2003 reflection *The Legal Labyrinth*, provides a commentary on one of Callinan's works.

In Sydney, the late Harold Glass as Benjamin Sidney wrote *Discord within the Bar*, as well as a short story collection, while Richard Beasley has two titles under his gown, The *Ambulance Chaser* and *Hell Has Harbour Views*.

In Kate Welshman, we have another exception. She has been at the bar since 2004. *Posse* is her first novel. Aimed at an altogether different market, this is young adult fiction, although the 'parental guidance' warning is justifiable, as a centrepiece of the plot is a sex attack on the protagonist.

Posse is set in a summer at the Riveroak Recreation Camp. Year Eleven from the Methodist School for Girls find themselves in a heatwave which rolls into their own friendships.

The title is an interesting choice. Last century, when I was young, the word had only one meaning. It was the group in the westerns which was rounded up to chase down the hero or the villain, depending. Or, for the more discerning audience of *Bar News* and as Blackstone put it, the sheriff could 'command all the people to attend him; which [was] called the *posse comitatus*, or power of the county: which summons every person above fifteen years old, and under the degree of a peer, [was] bound to attend upon warning, under pain of fine and imprisonment.'

These days, it can be something different. Since 1985, the *Oxford English Dictionary* tells us, it has had a colloquial meaning, 'A set of (esp. young) people associated by being members of a peer group'. For Welshman, 'posse' covers both. At the start of things, it is no more than the descriptor for the same thing in any school around the world, that group which performs the cruellest of children's games, Exclusion. By the end, it is something altogether different, with each different member passing different judgment on the other, the posse turning upon itself.

Posse is not *Lord of the Flies*. It doesn't pretend to be. However, it does have something new and worthwhile to say about youth, loyalty, authority and the cruel realities of that compendium which we are pleased to call 'human nature'. Welshman deserves to do well with her first novel, and should turn her mind to the next.

Reviewed by David Ash

> Posse *is not* Lord of the Flies. *It doesn't pretend to be. However, it does have something new and worthwhile to say about youth, loyalty, authority and the cruel realities of that compendium which we are pleased to call 'human nature'.*

The Art of Judging

Greta Bird and Nicole Rogers (eds) | School of Law and Justice, Southern Cross University | 2008

Advocates persuade judges, or try to. Persuasion involves understanding what judges do and how they arrive at decisions. *The Art of Judging* is a welcome addition to the learning on this topic. Edited by Greta Bird and Nicole Rogers, and a special issue of the *Southern Cross University Law Review*, *The Art of Judging* is a collection of papers by current and former judges, some first published elsewhere and reproduced here, some published for the first time. The list of contributors is impressive. It includes the chief justice of the High Court of Australia, two judges of the New South Wales Court of Appeal, Justice Ipp and Justice McColl, Justice Kenny of the Federal Court of Australia, Justice Pagone of the Supreme Court of Victoria, and many other distinguished jurists besides. Associate Professor Bird and Dr Rogers contribute an introduction, which draws many of the main themes together.

The paper by Sir Alan Moses, a justice of the English Court of Appeal, 'The Mask and the Judge' includes an erudite reflection on the use of the mask in theatre. The thesis developed in Sir Alan's paper is that judges must be to some degree formal and aloof in order to carry out most effectively their role:

> Judges diminish the authority which a legal decision requires when they speak without a mask. Without the mask they can no longer be distinguished from any other member of the executive or government; they are deprived of authority. The judge is least himself when he talks in his own person. Give him a mask and he will tell you the truth.

Sir Anthony Mason's contribution analyses judicial decision making, the art of judgment writing and the question of whether and if so, to what extent, the judge represents the community. Justice McColl addresses among other things the constraints on the role of an intermediate appellate court, particularly in the light of the judgment of the High Court in *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89. Justice Ipp considers the maintenance of judicial impartiality. Justice Kenny analyses the views developed by Justice Gaudron in her judgments over the years, particularly in respect of the judicial process and the role and responsibilities of courts and their judges in the pursuit of justice:

> Justice Gaudron's consideration of the judicial process – its features, its importance in the definition of judicial power and its effect on judicial responsibility – is, in my view, her most distinctive and remarkable contribution to the work of the High Court.

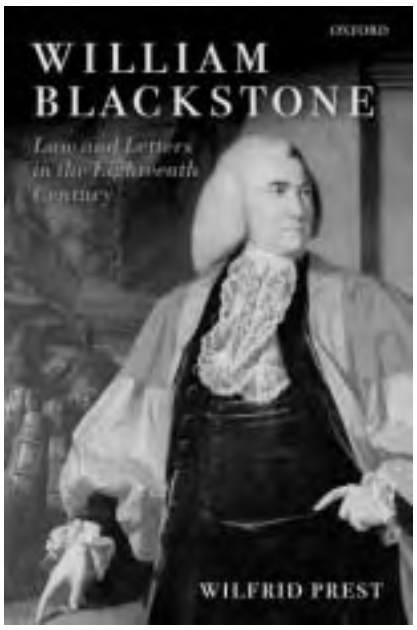
Justice Preston, chief judge of the Land and Environment Court of New South Wales, contributes a paper on the art of judging environmental disputes. Magistrates Jelena Popovic of Victoria and David Heilpern of New South Wales describe their experiences with decision making on the coalface; Magistrate Popovic includes an interesting discussion on the establishment of, and procedures in, the Koori Courts in Victoria.

It is not possible in a short review to refer, let alone do justice, to each of the papers in this volume. Each is different; each merits close attention. *The Art of Judging* is an important and contemporary consideration of the role and function of judges in Australia today.

Reviewed by Jeremy Stoljar

William Blackstone: Law & Letters in the Eighteenth Century

Wilfrid Prest | Oxford University Press | 2008



William Blackstone (1723-1779) is one of those authors who have been truly overshadowed by their work. Most of us probably know little more about him than that he wrote the *Commentaries on the Laws of England*. I was surprised by the dearth of biography, despite the enduring influence of his work around the world, and the breadth of his interests and achievements, over a relatively short life. Mr Prest's book is a welcome examination of the life and times of his subject, during the period of the 'Enlightenment'.

The word used by other reviewers to describe Mr Prest's biography of William Blackstone is 'magisterial' – which is a fitting tribute to this book. Mr Prest's book is meticulously researched, balanced in tone, and eminently readable. If anything, there were a few points at which I wished the author had continued to explore an issue further (e.g., the unusual antipathy that his former student, the philosopher Jeremy Bentham, bore towards him).

Mr Prest's research has been assiduous and lateral, and he has unearthed much new material. I found myself amazed (and more than a little frightened) at what can be revealed by the detritus of a life – from the most obscure and innocuous sources. Mr Prest leaves no stone unturned, and lesser mortals than Blackstone may be resting more peacefully, grateful at having escaped the biographer's gaze.

Blackstone not only lived in interesting times, but he also crossed paths with some interesting people. As you might expect, there are some surprises. At one stage, Blackstone was retained by the leading abolitionist, Granville Sharp, not only for the purpose of appearing in anti-slavery litigation, but also to review successive drafts of his treatise against slavery.

Blackstone was both a barrister and a member of parliament. He was frequently caught up in public controversy and debate, mostly because of the application of the Commentaries *to current political and social issues.*

Part of their correspondence survives. Whether Blackstone was retained because he was sympathetic to the abolitionist cause, or to prevent plantation owners from retaining him, or in an attempt to influence his *Commentaries* on the issue, it seems difficult to say. The successive, and deliberately subtle, amendments that Blackstone made to the *Commentaries* on the issue of slavery are particularly interesting, as is the debate about whether Blackstone made these amendments at the instigation of Lord Mansfield, or any other judge. Incidentally, Blackstone was later a judge in the Court of King's Bench, during Lord Mansfield's long reign as chief justice. How those two lions of the common law got along together, is another of the matters explored in this book.

Readers might also be surprised to learn that, among other things, Blackstone is largely credited with saving scholarly university publishing in England (and, in particular, the Oxford University Press). In addition, Blackstone's role in proposing reform of the penal system (including the transportation of convicts) will hold particular interest for Australian readers. And his contribution to a commentary on Shakespeare's plays (published by Samuel Johnson), is yet a further surprise. Polymath he was.

In the years after Blackstone had published the *Commentaries,* but before he was appointed to the court, Blackstone was both a barrister and a member of parliament. He was frequently caught up in public controversy and debate, mostly because of the application of the *Commentaries* to current political and social issues. However, there was only one occasion when Blackstone responded directly to a published attack on his *Commentaries* – when a young Joseph Priestley (the scientist and theologian), attacked what Blackstone had written in the chapter headed 'Of Offences Against God and Religion'. Their exchange affords an insight into their respective personalities, and the religious controversies of the day.

One of the benefits of a good biography is the opportunity it gives the reader to live the 'examined life', by examining the lives of others. Mr Prest's book allows us to get to know Blackstone closely enough as a person, to form some view of his strengths and weaknesses. Given the passage of time, and the available documents, that alone is a remarkable achievement.

Reviewed by Kylie Day

2008 Great Bar Boat Race

The annual Great Bar Boat Race was held on 22 December 2008, with generous assistance from the sponsor, Thomson Reuters. The following placings are adjusted for handicap.

	YACHT	TYPE OF YACHT	SKIPPER
1	Faoilean	20' gaff rig	Ian Neil SC
2	Yeromais V	21' gaff rig	Ron Solomon
3	Gramarye	Top Hat 25'	Andrew Morrison
4	The Ship of State	Laser	David Patch
5	Y-Worri	Folkboat	Christian Vindin
6	Belle Helena Too	Santana 28	Sam Reuben
7	Ikati	Catalina 34	Peter Frame
8	Felicity J	J 24	James Kearney
9	Blind Justice	Cavalier 28	Phillip Mahony SC
10	Irish Mist	Jeanneau 42	Peter Hennessy SC
11	Antares	5.5m (wooden classic)	Scot Wheelhouse SC
12	Slipstream	36' Sigma Sloop	Robert Buchanan
13	Farrocious	Farr 1220 Sloop	Michael Williams SC
14	St Elmo's Flyer	Jeanneau 36	Richard Royle
15	She	Olsem 40	Mary Walker
16	Fortune of War	Flying Tiger 10M	Adrian Gruzman
17	Another Dilemma	Adams 10	Jim Curtis
18	Reverie	Beneteau 40.7	John Turnbull
19	Rya	Beneteau 40.7	Louise Ferraro
20	Sybiosis	Sydney 36	Andrew Davis
21	Eye Appeal	Sydney 36 CR	Des Kennedy SC
22	Karakoram	Sayer 45	Roger Hamilton
23	Pretty Women	IC 45	Elizabeth Wood
24	Endorfin	SYD47	Peter Mooney
25	Broomstick	Sloop	Michael Cranitch SC

The Lady Bradman Cup

By the narrowest of margins (one wicket), the Eleventh Floor Wentworth XI, known internationally as the Wentworth Wombats, pipped Edmund Barton Chambers in the 19th annual clash for the Lady Bradman Cup in a fixture held on 11 April 2009 at the scenic Bradman Oval in Bowral. Batting first, Edmund Barton amassed 135 with contributions of 30 from Nick Bilinsky (on loan from 12 Wentworth) and Philip Wood (ring-in) with a stodgy contribution from Hodgson of two at the top of the order (dismissed in the 13th over). Wickets were shared by the public law combination of John Griffiths SC and Stephen Free. Griffiths, the bar's new Mitchell Johnson, also starred with the bat, compiling 26 not out in the run chase with contributions from Bell (18) and an invaluable nine in an eighth wicket stand of 25 by Holmes QC who was caught Pulling.

Post match photo at Bradman Oval.

Barristers v Solicitors at I Zingari's Camden ground

NSW Bar XI v Solicitors XI

The once traditional NSW Bar v Solicitors game was revived with a match played at Camden on Sunday, 22 March 2009. Nicholas Bilinsky reports.

The idyllic surroundings of Camden Park, situated on the old Macarthur Stanham property in Camden, provided the perfect bucolic backdrop for a memorable day of cricket with our professional counterparts. The solicitors, drawing on their deep reserves of talent, responded enthusiastically to the invitation to revive this once annual fixture. Likewise, the barristers keenly embraced the challenge and mustered a side boasting a balanced mix of youth and experience.

On a picture perfect day, the solicitors won the toss and chose, without hesitation, to bat first.

It was apparent from the very first that fielding would be tough going in the heat and effort would be required to build pressure and contain runs. A solid opening stand of 39 by the solicitors (Prince/Martin) was tempered by an excellent opening spell of bowling from Eastman and Taylor, who bowled with purpose, pace and accuracy. Both bowlers were frugal and yet also unlucky not to have broken the solicitors' resolute opening partnership.

At the 14th over with the score on 39, Chin and Allen were introduced into the attack. A breakthrough soon followed with Chin, returning from his last-ball heroics against Queensland last year, trapping Martin on the crease LBW. Both bowlers worked well in tandem, bowling with variation and economy. Chin soon had another when Eastman pouched a very sharp chance at short cover to remove Lee.

Drinks were called at the 20 over mark and the barristers had successfully contained the solicitors to 2-56.

In the second stanza of play, the solicitors showed more intent with Prince, Crocker and Schoeffer all making valuable contributions. Bilinsky yorked the defiant Prince for 40 with the score on 86 before Chin claimed another (Crocker), this time stumped to take his figures to 3/30 (9). Spirited bowling and fielding remained a feature of the barristers' play but a strong middle order performance from the solicitors lifted their total to a competitive 6-161 off the allotted 40 overs.

Neil SC bowled 'neck and crop'!

After lunch, the barristers opened up with Steele and Bell SC, who enjoyed a respectable opening stand of 20 against some determined bowling from Heap and Kembrey. After some characteristic fight, Steele (11) unluckily gloved a bouncer through to the keeper, followed soon after by the redoubtable Bell SC, who fell to a smartly disguised slower ball.

Another wicket soon followed and when Allen tickled one through to the keeper, the barristers' batting was looking as exposed as the gentlemen bathers at Lady Jane beach. Score: 4 for 28.

Bilinsky and Roberts (legitimately co-opted into the team as an honorary barrister for his part in the Invincibles Tour of Hong Kong in 2006) then set about the task of rebuilding the barristers' innings. A determined partnership of 79 ensued, helped in part by some erratic bowling from the solicitors' change bowlers.

However, with the equation to win standing at only 5 an over off the last 10, momentum suddenly shifted back in favour of the solicitors. Against the run of play, Bilinsky (20) was caught and bowled attempting to drive the left arm orthodox of Prince, Chin snicked an early offering from Schoeffer and Roberts (40) succumbed trying to hit over the top.

As is often the case, the lower order was subsequently left with the unenviable task of hitting out under increasing pressure. Neil SC and the evergreen Hodgson were nonetheless equal to the task, the former displaying some aggressive strokeplay and the latter some surprisingly fast running between the wickets.

However, when Neil SC attempted one ambitious shot too many [see inset] and Hodgson was caught short of his ground attempting another cheeky single, it appeared that the barristers would likely be 25 runs short of the target.

And yet hope had not entirely dissipated. New recruit, Taylor (14), and the reliable Eastman staged a surprising *volte face*, with some lusty hitting by Taylor in the last over giving the barristers some small chance of snatching victory from the jaws of defeat. Alas, however, it was not to be as Taylor was cleaned up by Heinrich in the last over with 12 runs still needed.

Congratulations must go to the solicitors for a deserved win. Cricket was, of course, the true winner. This was a game played in the best of spirits, competitive but assuredly friendly, and certainly in one of the most picturesque rural settings in Australia.


Opening of Law Term
ST JAMES' CHURCH SYDNEY
SIMON FIELDHOUSE