



## CONTENTS

### Winter 2001

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#### Cover

A portrait of Ian Barker QC, entered in the 2001 Archibald Competition by artist Deny Christian. The artist was previously the winner of the 'Packers' Prize' in 1999.

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Barristers wishing to join the Editorial Committee are invited to write to the Editor indicating the areas in which they are interested in assisting.

Editor's note . . . . .	2
Letters to the Editor . . . . .	3
A message from the President . . . . .	4
Recent developments	
Two recent High Court decisions . . . . .	8
Reinsurance recoveries . . . . .	11
Melway and Boral considered . . . . .	13
Opinion	
Criminal prosecutions . . . . .	20
To specialise or not to specialise? . . . . .	22
Interview	
Paul Daley: 40 years not out . . . . .	24
Bench & Bar Dinner 2001 . . . . .	30
Addresses	
The Hon. Bob Debus MP . . . . .	32
The Hon. Justice D A Ipp . . . . .	37
Justice Ruth Bader Ginsburg . . . . .	41
Features	
Pacific Circuit . . . . .	43
Duty Barrister Scheme . . . . .	45
Tribute	
Jennifer Blackman: A tribute . . . . .	47
Appointments	
The Hon. Justice McClellan . . . . .	48
The Hon. Justice Palmer . . . . .	48
The Hon. Justice Allsop . . . . .	49
The Hon. Justice Stevenson . . . . .	50
Vale	
Bertram Wright QC . . . . .	51
Hugh Robson QC . . . . .	51
The Hon. Russell Bainton QC . . . . .	52
Patrick Costello . . . . .	53
Michael Errington . . . . .	55
Mariusz Podleska . . . . .	55
John Evans . . . . .	54
Book reviews . . . . .	57
Sporting Bar	
Lady Bradman Club Cricket . . . . .	60

It is no understatement to say that the New South Wales Bar has undergone difficult times recently. In his interview in this edition, clerk Paul Daley describes morale around the Bar as being at its lowest ebb at present. Many members, however, have praised the President, Ruth McColl S.C., for the manner in which she is leading the Bar through these difficult times. It should also be noted that members of the Bar are making a special contribution to dealing with the present difficulties and setting the Bar on a firmer footing. For example, the Professional Indemnity Committee, led by Tony Meagher S.C., (together with James Allsop S.C., prior to his appointment to the Bench) has worked very hard to restore a market, and indeed a competitive market, with insurers for the New South Wales Bar. Under the leadership of Bernie Coles QC, PCC#5 has been dealing with the notifications required by the recent regulation. Anna Katzmann S.C. and Brian Ferrari have worked tirelessly to persuade the Government and the media of the very serious problems with the proposed new workers compensation legislation.

There are other initiatives which should be noted. The BarCare scheme has now been established and members have been circulated with the names of the BarCare counsellors. The Indigenous Barristers Trust is close to being established. The trust deed has been settled and the Association is awaiting approval from the Australian Taxation Office to ensure donations will be tax deductible. The Trust will incorporate the capital of a fund set up to honour the memory of Shirley Smith ('Mum Shirl'), who was known to many members of the Bench and Bar as a tireless worker for the welfare of Aboriginal people, particularly those facing the criminal justice system. The silks of 2000 will make a substantial gift to the fund.

In addition, a full day meeting was held of some 45 representatives of the Bar on 26 May 2001, being members of the Bar Council and heads or representatives from the various committees, sections and regions, to discuss future issues facing the Bar. Particular matters discussed included continuing professional development, practice management, limitation of liability and the services provided by the Bar Association. Proposals will be put before members shortly.

Leaving aside negative and often unfair publicity received by the Bar recently, there remains a legitimate expectation by the Government and the community

generally that the Bar will provide the highest quality professional services in respect to advocacy and dispute resolution, and that the Bar will constructively engage in a dialogue for an improvement in the delivery of legal services.

A number of questions arise which require the Bar's attention, including:

- how the balance is altering, or should alter, between oral and written advocacy;
- the extent to which it is proper to put time limits on cross-examination or oral address;
- how the Bar can better ensure that its services, particularly in relation to chamber work and advices, are provided on time to meet the needs of solicitors and clients;
- what is the role of the Bar when governments at all levels are increasingly taking matters away from the courts and placing them before tribunals;
- how the Bar can be flexible in terms of providing services in growth areas (e.g. insolvency, administrative law, or alternative dispute resolution) when traditional areas of work are declining; and
- what are the proper standards to be followed by barristers in areas such as practice management, business administration and risk management?

These are some of the questions which the Bar Association and the Bar Council are addressing. However, all members are encouraged to give their attention to these issues and other possible areas of reform. Any contributions to this journal on such matters would be warmly welcomed.

Some of the matters included in the previous edition of this journal have provoked comment or follow up. **Bill Walsh** wrote of the difficulties for country towns with the abolition of District Court sittings. This problem received further attention in the Legislative Assembly on 6 June when the Member for Lachlan, The Hon. Ian Armstrong MP OBE, drew attention to the recent press release by the Chief Judge of the District Court indicating there would be no sittings of that court in Cootamundra for the first six months of 2002. Mr Armstrong noted that this announcement caused major upset amongst the legal fraternity, local government and the broader community of Cootamundra. He said that District Court sittings are a boost to the local community as a whole, as an indication that the community is recognised as a viable and important one. Mr Colin Markham MP, the Parliamentary Secretary and Member for Wollongong, indicated that he tended

to agree with Mr Armstrong and that he would bring the matter to the Attorney General's attention.

The last issue also included an article by **Glenn Bartley** expressing the view that the sexual assault communications privilege was under siege. **Phillip Priest QC** has written a critical letter in response.

The last issue also included the address given by **Ellicott QC** at the dinner to celebrate his 50 years at the Bar. That address included some rather critical comment on certain aspects of the role of Malcolm Fraser as prime minister in relation to the Sankey proceeding. Mr Fraser has indicated to *Bar News* his concern at the inaccuracy of some of Ellicott QC's comments. Mr Fraser has been offered a right of reply.

The present issue includes a shortened version of the paper delivered by **Robertson Wright** and **Michelle Painter** at a recent meeting of the Trade Practices Section of the New South Wales Bar. It is hoped that

members will continue to contribute to the ongoing legal development of the whole Bar by delivery of such papers and allowing them to be published in this journal.

For those members, like the editor, for whom the notion of a country circuit is a strange and rare beast, considerable enlightenment is provided by the article in this issue from **Stephen Stanton** concerning his years of practice in the Pacific Islands. Members should also be interested in **Rena Sofroniou's** interview with **Paul Daley** which gives insight into his extraordinary success as a clerk over 40 years at the Bar.

*Justin Gleeson S.C.*

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## LETTERS TO THE EDITOR

Dear Sir,

Several aspects of Glenn Bartley's article in Summer 2000/2001 *Bar News* ('Sexual assault communications privilege under siege') require comment. He wrote:

A common criticism of the privilege, encountered by the author, is that it would prevent disclosure of a counselling note revealing that the complaint of sexual assault was 'recovered memory', which arose after hypnotherapy. However, these cases do not occur often and in nearly all of them there is other evidence of hypnotherapy having led to a recovered memory.

The first thing to note is the tacitly expressed suggestion that cases of recovered memory occur only where hypnotherapy has been employed. This is not so. Research has demonstrated that false memories are relatively easy to create in the course of therapy or counselling, without the need for hypnotherapy or similar techniques.

Secondly, the assertion that 'these cases do not occur often' is highly questionable. No evidence is offered in support of this statement. In my experience, the recovery of repressed memories of sexual abuse (or the creation of false memories of abuse) is all too common.

Thirdly, the suggestion that 'in nearly all of them there is other evidence of hypnotherapy having led to a recovered memory' does not accord with the experience of those who regularly practise in the area of sexual assault. Indeed, other than a client's denials, often the only objective evidence one has available that memories are, or might be, false, are the notes of counsellors produced in obedience to a subpoena. I have had personal experience of several cases where the first clue that memories may have been the product of 'therapy' came from the therapists' notes. There is no doubt in my mind that, in a number of cases in which I have been involved, potential miscarriages of justice were avoided by access to

therapists' notes and other records. (My experience has been in Victoria, although I doubt NSW is any different.)

As a counter to the Bar Association's submission, Glenn Bartley somewhat emotively asks:

How many tens of thousands of innocent sexual assault victims deterred from reporting the crimes committed against them or from maintaining their complaints, or traumatically humiliated in court, are sufficient to justify the legislation?

Again, two things ought to be noticed.

First, the statement seems to assume that innocent victim will be deterred from complaining by the legislation permitting access to records. Experience seems to suggest, however, that if anything, it is the curial process itself which may act as a deterrent to some victims.

Secondly, the implied suggestion is that tens of thousands of putative victims may be deterred from bringing or maintaining complaints as a result of the legislation. The extravagance of this assertion is manifest.

If innocent men are to avoid wrongful conviction and punishment (and make no mistake, it is principally fathers and grandfathers who are accused after repressed memory is 'recovered'), then further restriction upon access to counsellors' records is undesirable.

Yours sincerely,  
Phillip Priest QC  
20 April 2001

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# The law, politics and the media\*



Ruth McColl S.C.

The Attorney General of NSW recently described the relationship between the law, the media and politics as ‘the Devil’s Triangle’<sup>1</sup> - an allusion to the Bermuda Triangle and the lost souls who are said to have perished there in mysterious circumstances. While spoken in some jest, there are times when we know the media believe the law moves in mysterious ways. Equally there are times when lawyers believe the media moves in ways antipathetic to a lawyer’s world vision. And, further, there are times when politicians, no doubt, wish neither lawyers nor the media were there to plague them so they could get on with the business of government without having to reconcile the often conflicting influences of either.

The essential propositions that I wish to examine are:

- Do any or all of the three arms of government have any obligation to ensure the media is well equipped to report their activities accurately and, if so, do they discharge that duty?

- On the assumption that it is accepted that the media’s duty is to respect the truth and the public’s right to information and that that duty should be discharged in an honest, fair and accurate manner, does the fourth estate discharge that duty?

- If no to any of the above, who is failing in their duty and how should the position be redressed?

What I am concerned to examine, too, is the question of whether, as ‘news values become more narrow, more sensational and more trivialised’<sup>2</sup>, we increasingly run the risk that the public’s perception of government and the law will become distorted and shallow. While this is a problem for all levels of government, it is an acute problem for the rule of law if governments develop a knee-jerk reaction to law making shaped by the level of outcry manifested through the media. Media perspectives of sentencing do not necessarily reflect that of an informed public – yet there are increasing signs of political responses

to public outcry rather than calm deliberation and consultation.

It is critical in examining the questions I have posed to keep the following fundamentals firmly in mind:

- Politicians are elected, they conduct much of their business in public through parliamentary debate and they are answerable to the electorate on a regular basis.

- Lawyers are educated in the law. Judges conduct their business in public, they are protected by the principle of judicial independence and prima facie can only be removed by a joint sitting of both houses of parliament for ‘proved misbehaviour or incapacity’.<sup>3</sup> Save for the High Court, they are answerable to appellate review. Anyone can read and comment on their judgments.

- Few know the credentials of journalists. While their writings appear in public they can only criticised in the same forum if the editor of the day sees fit and even then the criticism will usually be

subject to length restrictions. Further, journalists are answerable primarily to their proprietors. Subject to the laws of defamation and contempt, they revel in a system of self-regulation which, if it applied to any other profession, would provoke a press outcry about self-interest.

Despite controversies about disclosing the source of political funding, politicians, by and large, have to disclose the substantial influences upon them. Judges, too have to refuse to sit in cases where a connection with a party or some other substantial matter might be perceived to influence their ability to deliver an impartial decision. But where is there any requirement that journalists disclose all matters which might be seen to affect their ability to be fair and impartial? Is such a concept possible in a world governed by ratings and subscription rates?

As the Media Entertainment Arts Alliance (‘MEAA’) has observed:

A journalist was once defined (by Peter Ustinov) as someone who invents a story and then lures the truth toward it. Anyone who has worked for long in the

‘The media would reject as an unfair constraint on the freedom of the press the modes of regulation which it advocates for members of the legal profession.’

\* An edited version of the address delivered by Ruth McColl S.C. to The Sydney Institute on 12 June 2001.

[journalist] profession, if they are being scrupulously honest, concedes that there is at least a grain of truth in that observation. Journalists exploring a story 'lead' are anxious - indeed, often under pressure - for that 'lead' to bear fruit. They may consciously or unconsciously close their minds to an area of inquiry that could shoot down the story idea. Or, more commonly, they may not make sufficient inquiries to justify the sweep of the stories (especially the intros) they write. Such stories often involve exaggeration or a wrong or misplaced emphasis, rather than blatant errors of fact. The third way of summing up the journalist's ethical failing in such circumstances would be to say: 'they didn't set out to get it wrong, but they didn't do enough to get it right.'

### Media reports of sentencing

It is undoubtedly true that the substantial publicity which accompanied media scrutiny of the mandatory sentencing regime operating in the Northern Territory led to some, albeit slight, amelioration of the mandatory sentencing provisions. The provisions had, however, been in force since amendments to the *Sentencing Act 1995* (NT) which had been passed in March 1997. Those provisions had been criticised soon after the amendments by the Full Court of the Supreme Court of the Northern Territory in *Trenerry v Bradley*.<sup>5</sup> Two members of that Court (Angel and Mildren JJ) described the mandatory sentencing provisions as leading to unjust sentences. In the same year, the Australian Law Reform Commission and the Human Rights Equal Opportunity Commission published a report which concluded that the mandatory sentencing provisions breached the United Nations Convention on the Rights of Children. The Northern Territory Bar Association, Australian Women Lawyers and the Law Council of Australia all expressed their concerns about the injustice of the legislation in letters to the Northern Territory and Commonwealth attorneys general as well as in media releases. None of this attracted any significant political response, let alone any media exposure of note. Once the media was activated and the public debate generated, there is little doubt the public furore which was generated produced results. But what does it tell us that it was not until a youth had committed suicide that the whole issue was apparently regarded as interesting enough for substantial media attention and a political reaction?

Or take a more general example. At least once a week a headline in one or more newspapers will report the latest judicial perfidy in what is said to be a grossly disproportionate sentence. Such criticism is not new - but nor is it fair. However distasteful this proposition may be to some members of the media, let alone the public, a true system of justice must be fair to all and that fairness encompasses consideration of the 'rights' of the offender. We have long since departed from a system of law which accorded the offender no rights. Moreover research tells us that a public which is fully informed about the circumstances of a case is likely substantially to support the sentence imposed or to believe it is far less lenient than if asked general questions.<sup>6</sup>

What is the answer to this conundrum? It is

certainly not to cease publishing reports of judicial proceedings. Such reports play a very important role in maintaining public confidence in the rule of law. But that public confidence will not be retained by reports which contain no, or no adequate, analysis of the detail which the court has to consider in coming to its decision on sentence.

### What have the courts done?

Some may think that the answer lies in the courts providing summaries of the key components of, in particular, their sentencing decisions with the media accepting a correlative burden to include in any report of that judgment the critical components.

The courts have not yet acceded in all cases to a practice of distributing judgment summaries at the time judgments are delivered. That practice has become more frequent - particularly in the case of judgments concerning matters of great controversy. Thus Justice Wilcox's judgment in *Patrick Stevedores* was broadcast on television and radio as, too, more recently, was Justice Finn's decision in the *South Sydney v News Limited*<sup>7</sup> litigation. The Federal Court has decided as a matter of policy to release judgment summaries in matters of public interest. The High Court issued a summary of its orders and the effect of those orders in *Patrick Stevedores Operations Number 2 Pty Limited v. Maritime Union of Australia*.<sup>8</sup> That summary undoubtedly assisted media outlets in reporting the decision.

Regrettably, to date, the preparation and distribution of such a summary has not become the usual approach. Nevertheless, even these, albeit so far small, steps demonstrate the courts' willingness to recognise that it is necessary to make decisions more accessible to the public - there is little indication, however, that the media accepts any correlative responsibility on its part to report decisions accurately. What are the checks and balances which regulate the media in this respect? Are the media conscious of the effect their work may have on larger issues concerning respect for society's institutions or do they care only for the latest by-line and the most sensational headline that can be produced? Do they care whether or not they produce an accurate and unbiased report? For those involved at the coalface of interaction with the media, these questions do not permit of a simple answer.

### What has Parliament done?

Venial as much criminal conduct is, it is time journalists recognised that one of the functions of the criminal law is to satisfy the public and the victim's desire for revenge. Once the sentence is served the perpetrator has discharged their debt to society and should be free to go about their business. But public pressure, whipped up increasingly, it seems, by the media, is leading to politicians engaging in what might fairly be described as 'knee jerk' legislation so that they may



be seen to be responding to the perceived public clamour for tougher measures.

The prime example of this in recent times was the legislation struck down by the High Court in *Kable v. The Director of Public Prosecutions*.<sup>10</sup> The unashamed and transparent purpose of the *Community Protection Act 1994* (NSW) considered in that case was to require 'the Supreme Court [of NSW] to inflict punishment without any anterior finding of criminal guilt by application of the law to past events.'<sup>11</sup> The legislation was passed in an atmosphere of significant community concern about the potential for Mr Kable to commit further acts of violence – yet it was a response which the High Court found to be unconstitutional and, in the words of one justice, 'repugnant to the judicial process.'<sup>12</sup> At the time the legislation was introduced, it was widely supported by the media, and few members of the public appeared to have an understanding of the fundamental threat to all our liberties.

More recently, we heard the NSW Premier speaking of legislation that would 'cement into their cells' nine murderers. Again one might argue that such legislation would appear to be repugnant to fundamental liberties. On this occasion even some members of the media had problems with the proposal – the *Sydney Morning Herald* editorial that dealt with it did not endorse it and legal commentators have pointed out such laws are not just harsh and discriminatory, but unprincipled, *ad hominem* and bad law. They are inconsistent with the fundamental sentencing principle that all sentences should be imposed in public by a court of law.

Other media proclaimed the merits of the legislation in emphatic terms – it was widely seen as satisfying a public perception that certain offenders never be released. Indeed, it was expressed in terms of applying to offenders of whom those words had been used at the time of sentence – even though, when they were used, those words had no legal effect. Chief Justice Gleeson, when he was chief justice of this State, expressed the view that such remarks should not have been made.

The legislation lottery which can be generated when politicians perceive there to be an increasing call for harsh penalties can be seen by the NSW Opposition's response. Even though the Premier's proposal was in terms very similar to the legislation on the same topic proposed by the Opposition in mid 2000, the Opposition's response, apparently to 'one-up' the Government's proposal, was to say it would introduce legislation which denied prisoners the right to seek parole.

### **What has the media done?**

In the face of increasing accessibility by the media to the judicial process, how does the media respond? The principle that the media should report fairly and with accuracy is seen, by some, to be overshadowed by the media imperative to increase ratings (in the case of the electronic media) and to sell more newspapers (in the case of the print

media). The media calls constantly for the judiciary and the legal profession to be accountable. There is no doubt that both are, in most cases these days, through parliamentary convention, statutes in the case of judges or through legislation disciplining lawyers in the case of the legal profession. The media, however, regulates itself. It would reject as an unfair constraint on the freedom of the press the modes of regulation which it advocates for members of the legal profession.

Many journalists take the position that the existing 'regulation' of their work through the laws of defamation and contempt impose sufficient restraints on their conduct to compel them to discharge their duties appropriately. But do they? The litany of correspondence which is published in the 'letters to the editors' pages indicates many complaints about the accuracy of the media's reporting. Often the complaint is, no doubt, satisfied by the publication of the letter, but where wider issues are at stake, for example the failure to present, adequately or at all, one side of a debate, there is no real remedy.

Journalists themselves question their ability to abide by their own code of ethics. The MEAA points out that journalists' ability to observe a responsibility to be ethical and accountable suffers from the fact that most journalists are employees... are subject to direction or 'heavy expectation', or feel themselves so. They do not always control the end product of their work as published or broadcast...managements will be crucial to the development of a 'culture of compliance' with ethical standards.'

Paragraph 8 of the AJA Code of Ethics requires journalists to:

Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice.

Despite this paragraph, time and again we have seen the Australian media using hidden cameras to obtain 'stories' which the media thinks worthy of publication. Just recently, a camera was taken into Ray Williams' house concealed in a briefcase. The justification for this was said to be the public's right to see how the Williams family was living in contrast to those who had fallen into economic misfortune as a result of the collapse of HIH. The unstated premise in all of this was a good illustration of the flawed reasoning which frequently seems to underline such exposes. The process appears to proceed somewhat along the following lines:

- There is a victim.
- The person responsible for the 'victim's condition' can be identified.
- Because there is a 'victim', the 'responsible' person must have done something wrong.
- It is appropriate for the media, especially the electronic media, to use means, including subterfuge, to expose the [media] identified wrongdoing.

## An external system of regulation?

Such frank criticism from the journalists' own organisation calls for a response. If journalists cannot regulate themselves, is the answer an external system of regulation? The response of various media bodies to this suggestion raises the spectre that too close a system of external regulation threatens the fundamental freedom of the press.

At present, the principal body which plays an extra-curial role in regulating the press is the Australian Press Council. This, it might be noted, is a self-regulatory body established and funded by the print media. Its power in relation to the receipt and determination of complaints is that which is given to it by the media which established it.

The Press Council has argued that the establishment of a statutory body to play a role in the regulation of the media would:

bring the status of the print media in this country closer to that in countries where there is no freedom of the press. In particular, it would place Australia at risk of being classed amongst those countries where the expression of critical opinion by the press may attract political or economic sanctions.<sup>14</sup>

The MEAA points out that journalists oppose licensing, and for good reason, because the history of the struggle for freedom of the press is in large part the struggle against licensing. Journalists, it is said, claim no 'exclusive right to perform particular functions' in the way that lawyers and doctors do.<sup>15</sup> This begs the question.

As we are all aware, journalists' daily writings have an extraordinary ability in the global village to influence events and individuals. Their publications can lead to vigilantism. Witness the recent events in England when a newspaper decided to publish the lists of convicted paedophiles and innocent people mistakenly identified as the guilty were subjected to gross physical abuse and harassment. The newspaper's conduct was widely condemned. And would it have been any less worthy of condemnation if those abused had been properly identified?

## Is there an answer?

I would argue that at the very least the media's reporting of legal issues could be much improved if that reporting was assigned to journalists with some legal qualifications. Time and again journalists' reporting of court proceedings bears little resemblance to what happened – a point remarked upon by jurors surveyed recently by Professor Chesterman.

Secondly, journalists should be required to include in sentencing reports a summary of the key factors influencing the sentence as indicated by the judge delivering the sentence.

Thirdly, in this media age, rather than limiting responses to what appears in the printed page, articles about substantial legal issues should give hyper-links to source materials exploring the issue as well as to electronic accounts of responses which space did not permit to be reproduced in the print version.

Finally, all journalists should have to subscribe to a minimum code of journalists' ethics. Regulation of this code should, at least for the time being, remain with journalists themselves – a position which should be kept under review.

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- 1 Speech at the NSW Bench and Bar Dinner, 18 May 2001, reproduced in this issue at p.32.
  - 2 Curran and Seaton, *Power without responsibility: The press and broadcasting in Britain*, 5th ed, (London, Routledge, 1997), p.1.
  - 3 In New South Wales, they are also subject to the *Judicial Officers Act 1986* – see esp. ss29, 41; see also s53 of the *Constitution Act 1902*.
  - 4 MEAA, *Ethics Review Committee final report*, November 1996.
  - 5 (1997) 15 NTR 1.
  - 6 'What works with South Australian newspapers?' Current issues in Criminal Justice, Volume 12, Number 2 at 228.
  - 7 Ibid., at 230.
  - 8 (2000) 177 ALR 611.
  - 9 Address by Black CJ reprinted in 1998 *UTS Law Review*, p.9.
  - 10 (1998) 195 CLR 1.
  - 11 (1996) 189 CLR 51.
  - 12 Ibid, per Gummow J at 134.
  - 13 Ibid.
  - 14 MEAA, *Ethics Review Committee Final Report*, November 1996 – Introduction.
  - 15 Australian Press Council, Second supplementary submission to the Senate Select Committee on Information Technologies on its inquiry into self regulation in the information and communication industries, at para 2.
  - 16 MEAA, op. cit., chapter 1.

# *FAI General Insurance Company Limited v Australian Hospital Care Pty Limited*

By Justin Gleeson S.C.

On 27 June 2001 the High Court delivered judgment in *FAI General Insurance Company Limited v Australian Hospital Care Pty Limited*. The Court by majority of 4 - 1 (Gleeson CJ dissenting) dismissed the appeal. The case concerned the application of s54 of the *Insurance Contracts Act 1984* (Cth) to a situation where the insured had, during the period of the insurance, become aware of circumstances likely to give rise to a claim. The insured failed to exercise the right available to it under the policy to give written notice to the insurer of the occurrence. The policy provided that, if such notice be given, any subsequent claim in respect to that occurrence would be deemed to have been made during the subsistence of a policy. The actual claim by the third party was not made until after the policy year.

In accordance with the decision of the New South Wales Court of Appeal in *FAI Insurance v Perry*, s54 would have no application to these circumstances. The insured would fail to obtain indemnity because the policy responded only to claims made during the policy period or claims deemed to be made during that period and in the present circumstance there was neither. Gleeson CJ, who sat in *FAI v Perry*, adhered to his views in this case.

However, the majority rejected the reasoning in *Perry* and held that s54 applied to this circumstance. The majority also rejected the reasoning of the New South Wales Court of Appeal in the decision of *Greentree v FAI General Insurance Co Limited* and of Hodgson CJ in Eq in *Permanent Trustee Australia v FAI General Insurance Co Limited*, although agreed with the results in those two cases.

As the law is now stated, three situations may be distinguished:

(1) where the insured has no knowledge of circumstances which might give rise to a claim during the policy period (and so has nothing to notify) and the third party claim is not made until after the period expires: the insurer may refuse to pay the claim and s54 has no application. The reason for the insurer's refusal is that the policy did not extend to a third party demand of the type referred to in the claim for indemnity. The reason for refusal is not some act or omission on the part of the insured or some other person within s54;

(2) where the third party makes the demand on the insured during the period of cover but for whatever reason the insured does not notify the insurer of that

demand until after cover expires, s54 applies. The insurer may refuse to pay the insured's claim only by reason of the insured's failure to notify the fact of demand during the policy period, so s54 has its relieving operation;

(3) where the insured becomes aware of the occurrence during the policy period, fails to notify it to the insurer during that period and the claim is not made until after the policy period, again s54 applies. The effect of the contract of insurance, but for s54, is that the insurer may refuse to pay the claim by reason only of the omission of the insured to notify the occurrence. This brings the case within s54.

Where s54 applies, the insurer may still be able to reduce its indemnity if it can point to prejudice from the act or omission. However, the insurer could point to no prejudice arising in this case from the failure by the insured to notify the occurrence during the policy period and so the insured recovered full indemnity.

A difficulty with s54 as so applied by the High Court is that an insured with notice of circumstances likely to give rise to a claim might choose not to notify the insurer prior to expiry of the policy period in order to obtain a 'clean' renewal from that insurer or to present a clean record to an alternative insurer, thereby obtaining a lower premium. The insurer is prejudiced in its rating of the risk on renewal. It may or may not be that this prejudice can be compensated for under s54. If the third party claim is subsequently made, the insured may then seek to recover indemnity under both policies, in the prior year relying upon s54 and in the subsequent year relying directly upon the words of the claims made policy. The insurer in the later year may invoke non-disclosure but under s28 will need to prove its prejudice from not having the circumstance notified. Dual insurance lurks as a possibility. Multiple policies may need to be pleaded and debated at trial.



# Brodie v Singleton Shire Council

By Justin Gleeson S.C.

On 31 May 2001 the High Court delivered judgment in *Brodie v Singleton Shire Council* and in the related matter of *Ghantous v Hawkesbury City Council*.

In these cases, the High Court by a majority of 4-3 (Gleeson CJ, Hayne and Callinan JJ dissenting) overturned what was known as the highway rule. Under that rule, a public authority, responsible for the care and management of a highway, when sued by a road user who suffers damage to personal property in consequence of the condition of the highway, may be liable for a negligent act of misfeasance, but is not liable for non-feasance.

The highway rule was originally developed by English Courts and declared for Australia by decisions of High Court in *Buckle v Bayswater Road Board* in 1936 and *Gorringe v The Transport Commission (Tas)* in 1950.

In the joint judgment of Gaudron, McHugh and Gummow JJ (with which Kirby J generally agreed) the following considerations were identified as requiring a change in the law:

(a) in other common law jurisdictions the highway rule has either been abolished or is of doubtful status. It has been overtaken by common law in Canada and most parts of the United States. Its status is doubtful in New Zealand. In England it was abolished by statute in 1961;

(b) the cases have either applied or circumvented the highway rule in a manner which has given rise to unprincipled distinctions;

(c) the distinction between misfeasance and non-feasance is itself artificial and of diminishing importance in other areas of the law of negligence;

(d) the highway rule created an immunity to action in respect of rights and duties which otherwise exist in the law. It is an immunity in the same sense as the immunity of the barrister, upheld in *Giannarelli v Wraith*, which assumes an obligation to exercise reasonable care and skill but sustains the immunity on considerations of public policy. Because the English origins from which the immunity was originally derived provide no reason for its continuance in Australia, the Court should focus squarely on whether there are sufficient reasons of public policy today for denying a remedy against the defendant councils if an action would otherwise lie against them in negligence;

(e) it is the law in Australia following the High

Court decisions in *Sutherland Shire Council v Heyman*, *Pyrenees Shire Council v Day*, *Romeo v Conservation Commission* (NT) and *Crimmins v Stevedoring Industry Finance Committee* that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the personal property of the citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. The factor of control is of fundamental importance;

(f) the decisions in *Buckle* and *Gorringe* were not strong candidates in support of the system of stare decisis. *Buckle* had ignored the earlier decision of the High Court in *Miller v McKeon*. There was a difference between the reasons of the Justices constituting the majority in *Buckle*. In *Gorringe* no square challenge was raised to the decision in *Buckle*. The decisions have produced unacceptable difficulties and uncertainties about the content of the highway rule. Further, the reasoning of Latham CJ and Dixon J in *Buckle* was heavily influenced by a blending of the principles of nuisance, negligence and breach of statutory duty in a way which has been overtaken in other areas of the law. The time has now come to treat public nuisance, in its application to highway cases, as absorbed by the ordinary principles of negligence.

Accordingly, under the joint judgment, the law may now be stated that authorities having statutory duties to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of, or failure to exercise, those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the

presence of latent dangers which might reasonably be suspected to exist: para 150.

Gleeson CJ delivered a powerful dissent to the effect that reform of the rule should be left to Parliament. This was particularly so when Parliaments had acted on the faith of the rule in conferring powers and responsibilities on public authorities and Parliament in New South Wales had expressly taken up the rule and extended its application to a particular public authority. To abolish the rule would require an investigation of the financial consequences which had not been done and could not be done in the High Court. It was a step which the Law Reform Commission had advised the New South Wales Parliament to take subject to qualifications and Parliament had not done so: paras 42 – 46.

Hayne J adopted the view that a public authority owes a duty to take reasonable care in the exercise of its powers but is generally not liable for their non-exercise: paras 327 – 334. Callinan J also dissented: paras 362 – 5.

The following may be noted about the judgment, from the position of counsel:

(1) a claim by a road user against an authority responsible for the construction or maintenance of the road should be pleaded by way of allegations of material facts giving rise to a duty of care, breach of duty and damage in accordance with the ordinary principles of negligence. An alternative count in nuisance may be included for caution;

(2) the facts which will need to be pleaded to give rise to the duty of care will commonly be those identified in para 150 of the joint judgment referred to above. The crucial factor will be the element of control exercised by the authority over the condition of the highway and thus the safety of those using it;

(3) in determining whether there is a breach of duty, the Court will consider the classic balancing exercise identified by Mason J in *Wyong Shire Council v Shirt*, i.e. the magnitude of the risk, the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps identified as necessary to alleviate the danger and any competing or conflicting responsibilities or commitments of the authority: para 151;

(4) this renders admissible evidence respecting funding constraints and competing priorities for the public authority (joint judgment para 104). This in turn opens up a broad ambit of discovery of documents in the proceedings.

The judgment is also interesting for indicating the approach of the current High Court to reformulation of the common law. The joint judgment illustrates the type of reasoning which might be employed to produce a change in the law.

A caution should also be sounded. The courts below were bound by the previous law. The plaintiff had signalled in its pleading a challenge to that law. The defendants did not call evidence to indicate the costs which would have been incurred in satisfying

the alleged duty or evidence as to competing financial responsibilities. The High Court did not award a new trial, ruling that each party had a sufficient opportunity to present its case at trial: paras 180 – 182, 190 – 191 and 240. If counsel is conducting a case in an area where a challenge to High Court or intermediate appellate authority has been flagged, it is thus necessary to lead or attempt to lead the evidence which might be relevant only if the law is subsequently altered at appellate level.

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# Reinsurance recoveries on an insurer insolvency: who gets to share?

By John Kernick

Reinsurance recoveries are likely to figure prominently in any assessment of the funds likely to be available for distribution to insurance creditors of the HIH group. As at the time of writing, HIH companies were in provisional liquidation and no decision had been made as to whether to proceed to a winding up or a scheme of arrangement. In either case, reinsurance recoveries are likely to be dealt with in accordance with s526A of the *Corporations Law*, which makes specific provision for the application of proceeds of contracts of reinsurance in a winding up.

S562A was introduced by the *Corporate Law Reform Act 1992* (Cth) to deal specifically with reinsurance recoveries in the liquidation of an insurance company. The provision was considered by Young J (as his Honour then was) in *Butterell v Douglas Group Pty Ltd* (2000) 35 ACSR 398 in the context of the winding up of a mutual insurance venture, Consulting Engineers Advancement Society of Australia Ltd (CEASA).

S562A provides that where the reinsurance recoveries equal or exceed the amounts payable under relevant insurance policies, the recoveries are applied to pay those claims. Where there is a shortfall, the recoveries are to be applied to claims proportionately according to a formula set out in the section, subject to an overriding court discretion for the proceeds to be applied differently. A non-exhaustive list of matters to be considered in the exercise of the discretion is set out in the section.

Prior to the commencement of s562A of the *Corporations Law* in 1993, reinsurance recoveries by the liquidator of an insurance company were treated in accordance with a priority provision applicable to companies generally in relation to liability insurance claims. This is to the effect that where a company goes into liquidation having a liability against which it is insured, the proceeds of the insurance claim received by a liquidator go to the third party claimant as a priority: s562, *Corporations Law*.

That provision has its origins in the UK *Third Parties (Rights Against Insurers) Act 1930* following the decision in *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105. In *Harrington* the applicant had obtained judgment against the company for damages for personal injuries, but the company went into liquidation before execution could be

levied. The company's insurer paid the damages and costs to the liquidator. It was held that the applicant had no right at law or in equity against the insurer and that he could prove only as a general creditor in the winding up, with the sum recovered by the liquidator from the insurer forming part of the assets of the company.

In Australia, the uniform *Companies Act 1961*, following a comparable provision in the NSW *Companies Act 1936*, made provision for receipts by a liquidator under a contract of insurance to be paid to the person to whom the company was liable in priority to all other debts: s292(5). Unlike the UK legislation, the provisions in the *Companies Acts* did not purport to exclude reinsurance contracts from their operation. Accordingly, Needham J, in *Re Dominion Insurance Co of Australia Ltd* [1980] 1 NSWLR 271, held that the uniform *Companies Act* provision applied equally to reinsurance recoveries where the company in liquidation was an insurance company.

The uniform *Companies Act* provision was re-enacted as s447 of the *Companies Code* and s562 of the *Corporations Law*. Difficulties arose however in relation to the application of the provision to reinsurance recoveries by reason of, among other things, the structure of reinsurance arrangements and the impossibility in many cases of attributing particular recoveries to individual claims: see *Saltergate Insurance Co Ltd (No 2)* [1984] 3 NSWLR 389; *Re Palmdale Insurance Ltd (in liq)* (No 3) [1986] VR 439; and discussion in *Australian Law Reform Commission Report No 45, General Insolvency* (the 'Harmer Report') Vol 1, at pars 759-764. In the event, s562 was amended by the *Corporate Law Reform Act 1992* to exclude reinsurance from its operation and s562A was inserted to deal specifically with reinsurance recoveries.

In *Butterell v Douglas Group Pty Ltd* (2000) 35 ACSR 398 CEASA had excess of loss reinsurance for claims over \$350,000. It was to meet claims up to this amount from its own funds and the reinsurance would cut in above this level.

In the liquidation there were outstanding claims both within the retained limit of \$350,000 and exceeding that amount so as to trigger the reinsurance cover. The question in the liquidation was how the reinsurance recoveries should be

allocated as between the different classes of claimants. The choice posed by Young J was whether the recoveries should:

a) form a pool of funds for all insurance creditors, whether or not their claims exceeded \$350,000;

b) form a pool of funds for the benefit of only those insurance creditors of CEASA whose claims exceeded \$350,000;

c) be distributed only in respect of those claims for which the liquidator received a reinsurance payment;

d) form a separate pool of funds in respect of each policy year for the benefit of those insurance creditors whose claims exceeded \$350,000 and were notified within that policy year.

It was conceded that only claims exceeding \$350,000 should benefit from the recoveries and Young J held that the intent of the legislation was to apply net payments received from a particular year proportionately to claimants in that year, taking account of the size of the claim according to the statutory formula. There is accordingly a strong argument for any reinsurance HIH has that is similarly structured to be dealt with in a comparable way.

HIH is said to have considerable assets and liabilities in overseas jurisdictions, most notably the UK and the USA, and if a viable scheme of arrangement cannot be put into effect internationally, ancillary liquidations can be expected in relevant jurisdictions to deal with local assets and liabilities. In relation to reinsurance recoveries, under UK law these will generally go into the pool of funds available to general creditors in accordance with the principle applied in *Harrington*. In the US, provision is made in most States to give effect to 'cut through' provisions in reinsurance contracts that provide for payments to be made by the reinsurer directly to an insured where the intervening insurance company goes into liquidation.

Also at the time of writing, the full details of government rescue packages had not been finalised, although in NSW standing legislative arrangements exist under the *Workers Compensation Act 1987* and the *Motor Accidents Compensation Act 1999* to deal with insurer insolvencies involving liabilities under those Acts. They provide a possible approach to structuring relevant aspects of other measures to meet liabilities of the insurer in a way that avoids jeopardizing reinsurance and other recovery rights, particularly where these are governed by foreign law or are subject to overseas jurisdictions.

The *Workers Compensation Act* and *Motor Accidents Compensation Act* model provides for the appointment of a statutory agent and attorney to facilitate payments while preserving rights to prove in the liquidation using the same device. The model has been applied effectively in relation to workers compensation liabilities in the liquidations of Bishopsgate Insurance Australia Limited and National Employers Mutual General Insurance

Association Limited ('NEM'). Bishopsgate was the subject of specific legislation: *Bishopsgate Insurance Australia Limited Act 1983 (NSW)*.

The scheme of that legislation also forms the basis of the more general Insurers' Guarantee Fund provisions contained in Part 7, Division 7 of the *Workers Compensation Act*, pursuant to which NEM workers compensation claims have been met and their cost subsequently proved in the liquidation of the company. NEM is subject to a principal liquidation in England, with an ancillary liquidation in Australia: see *McMahon v AGF Holdings* [1997] L.R.L.R 159 for an instance of litigation conducted by the UK liquidator and *National Employers Mutual (in liq) v GIO* (1991) 23 NSWLR 183 for proceedings brought by the Australian liquidator concerning the operation of the Workers Compensation Act Insurers' Guarantee Fund provisions.

In *McMahon*, following a sale of business and reinsurance agreement entered into by NEM, an arrangement was put in place by the purchaser – which was also the reinsurer – for reinsurance payments to be made directly to certain NEM policyholders, thereby relieving NEM of liability for such payments. This arrangement was attacked by the UK liquidator in an action framed in contract and tort as an alternative to proceedings under the *Insolvency Act 1986 (UK)* alleging that it constituted a preference. The action in contract and tort was dismissed as misconceived, Lightman J holding that the real issue was whether the arrangement constituted a preference that disadvantaged other (mostly Australian) creditors and that this should be determined in the action under the *Insolvency Act 1980*.

That action was subsequently resolved by way of settlement and the preference issue was not judicially determined.

By contrast with the NEM failure, the impact of the HIH collapse on the NSW WorkCover scheme will be minimal, with workers compensation premium and investment income in relation to policies issued since the end of June 1987 (and in some cases earlier) having been effectively quarantined in statutory funds of separately incorporated licensed insurers: see Part 7, Division 4 and Schedule 6.15.10, *Workers Compensation Act 1987*.

# Recent developments in the application of section 46: *Melway* and *Boral* considered

By Robertson Wright and Michelle Painter \*

## Introduction

The prohibition on misuse of market power contained in s46 is part of the legislative scheme embodied in Part IV and related parts of the *Trade Practices Act 1974* (Cth). A purpose of the Act as a whole, and Part IV in particular, is to enhance the welfare of Australians through the promotion of competition.<sup>1</sup>

Taken together with the remedies sections of the *Trade Practices Act* found in Part VI, s46 provides a powerful weapon which can be used by the regulator and other market participants, including commercial rivals, to eliminate anti-competitive conduct and to promote competition.

Like most powerful weapons, however, it is essential to identify the correct target and deploy the weapon so as to hit that target. Otherwise, the blast from the weapon may do substantial damage to what one is trying to protect.

The recent decisions of the High Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*<sup>2</sup> and the Full Federal Court in *Australian Competition and Consumer Commission v Boral Ltd*<sup>3</sup> provide illustrations of the operation of s46 and its potential impact on competition.

## Purpose and wording of s46

Whilst the major statutory elements of a contravention of s46 have become a familiar part of the law, it is worthwhile to state them again:

1. The respondent must have a substantial degree of power in a market.
2. The respondent must take advantage of that power.
3. The respondent must so take advantage for one of the purposes set out in s46(1)(a), (b) or (c), namely:
  - (a) eliminating or substantially damaging a competitor;
  - (b) preventing a person entering a market;
  - (c) deterring or preventing a person from engaging in competitive conduct.

It is worthwhile drawing attention to those elements, familiar as they are, because it serves as a reminder of how different s46 is from the other prohibitions in the major anti-trust sections of Part IV<sup>4</sup>. In those latter sections the requirement that the conduct have the purpose or effect of substantially lessening competition is generally an express and essential element of the prohibition<sup>5</sup>. Section 46 approaches the problem somewhat differently.

There is no doubt that s46 has the same aim or purpose as those other sections. In *Melway*, the majority of the High Court put it this way: 'Section 46 aims to promote competition, not the private interests of particular persons or corporations',<sup>6</sup> citing the well known passage from *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd*<sup>7</sup>. 'But the object of s46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.'

A literal reading of s46, and especially the descriptions of the prescribed purposes, might suggest that the purposes of the section extend beyond protecting and promoting competition to include protecting individual market participants, for example, by preventing a firm with substantial market power from injuring or interfering with a particular competitor or potential competitor. Such an approach would involve a misunderstanding of the application of s46 and has the potential to subvert the purpose of the section.

The fact that the wording of s46 can give rise to problems and may be applied so as to stifle rather than promote competition is illustrated by the recent Full Court decision in *Boral*. It is possible to characterise the Full Court's decision as involving a finding of contravention of s46 where the damage to competition and any resultant harm to consumers are far from obvious and may in fact be non-existent.

\* The authors are members of the NSW Bar. This paper is a shortened version of a paper delivered to a meeting of the Trade Practices Section of the NSW Bar Association on 2 May 2001. The full text of the paper will be published in a forthcoming edition of the Australian Bar Review, Vol 21.



The High Court's decision in *Melway* provides an interesting contrast. That decision can be seen as the Court approaching s46 having regard to the aim it is to serve, the economic principles it embodies and the commercial context in which it operates. The underlying rationale for the majority of the High Court's decision in *Melway* appears to be a reaffirmation that s46 is aimed at protecting and promoting competition rather than individual competitors, or in *Melway*'s case, an individual, would-be distributor.

The *Melway* decision contains a warning on proceeding too readily from a finding of purpose to a finding of substantial market power. The *Boral* decision might be seen as an example of what can go awry when purpose is allowed to swamp the other elements of s46.

### **Melway: A background**

*Melway* was essentially a refusal to supply case, although the High Court emphasised that it was important for its decision that the refusal to supply was in the context of an exclusive distribution system established and operated by *Melway*.

*Melway* was a publisher of a street directory for metropolitan Melbourne. The respondent was a wholesaler of motor vehicle parts and accessories. The *Melway* publication was by a significant extent the largest selling street directory in Melbourne and had been so for many years.

*Melway* distributed its street directories through wholesalers, which it appointed. Each appointed wholesale distributor was confined by agreement to an allocated market segment and each market segment was allocated on an exclusive basis (save for one exception not connected with the proceedings).

The respondent had been an appointed wholesaler of *Melway*'s street directories, but that appointment had been terminated by *Melway*, following a change in the shareholding of the respondent. *Melway* terminated the distributorship and indicated that it did not propose to have any further dealings with the respondent.

The respondent requested supply of between 30,000 and 50,000 directories per year, and indicated that it expected to supply the customers which it had previously supplied and that it expected to supply new customers without regard to the market segment in which those customers operated. The respondent expected to compete for sales with existing wholesale distributors. *Melway* refused to supply the respondent.

### **The majority's consideration of the elements of a s46 contravention**

In the High Court, the market and *Melway*'s substantial power in that market were not in dispute. Nor was the finding that there was strong competition between retailers in relation to the sale of *Melway* street directories, particularly in relation to price. At the wholesale level, however, there was

little competition between *Melway* distributors in relation to *Melway*'s street directory. Whether or not the various markets in which the distributors operated were competitive was not a matter that was referred to.

The majority of the High Court affirmed the approach of the Court in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd*<sup>8</sup> that the expression 'take advantage of' means nothing more than 'use', and that moral blameworthiness or predatory conduct does not enter the equation.

Having succinctly disposed of the concept of 'take advantage of', the majority moved to an examination of how the concept of 'purpose' related with 'take advantage of'.

Analysing the facts of the present case, the majority commented that:

[w]hat *Melway* intended to do, and did, was to terminate the respondent's *Melway* distributorship, with the necessary consequence that it would cease to be a wholesaler of *Melway* street directories. *Melway* was not the only possible source of supply of Melbourne street directories. It was the only possible source of *Melway* street directories, but that would have been the case if it only had 10 per cent of the market, or if it had no substantial degree of market power. Its ability to stop the respondent becoming a wholesaler of *Melway* directories resulted from the fact that it was *Melway*, and could appoint, or not appoint, distributors as it saw fit in its commercial interests.<sup>9</sup>

Following that factual analysis, the majority warned against the temptation to 'proceed too quickly from a finding about purpose to a conclusion about taking advantage'.<sup>10</sup>

This serves to emphasise the importance the Court placed on a stringent analytical examination of the particular facts which support a finding of conduct amounting to taking advantage of market power and the facts which underlie the purpose of the conduct. The Court, commenting on the particular facts in *Melway*, noted:

[w]here distributorship arrangements are concerned, an intent to give a particular distributor exclusivity may constitute a very insecure basis for concluding that there had been a taking advantage of market power.<sup>11</sup>

Given that *Melway*'s purpose did fall within the proscribed purposes in s46(1), the Court was essentially grappling with the factual connection – if any – between the existence of market power – which was uncontested – and taking advantage of, or using, that power for a proscribed purpose. The Court was ultimately of the view that each element could independently exist without it necessarily following that the elements combined to result in a contravention of s46.

The majority focused on the meaning of the concept of market power, which is central to the operation of s46 (and indeed Part IV of the TPA). It discussed the approach taken by the members of the Court in the *Queensland Wire*, noting that consistent with that approach, consideration ought to be given to the question of how *Melway* would

likely have behaved it if had lacked market power.

### **The majority's conclusion on the 'real question'**

The High Court formulated what it called 'the real question'<sup>13</sup> as being whether without its market power, Melway could have maintained its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market. The majority in the High Court observed that the majority in the Full Court had failed to address that question specifically, whereas Heerey J had. The majority of the High Court held that Heerey J's reasoning was to be preferred<sup>13</sup>. Heerey J had concluded that Melway had not taken advantage of its market power because it has adopted its exclusive distribution system before it acquired its market dominance, there was no reason to believe that Melway would not have been able or willing to continue its distribution system in a competitive market and Melway was not denying itself sales by doing so in this case. That was sufficient to dispose of the appeal<sup>14</sup>.

### **The Court's rejection of the respondent's primary argument**

The majority, however, went on<sup>15</sup> to reject the respondent's main argument that in refusal to supply cases, if the supplier has a substantial degree of market power, the grant or refusal of supply is 'necessarily' taking advantage of market power. The respondent argued that this conclusion followed because the power to grant or refuse supply is the power substantially to control the market. What the corporation may or may not have done in a competitive market, it was argued, was nothing to the point.

The majority pointed to the inconsistency of this argument with the reasoning of four of the five judges in *Queensland Wire* who had held that in determining the question of taking advantage it was relevant to consider how the corporation would have behaved without its substantial market power, that is, in a competitive market. The majority held that:

it does not follow that because a firm in fact enjoys freedom from competitive constraint, and in fact refuses to supply a particular person, there is a relevant connection between the freedom and the refusal. Presence of competitive constraint might be compatible with a similar refusal, especially if it is done to secure business advantages which would exist in a competitive environment.<sup>16</sup>

### **A sidelight**

Interestingly, in an aside, the majority accepted to a limited extent the argument made by the ACCC (intervening) that s46 would be contravened if the market power enjoyed '*had made it easier* for the corporation to act for the proscribed purpose than otherwise would be the case.'<sup>17</sup> Application of that principle could result in a finding of a contravention of s46 in circumstances where the corporation's power (although not overwhelming) is

sufficient to assist it to act for the proscribed purpose – even in circumstances where it does not enjoy a dominant market position, but shares a market with other competitors.

### **Boral**

The Full Court's decision in *Boral* provides an interesting contrast. If the Full Court's judgment is correct, s46 may prove to be an instrument for the suppression of competitive pricing conduct in many Australian markets. A corporation with substantial capital backing, which is confronted by a highly competitive market characterised by excess capacity and low demand may, by engaging in vigorous price competition, run a very serious risk of being found to have contravened s46.

### **Background**

*Boral* was essentially a predatory pricing case.

Boral, through its subsidiary Boral Besser Masonry (BBM) competed with a number of other companies in relation to the manufacture and supply of concrete masonry products (CMP) which were used in the building industry for walls and flooring. The impugned conduct in *Boral* occurred from April 1994 to October 1996.

In the narrow concrete masonry products market found by the Full Court (although it had been rejected by the trial judge), BBM had a market share of approximately 33 per cent in 1994. C&M had entered the market as recently as late 1993 and by 1994 it had a market share of eight per cent. In addition, at that time Pioneer had a share of 24 per cent, Rocla 24 per cent, Budget four per cent and others seven per cent. By late 1996, C&M had substantially increased its market share but Rocla and Budget had both left the market<sup>18</sup>. C&M, the relatively new competitor, operated out of a modern and highly efficient plant. BBM was of the view that its own plant was obsolete and uncompetitive, and took steps to construct plant so as to increase its productive capacity and rationalise its costs<sup>19</sup>.

What was described as a 'price war' initially between BBM, Pioneer, Rocla and Budget had commenced in about mid-1993<sup>20</sup>. This appears largely to have continued until December 1995 (judging by incidents four to 28 referred to in Beaumont J's reasons for judgment<sup>21</sup>). Thereafter it appears to have petered out<sup>22</sup>. During this period, BBM's conduct could fairly be described as matching or slightly undercutting competitors' prices in many cases but in some cases either refusing to match or to undercut competitors. Even when BBM matched or undercut prices it was not always successful in securing the business.

In addition, during the relevant period, building activity was depressed until about 1994 and real improvements were not apparent until 1996 or 1997. The recession in Victoria from the early 1990s affected the level of demand for concrete masonry products. There was substantial excess capacity. Customer acceptance of concrete masonry

products was at a very low level and developers and builders, working for the most economic outcomes, were very receptive to suggestions that they change to alternative products and building systems<sup>23</sup>.

Heerey J at first instance described the Victorian building industry as a 'highly competitive market' and noted that blocklayers and builders were able to force masonry manufacturers down and down<sup>24</sup>. If the instances identified by Beaumont J and referred to above are considered, it does not appear that BBM was unconstrained by the conduct of competitors or potential competitors<sup>25</sup>. It was forced to reduce its prices to match or undercut its competitors' prices on many occasions. These conclusions on the state of competition were not directly challenged by the Full Court. Nonetheless, the Full Court found that BBM had a substantial degree of market power.

For each year of the relevant period, BBM's total sales revenue exceeded variable costs of manufacture and supply. Nonetheless, the monthly sales revenue from sales of all concrete masonry products by BBM did not exceed the variable costs of manufacture and supply for eight months out of the 31 months comprising the relevant period.<sup>26</sup>

It might be thought that, against this background, BBM's struggle to survive in 1994 to 1996 was quintessentially competitive behaviour. The fact that some competitors withdrew from the market or went out of business might be seen as the consequence of 'deliberate and ruthless' competition working as it should to achieve a more efficient allocation of resources. The Full Court thought differently. It held that BBM had a substantial degree of market power in the concrete masonry products market and misused that power in contravention of s46 for a relevant purpose by engaging in a predatory pricing scheme<sup>27</sup>.

### Issues for consideration

There are many aspects of the Full Court's decision which require exploration and consideration. In this paper, we shall not attempt a comprehensive review but shall identify some of the issues which arise out of the decision and briefly review some arguments and problems relevant to one or two of them. Each issue probably warrants its own paper. The issues which arise include:

(a) How is predatory pricing in contravention of s46 to be distinguished from competitive price cutting? Are the concepts of 'below cost pricing' and 'recoupment' useful guides?

(b) Has the Full Court done any more than find that BBM had a prohibited purpose? Was its reasoning circular or otherwise defective in this regard?

(c) What conduct was found to have constituted the taking advantage of market power and how did the Full Court conclude that it amounted to a taking advantage of market power?

(d) Did BBM have a substantial degree of market power in a market having regard to the

criteria identified in s46 (3)?

(e) Is it correct to find that a barrier to entry exists by reason only that economic circumstances – such as falling demand, over-capacity and low prices – make it unattractive for a new entrant to enter the market?

### Predatory pricing in contravention of s46 and competitive price cutting

In the Attorney General's second reading speech on the 1986 amendments to s46, 'predatory pricing' was given as an example of what might 'in certain circumstances' amount to misuse market power<sup>28</sup>. Nonetheless, it is important to recognise that merely because pricing conduct might be able to be described as 'predatory' it does not follow that such pricing is prohibited by s46. It was only pricing conduct which amounts to taking advantage of market power by a corporation with a substantial degree of market power for a prohibited purpose that contravenes s46.

What was the 'something more' that transformed BBM's conduct from vigorous price competition into predatory pricing which contravened s46?

Heerey J answered that question at first instance when summarising his analysis as follows:

selling below cost plus recoupment by supra-competitive pricing equals predatory pricing [which contravenes s46]. Absent the second element, or at least the hope or expectation thereof, there is no more than ruthless competitive conduct, something which the TPA does not forbid, but rather promotes.<sup>29</sup>

At first glance, these two elements of below cost pricing and recoupment might appear to be an unjustified, additional gloss on the requirements of s46. This is in effect what the Full Court in *Boral* held.

This gives rise to two matters for further consideration. First, do the tests of below cost pricing and recoupment have a role to play in the application of s46 to pricing conduct? Secondly, is the Full Court's approach workable or consistent with the purpose or aim of s46?

### Below cost pricing and recoupment

These concepts of below cost pricing and recoupment are derived from the US authorities on s2 of the *Sherman Act*. They clearly are not reflected in the wording of s46 (nor for that matter do they appear in s2 of the US statute). Some of the relevant authorities were referred to by Heerey J at first instance<sup>30</sup>.

These concepts in the context of s46<sup>31</sup> can be deployed as, at least, useful factual tests to determine whether there is likely to be any contravention of the *Trade Practices Act*.

Pricing below a certain measure of cost may tend to indicate, but does not necessarily prove, that advantage is being taken of market power. A corporation, whether or not it has market power, is able to cut its prices to a level below an appropriate measure of cost (whatever that might be held to be

in any particular cases involving alleged predatory pricing) in some instances. Conversely, if a corporation is merely engaging in pricing above the appropriate level of cost it would not usually be said to be doing something which could only be done by a corporation with substantial market power. Thus, identifying the presence or absence of below cost pricing may be a helpful step in determining whether there has been a use of substantial market power. Absent unusual circumstances<sup>32</sup>, if there is no below cost pricing it is unlikely that s46 will have been contravened.

Recoupment, as an analytical tool, may be similarly deployed as a practical, factual yardstick. In the ruthless struggle to survive in the competitive market that Part IV is designed to foster, competitors may have to reduce prices to obtain business and in these circumstances firms without market power often price low for a variety of reasons, including attempting to survive. The facts of the present case present examples of the other firms (some of whom must have lacked market power) pricing at or below the levels of BBM's prices.

The ability to recoup or, at least the reasonable prospect of being able to recoup, past losses out of future supra-competitive prices is what distinguishes taking advantage of market power from beneficial competitive conduct. A firm without market power faced with a competitive market with over-capacity and depressed demand does not have the prospect of recoupment and must price low because it does not have the market power to resist the price competition of its rivals. That is not to say that such a firm does not hope or expect that it can withstand such low pricing levels longer than its competitors so that it will be one of the last left standing and thus able to increase prices to normal competitive levels.

It is the ability to recoup from supra-competitive prices that makes it rational and possible for a firm with market power to engage in price cutting that it would not or could not otherwise engage in with a view to eliminating or damaging a competitor or preventing new entry. If the conduct would be engaged in whether or not recoupment was reasonably likely, the conduct should not as a matter of fact amount to taking advantage of market power.

Recoupment, thus, provides an additional useful, factual guide for determining whether the pricing conduct complained of could amount to a taking advantage of market power or not, even if all other elements of s46 are satisfied.

In the present case, BBM does not appear to have been pricing at a level significantly different from pricing levels of its competitors, some of whom at least did not have market power. It was always conceded that BBM did not have any reasonable prospect of being able to recoup its losses from supra-competitive pricing even after Rocla and Budget left the market. In those circumstances, it is most unlikely that competition has been harmed in

the market and that consumers would be harmed in the short or long term. Accordingly, in those circumstances a court should be very wary of concluding that there has been a breach of s46.

### The Full Court's approach

At paragraph 266 Finkelstein J held that:

Predatory pricing is no more than a price set at a level designed to eliminate a competitor or keep potential competitors from the market ... It is all that is necessary for the purposes of s46.

Nonetheless, his Honour went on to hold at paragraph 299 that:

BBM's conduct in persistently selling at below average cost for the purpose of eliminating or damaging its competitors, Rocla and Budget, or preventing the entry of C&M into the market (that is, predatory pricing on any view) will contravene s46 only if it can be shown that BBM "ha[d] a substantial degree of power in a market [and had taken] advantage of that power for [that] purpose": s46(1).

Merkel J dealt with the question similarly<sup>33</sup>.

Finkelstein J's analysis of market power and taking advantage is instructive. Having determined, contrary to Heerey J's finding, that the market was the narrower concrete masonry products market<sup>34</sup>, his Honour noted that s46 does not require 'monopoly power' to be shown but only considerable and not minimal market power<sup>35</sup>.

On the basis of United States authorities dealing with monopoly power, Finkelstein J concluded that market power exists not only when a firm is in a position to set its price above 'marginal cost' (which appears to reflect notions such as long run marginal cost – paragraph 323) but also when a firm has the power to exclude competition<sup>36</sup>.

Finkelstein J went on:

Generally, an analysis of abuse of market power involves a two-stage process: first, it is necessary to determine whether a firm has market power, second it is necessary to examine whether that power has been abused. However, when the existence of market power is defined by reference to the firm's ability to exclude competition, the two step investigation is not appropriate. The evaluation of market power and the abuse of that power are part of the same analysis. The existence of market power based on this approach cannot be examined independent of the alleged exclusionary conduct. It is the exclusionary conduct that establishes market power, not the reverse.

Merkel J adopted a similar approach<sup>37</sup>.

There followed in Finkelstein J's reasons for judgment a consideration of barriers to entry as the single most important determinant of a firm's ability to exercise market power although the extent to which the firm faced competition from existing rivals was acknowledged to be important. In that reasoning, His Honour appears to accept that market conditions leading to vigorous price competition, low prices and low returns may be 'strategic' barriers to entry - for example, it was held that inadequate demand resulting from an economic cycle would be a barrier to entry<sup>38</sup>.

In addition, it was also apparently accepted that behaviour of incumbent firms to exclude rivals by a



variety of restrictive or uncompetitive practices also constitutes a barrier to entry. In the course of this analysis, Finkelstein J identified two types of exclusionary behaviour as relevant in the present case: the predatory pricing carried out in a sustained fashion between 1993 and 1996; and, the upgrade of the plant to increase BBM's production capacity<sup>39</sup>, the latter notwithstanding that s46 (5) takes the acquisition of plant or equipment outside the operation of section 46 (1).

The market conditions and the exclusionary behaviour, it was held created strategic barriers to entry which confer on BBM a substantial degree of market power. As a result, it was concluded that: 'BBM has substantial power in the concrete masonry products market and it misused that power for a relevant purpose when it engaged in a predatory pricing scheme'<sup>40</sup>.

### Further Consideration

After consideration of the Full Court's decision, one might ask:

(a) Where is the harm to competition and how have consumers been harmed, in all of this?

(b) How should BBM have acted so as to avoid a contravention, given its 'exclusionary' purpose?

(c) Is there not a significant risk that the Full Court's decision, if it is correct, will have the effect of suppressing vigorous price competition?

Any competitor with more than 20 to 30 per cent of market share, if it is financially strong or well supported, will risk contravening s46 if it competes vigorously on price in a market which is characterised by low demand and excess capacity, especially if one or more of the competitors exits the market as a result of the price cutting. It seems unlikely that this was intended by the Parliament. Has something gone wrong with the Full Court's analysis?

First, the Full Court's reasoning appears to involve a degree of circularity. In summary, the Full Court appears to be arguing that the existence of a substantial degree of market power can be demonstrated by the persistent ability to engage in exclusionary conduct. BBM's purpose was exclusionary and its pricing conduct over a considerable period was motivated by that purpose<sup>41</sup>. Thus, it engaged in sustained exclusionary conduct which achieved, in part at least, its purpose. Therefore, BBM must have had the requisite degree of market power. Having found a substantial degree of market power as a result of the ability to engage in exclusionary conduct, it is inherent in the Full Court's conclusion that the exclusionary conduct constituted a taking advantage of that market power.

If this reasoning were a legitimate approach to the application of s46, any persistent conduct engaged in for a so called 'exclusionary purpose' would justify a finding of the existence of a substantial degree of market power and use of that power.

What appears to have occurred is that the Full Court has moved too readily and without a proper

foundation from a finding of an 'exclusionary' purpose to 'exclusionary conduct' and findings of market power and taking advantage<sup>43</sup>.

Next, to adapt the reasoning of the High Court in *Melway* and assuming for the purposes of argument at this point that BBM did have a substantial degree of market power, the real question which the Full Court should have addressed was: Without its market power, could BBM have engaged in the pricing conduct complained of? Or, put another way, could BBM have acted in this manner in a competitive market?

One obvious way to answer the questions would have been to examine whether other firms, for example, Pioneer, Budget, Rocla and C&M were able to and did engage in similar pricing conduct. The evidence referred to in the various reasons for judgement at first instance and on appeal suggests that they did. It can probably be safely assumed that those firms did not have substantial market power. Yet, they engaged in similar price-cutting. Indeed, this is presumably why Budget and Rocla eventually left the market.

Furthermore, by rejecting the factual tests of below cost pricing and recoupment as useful even if not determinative guides to the existence and use of market power, the Full Court allowed itself to focus primarily on purpose and not on whether BBM actually possessed the requisite degree of market power and used it.

Finally, it appears to have been an influential consideration for the Full Court that BBM had been successful, at least in relation to Rocla and Budget, in achieving its exclusionary or predatory purpose. Both firms left the market. The Full Court appears to have assumed that these exits were caused by BBM's conduct and thus it misused its market power. This assumption is, on a proper analysis, questionable. It is arguable that the departures of Rocla and Budget were not the product of 'exclusionary conduct' by BBM in the exercise of market power. Rather, they were the natural result of the market adjusting to the disequilibrium constituted by excess production capacity, falling demand and falling prices. The market, in the sense of the totality of the conduct of all market participants not just BBM, was operating competitively and produced the consequences that competitive markets should produce.

### What should Boral or BBM have done?

The difficulties inherent in the Full Court's approach and conclusion are highlighted by consideration of the question of what Boral and BBM should have done to avoid a contravention in this case, given that they had a proscribed purpose. The most obvious answer is that they should not have competed on price by matching or undercutting their competitors' prices. If s46's aim is to promote competition and consumer welfare, this would appear to be a surprising result.



## Conclusion

The themes in the development of the application of s46 illustrated by the two cases under consideration in this paper can perhaps be summarised in the following comments:

(a) The purpose which underlies s46 is the promotion of competition for the benefit of all Australians<sup>43</sup> and not the protection of individual market participants. Section 46 should be applied so as to give effect to that purpose and not so as to make it an instrument for the potential suppression of beneficial competitive activity.

(b) An anti-competitive purpose is a most unsure foundation upon which to construct conclusions concerning the existence and use of a substantial degree of market power. Each of the elements of a s46 contravention should be considered independently having regard to commonsense, commercial considerations and the aim of s46.

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- 1 Section 2 of the *Trade Practices Act 1974* (Cth).
  - 2 [2001] HCA 13.
  - 3 [2001] FCA 30. A special leave application has been filed.
  - 4 Sections 45, 47 and 50.
  - 5 The exceptions are the so-called per se contraventions under s4D, s45A and s47 (6) and (7).
  - 6 [2001] HCA 13 at paragraph 17.
  - 7 (1989) 167 CLR 177 at 191.
  - 8 (1989) 167 CLR 177.
  - 9 [2001] HCA 13 at paragraph 30.
  - 10 [2001] HCA 13 at paragraph 31.
  - 11 [2001] HCA 13 at paragraph 31.
  - 12 [2001] HCA 13 at paragraph 61.
  - 13 [2001] HCA 13 at paragraph 62.
  - 14 The dissenting judgment of Kirby J in *Melway* merits separate analysis which, given the scope of this paper, it is not possible to include here.
  - 15 [2001] HCA 13 at paragraph 63 and following.
  - 16 [2001] HCA 13 at paragraph 67.
  - 17 [2001] HCA 13 at paragraph 51. Emphasis added. Note also paragraph 69.
  - 18 [2001] FCA 30 paragraph 4.
  - 19 [2001] FCA 30 paragraph 68.
  - 20 *Australian Competition and Consumer Commission v Boral Limited* (1999) 166 ALR 410 at 420 paragraph 48.
  - 21 [2001] FCA 30 paragraphs 48 – 83.
  - 22 [2001] FCA 30 paragraphs 84 – 87.
  - 23 [2001] FCA 30 paragraph 43.
  - 24 (1999) 166 ALR 410 at 439 paragraph 151 and note section 46 (3) (b).
  - 25 Note section 46 (3) (a).
  - 26 (1999) 166 ALR 410 at 432 paragraph 110.
  - 27 [2001] FCA 30 paragraph 349, 233
  - 28 Hansard, House of Representatives, 19 March 1986 p. 1626.
  - 29 (1999) 166 ALR 410 at 443 paragraph 173.
  - 30 (1999) 166 ALR 410 at 440 - 442 paragraphs 159 - 168.
  - 31 It appears that under section 2 of the Sherman Act the relevance of below cost pricing and recoupment fit into the analysis in a slightly different way – see *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 70ff.
  - 32 For example, circumstances where the above cost pricing in question could only be engaged in by a firm with the requisite degree of market power.
  - 33 [2001] FCA 30 at paragraph 197.
  - 34 [2001] FCA 30 at paragraph 320.
  - 35 [2001] FCA 30 at paragraph 321.
  - 36 [2001] FCA 30 at paragraph 325.
  - 37 [2001] FCA 30 at paragraph 222.
  - 38 [2001] FCA 30 at paragraph 338.
  - 39 [2001] FCA 30 at paragraphs 343 and 347.
  - 40 [2001] FCA 30 at paragraph 349.
  - 41 In that Rocla and Budget left the market.
  - 42 Something which the High Court warned against in another context in *Melway* [2001] HCA 13 at paragraph 31.
  - 43 Section 2 of the *Trade Practices Act 1974* (Cth).

*The following is an edited version of a seminar delivered by Bryan Pape at the Michael Kirby seminar series on socio-legal perspectives, at the School of Law, University of New England.*

# To specialise or not to specialise? That is the question

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*'I have been ruined twice by going to Court – once when I lost and again when I won'. Voltaire.*

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The cause of much litigation is brought about by ignorance of this wisdom. However the present volume of litigation is in part attributable to the growth in legislation, particularly in the length of statutes. Professor Paul Finn (as he then was) has described Australians as 'born to statutes'.<sup>1</sup> Here a great deal of the Federal Court's present work is in hearing immigration appeals arising under the lengthy *Migration Act 1958* (Cth).

An apparent result of this exponential increase in statute law, is a corresponding growth in specialisation at the Bar. It is reflected by the relatively recent establishment of specialist sections of the NSW Bar Association, such as the administrative law, constitutional law, and corporations and securities law sections. The Revenue Bar generally belongs to long standing taxation discussion groups, comprising lawyers and accountants such as the Challis Group, the Gunn Club and the Ratcliffe Society.

The Hon. Justice McHugh has said; 'the growth of legislation is to render it more difficult for legal practitioners to develop broad ranging practices.'<sup>2</sup> He went on to say:

My practice at the NSW Bar was a wide ranging one involving both trial and appellate work in fields ranging from the criminal law and industrial law at one end of the spectrum to fields like intellectual property and constitutional law at the other end. Practice in such diverse fields naturally forces a lawyer to seek to understand the general body of law as a coherent whole and to perceive and question the anomalies and inconsistencies generated by particular rules in particular fields. Moreover, you often find that ideas acquired in one branch of the law are transferable to other branches of the law. Practical examples of the working of the law in one of its branches frequently provide persuasive analogies in other branches. *The wider the scope of the lawyer's practice the better lawyer he or she is likely to be*<sup>3</sup>(emphasis added).

'The idea of  
specialisation  
poses a  
paradox'

There is a saying at the Bar, 'that you don't choose to specialise; the Bar specialises you'. Many barristers would not admit that they are specialists. For example, barristers who practise exclusively in the areas of workers compensation, family law or criminal law - where the province of prosecution work is entirely in the hands of the Directors of Public Prosecution. The reality is otherwise; most barristers are specialists. The generalist is rare, if not extinct, and to assert the contrary is to propound a myth.

The idea of specialisation poses a paradox; on the one hand, specialisation has an attraction of confidence gained from the mastery of knowledge in a narrow field which brings in work and fees. On the other hand, this knowledge is often acquired at the cost of being unaware of relevant developments in other fields. This can only detract from the enhancement of the barrister's general skills and may even ultimately work against the development of the specialist practice.

The true specialist skill of the barrister ought to be as an advocate and as an adviser, rather than as a specialist in a particular field of law.

A little over a century ago the eminent physician Sir William Osler in speaking against specialisation said:

The man that, year in year out, examines eyes, palpates ovaries, or tunnels urethrae, without regard to the wide influence upon which his art rests, is likely, insensibly perhaps, but none the less surely, to acquire the attitude of mind of the old Scotch shoe maker, who in response to the Dominie's suggestion about the weightier matters of life, asked 'D'ye ken leather'?<sup>4</sup>

Once a barrister is recognised as a specialist, he or she finds it increasingly difficult to be briefed in other fields. Many will be thankful for this state of affairs and have no wish for it to be disturbed. Others, who wish to withdraw will find it impossible to do so. In the short term, specialisation is an attractive option; in the longer term it carries risks, which may impinge upon the professional development of the barrister and either work against appointment to judicial office or indeed diminish his or her practice. In the United

Kingdom it was until recent times apparently unusual for specialist patent barristers and revenue barristers to be appointed to the Bench. However, as always, there were notable exceptions such as Fletcher–Moulton L.J. (patent law) and Rowlatt L.J. (revenue law). Wisely, here in Australia this practice has never been followed. For example, The Hon. Justice Graham Hill of the Federal Court and earlier in the 1960's The Hon. Justice Lee of the Supreme Court of NSW. (Interestingly both authored works on stamp duty.) The Hon Justice Franki of the Federal Court was a specialist patent barrister.

The question asked, has been at best, fleetingly recognised. Generally, it has been met with indifference as to its long term implications. The Hon. Justice McHugh has remarked: 'To the extent that the growth and complexity of legislation is forcing practitioners to specialise, it is to be deplored'.<sup>5</sup>

In opening the 1996 Australian Bar Conference The Hon. Sir Gerard Brennan elaborated on this point, when he said:

From the viewpoint of the Bar as a whole, narrow specialisation brings the risk of transformation from a profession to a business. If specialist barristers were to lose the consciousness of the law as an entirety, the Bar would be a loose federation of specialist interest groups. Institutional cohesion would be weakened.<sup>6</sup>

Is there a way to stop the growth of forced or over specialisation at the Bar? If the root cause is the growth of legislation, the likelihood of it being reversed in the short term is remote.

Nevertheless, if law students were to be educated in the techniques of Problem Based Learning (PBL), this might engender greater confidence in tackling new fields. A promoter in the 1960s and 1970s of PBL was The Medical School of McMaster University in Canada. It is presently used as a teaching strategy in the School of Medicine in the University of Newcastle. Barrows and Tamblyn<sup>10</sup> identified six stages in the process of PBL. They are:

1. The problem is encountered first in the learning sequence before any preparation or study has occurred;
2. The problem situation is presented to the student in the same way as it would present in reality;
3. The student works with the problem in a manner that permits his ability to reason and apply knowledge to be challenged and evaluated, appropriate to the student's level of learning;
4. Needed areas of learning are identified in the process of work with the problem and used as a guide to individualized study;
5. The skills and knowledge acquired by this study are applied back to the problem, to evaluate the effectiveness of learning and to reinforce learning, and
6. The learning that has occurred in working with the problem and individualized study is summarized and integrated into the students existing knowledge and skill.

This sketch of PBL establishes that it is consistent with the way a barrister approaches the solution of

problems. Its use as a teaching strategy in law schools is the very essence of 'learning how to learn'. '*Problem solving is the single intellectual skill on which all legal practice is based*'.<sup>11</sup> PBL has the potential to stop the growth in specialisation at the Bar.

It has been said, 'that a barrister writes his name in sand.' The Bar is a precarious profession. Even greater specialisation, contrary to received wisdom, is likely to make it more precarious and that can only work to erode its independence. It is also probable, that there will be a decline in the general level of legal skills. This can only impact on the suitability of candidates available for appointment to judicial office. And it is time spent in an active and long practice at the Bar, being time spent immersed in facts, which serves as the filtering process for the selection of judges. A matter, which mistakenly, the executive arm of government is increasingly choosing to disregard.

'The MacCrate report of the American Bar Association suggests that skills must be an integral part of law school, not something to be left to be developed haphazardly once law students are in practice.'<sup>12</sup> The education of law students in strategies such as Problem Based Learning has the potential to offer a long term solution to the problem of over specialisation. The beneficiaries of all this, are of course, the clients.

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1 Paul Finn, 'Statutes and the common law', (1992) 22 WALR 7 at 8.

2 The Hon. Justice M H McHugh A.C., 'The growth of legislation and litigation', The 1994 Sir Ninian Stephen Lecture, The University of Newcastle, 17 March 1994 at 14.

3 Ibid. at 15-16.

4 Michael Bliss, 'William Osler: A life in medicine' (Oxford University Press, 1999), at 198; n55 at 528.

5 The Hon. Justice McHugh, above n2 at 17.

6 The Hon. Sir Gerard Brennan A.C., K.B.E., 'Profession or service industry: The choice': Opening address, Australian Bar Conference, San Francisco 18-21 August 1996.

7 (2000) 175 ALR 1 at 2-3.

8 The Rt Hon. Sir John Fletcher-Moulton P.C., 'Law and Manners' (1999) 73 ALJ 256 at 257.

9 Ibid. at 258.

10 H.S. Barrows and R M. Tamblyn, *Problem based learning: An approach to medical education* (New York, Springer, 1980), pp. 191-192.

11 Jos H.C. Moust, 'The problem based education approach at the Maastricht Law School,' *The Law Teacher: Journal of the Association of Law Teachers*, Vol 32(1) at 8, see n14.

12 Anita B. Szabo, 'Changing the way we educate law students; Research and development in problem based learning' – v2 (1994), Proceedings of PBL Conference 1994, The University of Newcastle, at 272.

*An interview with the Clerk of 11 Wentworth/Selborne and 5 St James Hall*

# Paul Daley: 40 years not out

*By Rena Sofroniou*

**Disclaimer and confession:** Paul Daley was my clerk for a wonderful readership year on 11 Wentworth/Selborne during 1993. There were about 25 silks on the floor at that time and people like Doug Staff, Frank McAlary, Kevin Lindgren, Hal Sperling, Bob Hunter, Dick Conti (to name only a very few) would pop their heads in to the reader's broom closet, which I timeshared with Michael Wigney, to proffer the odd word of encouragement and advice. Meantime, Paul Daley never had an off day. He was always impeccably serene, polite, brisk and positive. Always positive. He would provide the readers with piles of junior work 'to cut their teeth on.' Solicitors would ring Paul and request a 'wig on the floor' to accept a junior brief on the various matters they had to hand. No names proffered by the solicitor- they just trusted Paul's judgment. He had monstrously high fitness and sporting levels and was invariable smiling and, well, perky! I never had the nerve to find an answer to the question: what is with this guy?

Here, at last, in his fortieth year in the harness, is the opportunity I have been waiting for...

**Sofroniou:** Hi Paul. Have you thought of writing your memoirs?

**Daley:** (Laughs) No not yet, but I have been in the practice of jotting down some of the amusing things that happen from time to time. They might come in handy one day.

**Sofroniou:** Are you a Sydney boy?

**Daley:** Yes. I was born at Parsley Bay in 1944. I am the second eldest of five boys. I went to Rose Bay Christian Brothers School and left at intermediate certificate level, aged 16.

**Sofroniou:** I gather that's where the clerking story begins. How did you and the Bar discover each other?

**Daley:** I saw an ad in the newspaper for a junior



Paul Daley

to 11 Wentworth Chambers and I applied for it.

**Sofroniou:** Why?

**Daley:** Well, I didn't really know what I wanted to do. I had been thinking of joining the police force, but you needed to be at least 17 to join. So I needed a job to do in the meantime until I made up my mind.

**Sofroniou:** Did you know what a barristers' clerk or junior did?

**Daley:** I had no idea at all. There were no lawyers in my family.

**Sofroniou:** What was 11 Wentworth Chambers like at that time?

**Daley:** Selborne Chambers had not yet been built. The building had one of the old PABX switchboards, which used

cords. There was no carpet at all on the floor. The rooms had either boards or green lino. The clerk was Jack Caffrey and the chairman of the floor was Mr Bernard Riley QC, a very gentlemanly man. There were 14 barristers on the floor then.

**Sofroniou:** Can you tell me some of the names?

**Daley:** Yes. Frank McAlary was then a hugely busy junior, and we had Doug Staff (who had a huge equity practice and who had become a QC at age 35), Jim Staunton, Des Ward, Ray Loveday, A B Kerrigan (he was one of the greats), Bernard Riley, a very young Theo Simos and Gerrold Cripps, among others.

**Sofroniou:** It must have seemed very formal to a 16 year-old?

**Daley:** Barristers chambers then were quite forbidding places and the barristers as a whole were not as outgoing as they generally are now. The times did not really encourage informality of any kind. Everyone was referred to as 'Mister'.

**Sofroniou:** Can you remember your initial job interview?

**Daley:** Very clearly. Bernard Riley interviewed me. He asked me a few questions about myself, school, etc and I remember him telling me: 'There most

probably won't be a future for you here because Mr Caffrey is the clerk and will remain here. The job's really for a year or two' and I said 'fine, that's all I'm looking for' and he hired me on the spot.

**Sofroniou:** In what should come to be known as the 'Famous Last Words' conversation.

**Daley:** (laughs) Yes, I never left.

**Sofroniou:** How did you manage to stay after the one or two years was up?

**Daley:** When Selborne Chambers was constructed, Doug Staff QC and Preston Saywell were the driving forces behind an amalgamation of the new 11 Selborne with the existing 11 Wentworth. The members of Chalfont Chambers at 140 Phillip Street mostly moved to 11 Selborne. We amalgamated from the outset and, to my surprise, no other floor did at that time. So we inherited Bill Deane, Geoff Stuckey, Bob Hope, Bob Hunter, Simon Sheller, John Newton, John Spender and a very young Rob Macfarlan. At that time Doug Staff asked me if I could stay on and share the clerking with Jack Caffrey.

**Sofroniou:** How did you share the job with Jack Caffrey?

**Daley:** We split the court lists between us. In those days the listing of cases was left up to the dozen or so clerks of chambers and the court clerks. I was responsible for the District Court list and Jack Caffrey did the Supreme Court and the Court of Appeal lists. Every afternoon at 2pm I had to go to where the Mint building currently is on Macquarie Street for the calling of the list. I had my barristers' District Court cases marked and I would negotiate, that is, check with them and their opponents to see if the matter was ready for hearing, the length etc. Then when the court clerk called the case I would say who was appearing and give the estimated length, then I would return to chambers and tell my barrister something like 'you've got a start tomorrow in front of Harvey Prior'.

**Sofroniou:** Good heavens - a clerks' callover!

**Daley:** That's right. We ran the District Court list and the undefended divorces list that way. Most of the young barristers did those. I still remember going to that calling of the undefended divorces list where the clerk, 'Smacker' McCarthy, would give me the dates for my barristers.

**Sofroniou:** 'Smacker'?!

**Daley:** Smacker (laughs). He always had a cigarette hanging out of the side of his mouth.

**Sofroniou:** Did the Supreme Court list work the same way?

**Daley:** The Supreme Court was a little different. Jack Caffrey would obtain his barristers' hearings for the next month, would submit them to the court clerk and would try to obtain convenient court dates. You would then find out on Monday to which cases specific dates had been allocated. By and large they would try

to fit in with counsel's commitments if they could.

**Sofroniou:** Was it ever boring?

**Daley:** No. I never had time to be bored. I was always wanting to work as hard as I could. I think I was a bit hyperactive. Also, by then, I was married with three children and was getting £8 per week, so to supplement that income for school fees and the like, I worked for my barristers on the weekends - washing cars, cutting lawns, polishing books. They knew I wanted to earn extra money so they were happy to find me extra jobs to do.

**Sofroniou:** Now when did you find time in the midst of all this to get married?

**Daley:** I married Jeanette when I was 22 and we remain married to this day! We have two girls and a boy, now aged 32, 30 and 28.

**Sofroniou:** And the number of lawyers among them is...

**Daley:** Nil! They are a nurse, a schoolteacher and a real estate agent.

**Sofroniou:** Smart thinking. How long were you sharing the clerking with Jack Caffrey?

**Daley:** He retired in the mid-seventies, and after that I was clerking for 32 barristers.

**Sofroniou:** When you compare the Bar of the seventies to the Bar now, what kinds of changes seem

obvious to you?

**Daley:** Barristers had a bigger input into the hiring and firing of staff then. Much of that these days is delegated to me by my floor. Also it was common practice for solicitors to call clerks with their briefing requirements and for clerks to recommend barristers to suit the cases. For example I can recall that Alan Mitchell of Henderson, Taylor and Mitchell would call me on any given Monday with his next month's list of, say, thirty workers' compensation cases for me to find barristers to do them.

**Sofroniou:** How did you develop that sort of trust relationship with the solicitors?

**Daley:** I had observed that Fred de Saxe, the clerk on 7 Wentworth - a very strong floor, there were people like Jack Smythe, Laurence Street there - had developed that sort of rapport. He had got to know the solicitors and they trusted his judgment. The point was to provide a thorough, trustworthy service to the solicitors so that you always did find them someone suitable for the type of matter. Also it was developed by marketing.

**Sofroniou:** By the barristers or the clerk?

**Daley:** The clerk. There wasn't anything contrived about it. I was involved in a great number of other activities outside the law and chambers. Sport was and still is an enormous entrée, a wonderful opportunity to meet and get to know solicitors. As they found out during a sporting event what I did for a living they would say, 'well, fine, so when I need a barrister for my matters, I can just come to you'. That type of thing.



'Not a problem.'



**Sofroniou:** But I gather sport was, and is, a love of yours anyway. What type of sporting involvement have you had?

**Daley:** I loved playing sport and also conditioning and coaching teams. My sports include surf lifesaving - I competed at Queenscliff Surf Club and I'm still an active member there. Also rowing - in the early days I was earning extra money by working as a conditioner for the Sydney Rowing Club two nights per week. I conditioned the Riverview First Eights and I conditioned two Australian Eights teams for the Munich and Montreal Olympic games.

**Sofroniou:** !!!! (hard to transcribe gasping sound emitted by interviewer here). And football too?

**Daley:** I played second grade rugby for Easts for a couple of years, but various injuries stopped me. In those pre-trolley days I was carrying books to court for the barristers with my good arm whilst my other one was in a sling after I'd broken my shoulder in a match. So then I coached their juniors and conditioned the Easts first to fifth grades and coached the footballers at Saint Ignatius College.

**Sofroniou:** And you've run in the City to Surf?

**Daley:** In all of them.

**Sofroniou:** I'm exhausted just hearing about it. You've mentioned being 'a bit hyperactive'. What do you attribute that to? Family background?

**Daley:** Yes, my dad really encouraged all of us boys to always work hard. He wouldn't let us sleep in. He taught us how to box when we were quite young. I had weekend jobs from the age of 14. Mum had the same view. My parents ran a business, so I was helping them on the weekends from then.

**Sofroniou:** So, is all this hard work and activity an obsession, or do you enjoy it? Have you been satisfied with your choice of career-by-default?

**Daley:** I loved it from the outset and have loved every day of it ever since. I feel I've been unbelievably lucky to work for about 120 different barristers with no cross word with or from any of them.

**Sofroniou:** I have a suspicion that there's more than luck involved, Paul. I don't imagine you would have tolerated it any other way. And I gather the boys' 'matey' environment of the Bar at the time would have been an extension of the male sporting type environment you enjoyed?

**Daley:** True, there were few women at the Bar and few women briefing barristers. It was a very conservative period. But I have to say that I think having women at the Bar now is an enormous advantage and benefit to the Bar as a whole. They have a huge role to play, given that they are 50 per cent of the population and at least 50 per cent of the law students. I also think it's not right to suggest that men can or should only do one sort of job and women can only do one sort of job. Any man or

woman can do the barrister's job if they are good enough. We've had Jenny Blackman, Margaret Renaud, Helen Coonan, Jackie Gleeson as floor members and more recently Sarah Pritchard and Ruth McColl S.C.

**Sofroniou:** How do you account for the comparatively small percentage of female barristers?

**Daley:** I take a commonsense view. I can't say why individuals don't choose to come, but I think it's a matter of personal preference rather than any hostility to women on the part of the Bar. I think a lot of people - men and women - choose not to come because it's a very hard job. It's unbelievably taxing on your time and on your nerves. It takes a big toll on family life. You are trained, essentially, to be a fighter and you have to do it every day. You can't ever afford to be off your game.

**Sofroniou:** Is it still like that or are there different approaches?

**Daley:** It's still the same fight. But there's room for different styles now. Some people are more bombastic, others are quieter. It's what the Bar's all about.

**Sofroniou:** Yes one hears of some great eccentrics from time to time.

**Daley:** (laughs) Yes. Clive Evatt was one of the great characters of the Bar. I have an image of me, knocking on his door and hearing him call 'Enter!' A voice said 'And your name is?...' But he wasn't there. I looked around to see where the voice was coming from. I eventually located him. He was lying underneath his desk.

**Sofroniou:** And he was...?

**Daley:** Well, just having a rest, I suppose. I was 17 at the time. You can imagine that this was pretty extraordinary to me.

**Sofroniou:** I gather eccentricity was tolerated then?

**Daley:** Yes, even welcomed. Horrie Miller, on 13 Wentworth, was a great property owner. His clerk, who at that time was Ernie Stanhope, received a badgering one day from a lady who rented one of Horrie's properties. She was complaining about a leaking water pipe that Horrie had refused to repair for the preceding six months. Ernie felt sorry for her and thought Horrie should be held to account for his neglect. He sent the lady straight round to Horrie's room. She marched in and got stuck into him about the leaking pipe. Horrie listened silently to her complaints, then lied to her as follows: 'Madam, I'm afraid you have the wrong Miller. I think you need Eric Miller QC. You will find him on the sixth floor'. Poor Eric Miller was meek, conservative and totally upright. Horrie's total opposite, in other words. We never heard how he handled the complaint!

**Sofroniou:** Great fun.

**Daley:** Yes. Then there was the great annual cricket match played between the bar clerks and the barristers. After ten years the barristers couldn't understand how the clerks always won the toss. In

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fact it was not that the clerks were anxious about getting to bat first, it was just that they were paranoid about getting first use of the keg.

*Sofroniou:* So obviously...

*Daley:* Yes, the clerks always tossed with a double-headed coin...

*Sofroniou:* And they always called...

*Daley:* Heads.

*Sofroniou:* The Bar lost some of that in the commercial eighties?

*Daley:* The Bar, all sections of it, flourished in the eighties and the work speeded up as well. In that era John Kearney would have what was called a 'huge Friday list'. That meant six, seven or eight mentions or motions.

*Sofroniou:* Things that the solicitors now choose to do themselves?

*Daley:* Yes. The junior Bar had it much easier then than they do now. You could survive on just the motions, the PCA's, directions hearings in all of the courts.

*Sofroniou:* (whimper) When I was doing the readers' course in 1992 all of the speakers would tell us at the beginning of their talk (somewhat sadistically I thought) that it was a *terrible* time to be coming to the Bar. They were comparing it to those times I think.

*Daley:* Yes, well they always say that. Certainly in the eighties the Bar was smaller than it is now and the work was expanding in all directions. Remember too that that was when the technology increased hugely. Photocopies, faxes - they hadn't been around when I started.

*Sofroniou:* Oh yes, I can just about remember those ghastly smelly purple ink spirit devices.

*Daley:* To make multiple copies of documents, yes. And even automatic typewriters weren't around then. It was only manual typewriters and carbon paper. So the work increased and sped up when these innovations came in. Not to mention e-mails and the Internet now.

*Sofroniou:* Was the Bar as specialised (or perhaps polarised is the better word) in terms of types of work as it is now?

*Daley:* Yes, it was quite specialised even then. There were really only a few barristers who could truly be called all-rounders.

*Sofroniou:* So it was important then, as now, for readers to try to read on good floors doing the type of work they wanted ultimately to practice in?

*Daley:* Yes, but they should also think things through and work towards being seen in as many courts as possible in the first year to eighteen months.

*Sofroniou:* To what extent is that harder to do now than it was for readers in the eighties?

*Daley:* Well, even though solicitors have started to do more of their own appearance work in the last few years, I believe that people coming to the Bar can still make a good career of it. But they have to be prepared to build a practice, not just be in it to make a quick buck.

*Sofroniou:* Can you elaborate on that?

*Daley:* Yes, it means really setting out to provide a one hundred per cent service. The Bar still rewards effort. It means being pleasant to deal with and working conscientiously and following through with their commitments and having work done in under the estimated time. It requires a lot of enthusiasm and working as hard as possible.

*Sofroniou:* I can hear Dad talking here.

*Daley:* (laughs) That's right.

*Sofroniou:* What about the manner in which floors recruit readers and juniors?

*Daley:* I liken it to a surf club or a football team. It is only as strong as its juniors. If the seniors retire and there are no good juniors to replace them the club or team - or, in this case, floor - becomes weak. My own floor has been very lucky in this regard and when it comes to good juniors on any floor, being a good person is as important as being a good lawyer.

*Sofroniou:* There's been some fairly low morale around the Bar of late, problems with tax-dodging, bankruptcies, financial problems, etc?

*Daley:* I think it's at its lowest ebb at present. Certainly the lowest that I can remember. Practice management is just so crucial these days. That involves getting help when the barrister requires it, from a clerk, accountant, other barristers, bankers, whoever.

*Sofroniou:* But there seems to be some inane taboo over all matters financial, don't you think? I mean the barristers won't let on that they're having difficulties in case it makes them look somehow inferior to the others or as if they are doing less well than their neighbours?

*Daley:* Well, help can be sought in confidence. And it's important to seek it early because there are things one can do to get on and keep on track, like having a flexible home loan that can be paid into in advance and drawing down from that loan when it's time to pay tax. Paying all bills from one credit card, which is paid each month. It's important to think about these things so one can use money properly.

*Sofroniou:* (sigh) Will you be my financial advisor?

*Daley:* (laughs) I think it's part of my job to address these things if required. My big kick in this job is seeing readers doing really well - becoming busy juniors, taking silk and ending up on the Bench,

'Practice management is just so crucial these days. That involves getting help when the barrister requires it, from a clerk, accountant, other barristers, bankers, whoever.'

assuming that's what they want to do. I like to be associated with that.

**Sofroniou:** It's a very nurturing job from that point of view?

**Daley:** Well, I'm watching it, really, but I like to think I have been of help when needed.

**Sofroniou:** No doubt about it, Paul! Well what advice for the weary mid-juniors for whom one year is pretty much looking like another, moving neither forward nor back (little sigh)?

**Daley:** Two things. One, life is too short not to be doing what they want to be doing. Second, you must make it a point to take proper rest breaks to refresh and recharge yourself.

**Sofroniou:** Oops. But something always seems to come up, and, well I don't know...

**Daley:** It's important to cross the time out of your diary and do it, otherwise you burn out. It's not easy to do. One person I know had to knock back six briefs to take a fortnight off, but he did it. It was the right thing to do, because he was due for his rest and the work will be there when he comes back.

**Sofroniou:** OK - now, good barristers - born or made? Your views please?

**Daley:** I think there are people who are born to be great barristers. There are people who are born to be great judges. Some both, but not necessarily. And good barristers can be made by hard work. But you can recognise very gifted ones. Similarly, there's not much point being gifted if you don't work.

**Sofroniou:** OK, Paul, bite the bullet. You've seen enough of them - what is a good barrister anyway?

**Daley:** A good barrister, to my mind, is a good human being, first and foremost. It comes across in his or her conferences and in court. You can't be lofty and distant and arrogant. Clients used to want that, along time ago. They held the barrister in awe. Now they want to feel comfortable. But they also want to be told either (a) or (b). Not maybe. I think the Bar must never give away the paramount job of giving a final answer.

**Sofroniou:** What else?

**Daley:** They have to be eloquent on their feet and very persuasive. Although that can be done with different styles.

**Sofroniou:** Yes, when I started, everyone seemed to be trying to do a Murray Gleeson QC impersonation. Very concise, clipped, incisive, even spare. Doesn't suit everyone, does it?

**Daley:** No. Before that it was the bombastic style. No one should ever try to change their own style and become someone they're not.

**Sofroniou:** OK, nice person, decisive answers, individual, persuasive eloquent style. Phew - what else?

**Daley:** They have to be able to handle stress. It's

an intrinsic part of the job. It's a really good idea to have interests outside the law, to be able to get away from it from time to time.

**Sofroniou:** Working alone or working with silks - your views?

**Daley:** It's imperative to work both on your own and with silks. In a barrister's first year, it's great to work with a very good silk to watch how it's done correctly. But it's also beneficial to have to go and stand in front of a magistrate and have to think on your feet. It's good to try to get experience in different areas of the law because they seem to help develop different skills.

**Sofroniou:** You would still encourage people wanting to become barristers to come to the Bar?

**Daley:** I think whatever you want to do, do it. I've known a successful merchant banker who was a great debater, give it all up to come to the Bar. He talked to me about it six years ago. I told him 'It's tough but if you want to make it at the Bar you can'. He gave up his very well paid job, started studying law. He's now at the Bar. He's doing well and he loves it.

**Sofroniou:** How do you juggle clerking for 11 Selborne/Wentworth Chambers and 5 St James Hall Chambers?

**Daley:** By phone hook up and lots of visits. It's worked out really well.

**Sofroniou:** Why do some members of the public seem to be fascinated by lawyers and barristers in particular? There are so many TV series, newspaper reports, etc? Can you understand it?

**Daley:** Barristers used to be put on a sort of public pedestal. They are eloquent, they are perceived as earning a lot of money - although bear in mind that really 20 per cent earn a lot of money and 80 per cent do not. But the 'tall poppy' syndrome plays a part too.

**Sofroniou:** Will the independent Bar survive? Your tip?

**Daley:** As long as we still have our current legal system it will. Advocates will always be required and there will always be people wanting to do that as individual operators.

**Sofroniou:** Finally, and perhaps most importantly, you have become very involved in raising money for Prostate Cancer Research. You paddled in the '20 Beaches Race' from Palm Beach to Manly Beach last year and done other things besides. How much have you raised?

**Daley:** I've raised about \$30,000 altogether, which will go towards research for early detection and treatment of prostate cancer.

**Sofroniou:** Given your very high fitness and health levels, did you ever feel at all 'betrayed' by your body when you were diagnosed with prostate cancer?

**Daley:** You know I never felt bitter about it. I never for a minute thought 'Why me? Why not me?'



Daley snaring another brief...

And anyway, if I didn't have it, who would I be willing to pass it on to instead?

**Sofroniou:** In fact I suppose your fitness operated to maximise your recovery?

**Daley:** Yes (laughs) the doctors told me 'you've trained for this operation'. The fact that I was pretty fit and healthy really assisted the recovery.

**Sofroniou:** And you have a clean bill of health today, touch wood?

**Daley:** That's right.

**Sofroniou:** What type of support did you receive throughout the ordeal of the diagnosis and the prostatectomy operation?

**Daley:** I had a lot of support and as I said I accepted the diagnosis from the beginning. I had a positive attitude to fighting it.

**Sofroniou:** Did you know anything about prostate cancer before the diagnosis?

**Daley:** No. The scary part is that I had no symptoms. The cancer was discovered in the course of a yearly check up, which I started having as an annual routine when I turned 50.

**Sofroniou:** It's really not spoken about much, is it? Do you think people know much about it?

**Daley:** No. Prostate cancer is treated as 'private men's business'. There is really not much awareness about it, yet it's the second biggest cancer killer of men, after lung cancer. It is as frequently occurring as women's breast cancer. I also don't think people know much about the ramifications of having prostate cancer or the range of available treatments for it.

**Sofroniou:** I guess as far as available treatments are concerned, if you are going to contract prostate cancer, you'd want to be living in Australia in the twenty-first century?

**Daley:** Absolutely.

**Sofroniou:** Thanks for your time Paul.

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Paul Daley paddling the 20 Beaches Race from Palm Beach to Manly to raise money for prostate cancer research.



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# Bench & Bar Dinner 2001



Back left to right: Mark Papallo, David Dalton, Richard O'Keefe and William Walsh.  
Front left to right: Geoff Gemmell, Sabine Thode, Campbell Bridge S.C., Erin Kennedy, Michelle Dolonec.

The 2001 Bench & Bar Dinner was held at The Westin Sydney on Friday 18 May 2001. The speakers were John West QC and Lee Aitken. The Guest of Honour was the Attorney General of New South Wales, The Hon. Bob Debus MP. A record 565 members and guest attended.



Back left to right: Karin Ottesen and Gordon McGrath.  
Front left to right: Susan Phillips, Peter Taylor S.C.,  
Her Honour Judge Judith Gibson.



The Hon. Justice AM Gleeson AC and Ruth McColl S.C.





Lee Aitken



John West QC



From left to right: Michael Slattery QC, Anna Katzmann S.C., Ian Harrison S.C., Ruth McColl S.C., Bret Walker S.C.



Back left to right: John Bowers, Sunil De Silva, Virginia Lydiard, Anna Seeto.  
Front left to right: David Degnan, Richard Herps, Sara Bowers, Lloyd Babb.



Kate Traill and Lee Aitken

# Bench & Bar Dinner

*Speech by The Hon. Bob Debus MP, Attorney General of NSW, 18 May 2001.*

Your Honours, Ruth McColl, John West, Lee Aitken, ladies and gentlemen. In preparation for this evening, Ruth McColl was kind enough to say that she would lend me a copy of a tape or two from the Bar's archives of previous such events.

I must say that I found it rather unnerving to learn even that there was in existence such an archive of tapes. In my admittedly cursory viewing, some of the participants over the years appear to have drawn their inspiration chiefly from old scripts from 'Sydney University Law School Revues' of the 1970s. At any moment I expected someone to break into one of those witty closing numbers the organisers of the Revues traditionally used to bring down the curtain at the end of the night.

You know the kind of thing. Parodies of Sex Pistols songs, incorporating zany quotes from the judgments of Lord Denning. Or wacky impersonations of the lectures of Roddy Meagher, set to the theme from 'Jesus Christ Superstar'.

At any rate, those video archives are a potential goldmine for someone. Some of you, as you rise to eminence in later years, face the prospect of being bled white by Philip Selth, who I fear is setting himself up for a very comfortable old age indeed.

With or without video evidence, it is incontrovertibly the case that my own career since law school - as various parties here have been kind enough to remind me even during the course of the evening - has been somewhat varied. Bearing great resemblance to a descent through the seven levels of *Dante's Inferno* - rather than the stately progress mapped out for us during first year legal institutions.

A lawyer, then a publisher, then a journalist, then a politician. I agree that it looks like a pretty single-minded quest through the list of professions most



The Hon. Bob Debus MP, Attorney General of NSW

despised by the public. Then onwards - to become minister for corrective services.

That role is traditionally associated with the smashing of bullet proof glass, the wail of sirens and the smell of smoke billowing across the city from the walls of Long Bay, soon to be followed by smoke billowing from the career of the incumbent minister of the day. Having avoided this fate, I naturally looked around me for new challenges.

Fortunately my relentless pursuit of the most unpopular possible career path was halted by the fact that the most socially despised position of all - Director, HIH

Insurance - abruptly ceased to exist before I could set my sights upon it.

Instead, when my esteemed colleague Jeff Shaw retired, I eagerly grasped at the next best thing; a position which combines the roles of politician and lawyer, thus satisfying all my most self-destructive urges - that of attorney general.

Its really proven to be brilliantly successful. Like a character out of *Alice in Wonderland*, I can have the privilege of defending six impossible propositions before breakfast.

The day begins with a bracing pre-dawn debate with a furious talkback host, who is attacking the decision of the DPP to no-bill a case. I defend in lofty terms the integrity of the DPP and the vital role of his independence in our system of government. The talkback host then reads out to me, live on-air, published pre-election undertakings by a colleague promising that the subject of the now defunct prosecution would perish in jail.

There's only one thing to do, and I do it. Fearlessly, I call for a report.

Next, the head of one of my departments calls to tell me that a civil jury has just awarded two million

dollars to a member of the public who fell off a building owned by the Department after consuming 43 drinks at a Christmas party. The Head of Department demands to know when I am going to implement a four year old government undertaking to curtail the role of civil juries.

Time to move up to option two. I sack the Head of Department and call for a report.

Refreshed, I open my *Sydney Morning Herald* to discover that apparently the entire Sydney Bar has declared itself bankrupt, moved offshore and is now operating via CB radio from a freighter somewhere in Bass Strait.

There's only one thing left to do, and I do it. I launch a full investigation, sack another departmental head - pretty much at random - and call for a report.

Of course, now and again an especially diligent public servant has the poor taste to complete one of these requested reports.

Generally not, thank God, one of the ones that *I* have requested. Usually one requested by one of my predecessors - which can, of course, be nearly as bad.

Only recently - and this *is* true - a report finally surfaced, which had been requested eight years ago by Peter Collins when he was attorney general. It contained recommendations about an aspect of law reform, the precise nature of which escapes me at the moment. To the naked eye the report seemed innocuous; but buried within it were recommendations which targeted, with pinpoint accuracy, the sensibilities of thousands of ordinary suburban people in 12 key marginal seats. It was like those Beatles records which, if played backwards, contain hidden messages invoking the demonic ritual which in fact incited the Manson family.

At any rate, all these otherwise apolitical souls started writing in abusive letters and confronting me in the street - almost before I knew that the report, which was clearly ghostwritten by Satan - even existed. Which just goes to prove that a report is never too old to be dangerous.

Any day now, I expect that a report commissioned by Sir Francis Bacon when he was attorney general to James I in 1613, will turn up in my office with a polite briefing note from the Department, explaining that by some arcane constitutional quirk it is the residual responsibility of the attorney general of NSW.

Sir Francis Bacon's career, of course, ended in disgrace when he was accused of taking payment for his services. He was the first - to my knowledge - to raise the defence that although he had *taken* payments, those payments had not influenced the exercise of his judgement in the particular cases under his consideration at the time.

An argument still in vogue today, and employed -

I think I am right in saying - by Bret Walker S.C. only last year in his representations before the Australian Broadcasting Tribunal in the 'Cash for Comment' inquiry.

The quirks of the relationship between the law, the media and politics - the Devil's Triangle - were to an extent laid bare to the public in the ABT proceedings last year. As I have said earlier, I have over the years participated in each of those professions in turn. Whether that makes me uniquely insightful or completely blinkered in my approach is for others to judge.

In his speech at last years dinner Bret Walker spoke, in passing, of the 'honesty and aggression that is the mark of the best of the Sydney Bar'. In so speaking, he used his customary elegant understatement.

I can state that in my not inconsiderable experience the Sydney Bar has a degree of comfort with openly pugnacious behaviour as would intimidate nine-tenths of the inmates of the main yard at Goulburn Gaol.

Although I can say that, with the exception of a few particularly celebrated feuds, once the meeting or court case has been concluded the aggression is less likely to be perpetuated socially. This cannot be said of disputes which erupt in prison, where an argument over a carton of milk generally results in the manufacture of a shiv from the inmate's toothbrush and its subsequent deadly deployment in the shower block.

The latter practice is also commonplace in most major metropolitan newsrooms, but for some reason it is not widely reported.

In all three professions - law, journalism and politics - the participants are inclined to express their opinions in robust terms. In all three professions questions of nuance and shades of meaning are important in the highest degree. And this may in itself provoke suspicion and resentment from those who are 'outside the club'.

I do not wish to overstate the commonalities between these professions. There are massive

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divergences and, indeed, structural antagonisms which separate them. But, historically speaking, a free press, an independent legal system and a democratic system of parliamentary government are rare and precious phenomena; and to have all three coexist at one time is rare indeed.

It is commonplace to point out that in recent times the courts and the judiciary have come under increasing public scrutiny from the media. But I'm not sure if this is actually true. A glance through the newspaper archives of the last half-century of *Sydney Morning Herald*s would show you that high profile criminal and civil matters have always attracted intense media scrutiny and that scrutiny has often been couched in sensational terms.

Some things, however, have changed. The first is the nature of the media itself.

The predominance of the conventional print media has receded, and the electronic media, particularly radio, but also television and of course the Internet, has greatly increased. Rapidity of communication and the growth in the power of talkback in setting the news agenda means that the speed of a news cycle has accelerated.

Your morning newspaper reporting, for example, a sensational court case, is available at around midnight the night before on the relevant web site.

This means that by five past midnight the producers of morning radio shows may be ringing the Attorney General's Press Secretary seeking a comment. By ten past midnight the Attorney General's Press Secretary has either been driven to drink or has woken up a bureaucrat or the luckless Attorney General himself asking for advice about what to say.

Certainly, by five thirty or six the next morning, several telephone calls will have already been exchanged, news grabs will have been recorded, the comments of the Opposition will have been sought. And as Ruth McColl knows to her cost, keen journalists will be ringing the Bar Association and other bodies in search of a fresh angle.

In other words, before many of you have staggered out tomorrow morning to retrieve your copy of the *Sydney Morning Herald* or *Financial Review* from amongst your dew soaked roses, before you even read

the front page, the story in media terms will be old and dated and the journalists will be looking for a new angle or controversial opinion to revive it.

By 8.00 or 8.30 in the morning, members of the public will have flooded ministerial offices with faxes, telephone messages and, particularly, e-mails, expressing their views, based on what they have learnt of the case from early morning radio.



The Hon. Bob Debus MP:

'A lawyer, then a publisher, then a journalist, then a politician.'

The minister - let us say, the attorney general, to pull an example out of the air - ambling along to a previously scheduled 8:30 press conference or 9:00 o'clock conference opening will be door-stopped and asked for comment. Any divergence between what he says to the waiting media pack and the statement given by his media officer at five past midnight the night before will be instantly

reported as a backdown, crackdown, change in direction, split or anything else to give the story the sense of drama it needs to keep up momentum as a story to survive until the six o'clock TV news.

The contrast could hardly be more marked with the days when Ben Chifley as prime minister could be asked a question as he got onto the train at Bathurst, think about it as it took the best part of two days to journey to Canberra and jot down a response in longhand for his arrival.

It is also the case that there has been a fundamental alteration - a marked increase - in the willingness of newspaper commentators and radio talkback hosts to comment belligerently upon individual decisions and indeed to provide running commentary upon proceedings that are underway.

In many - indeed in most cases - the high velocity of modern media reporting means that commentary will be based upon the accounts given to newsrooms by court reporters; some of whom, in the nature of things, are extremely seasoned and experienced, while others are mere neophytes and may have fundamentally misunderstood the nature of what has occurred.

It is important to bear in mind that for the 99 per cent of citizens, their only contact with the court system, other than what they learn from the radio and press reports, is through fictional representation. To those not immersed in the daily reality of the court system, the novels of John Grisham or television



dramas like 'The Practice' or even 'The Bill' teach some important and indelible lessons.

They teach that those charged by the police are generally guilty. They teach that police are generally hard working, morally motivated and insightful, whereas lawyers are clever, slippery and intent upon freeing the guilty through word play and the crafty exploitation of technicalities.

I'm not here making a moral judgement about fictional depictions of the criminal justice system. I'm inviting you to consider, as you have no doubt considered yourselves on many occasions, the basis upon which most people obtain their information about how the court system works. And the consequences that has for how people think about, and speak about, courts and the judiciary.

There is an invisible line between legitimate disagreement with a judicial decision and personal attack. And it is a line which in the great majority of cases is respected by the Australian public, press and by politicians.

I am not here tonight to argue that increased public scrutiny and comment upon judicial decisions is a bad thing. The justice system is an institution which goes to the very heart of our democracy, and as such must be strong enough to survive adverse criticism, including badly ill-informed criticism.

However, the line between legitimate criticism and oppressive attack, which may have a tendency to undermine the authority of the legal system, is far from clear. It is my own view that it is the role of the attorney general to speak up in defence of the judiciary when criticism crosses a legitimate line.

I emphatically do not believe that it is for the attorney general to rush into print every time that a criticism is made. Media interventions are always a judgement call. In some cases a media intervention by the attorney general will give a story prominence and longevity it would never otherwise have, and result in the perpetuation of a controversy that would otherwise have died a rapid death.

Whether a response is made - or indeed, having been made, is put to air or printed - depends nevertheless more on the vicissitudes of the daily media cycle than is often recognised. I recently made what I modestly regarded as a few rather well chosen remarks defending the integrity of one of our State courts which had become mired in some unfair criticism, only to have them sink virtually without trace.

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For all our  
sakes'.

There is no point complaining when such a thing happens, and it is certainly not necessary to interpret such events in the light of a media conspiracy, as we used to do when I was a student radical in the late 1960s. It is more to do with the ebb and flow of news. If there is a lot of other news around, or news with more meat, conflict and colour in it, then that is what will be reported.

On another slower news day some innocuous and casual remarks can seize the front page and provoke a storm of interest; or an otherwise unremarkable court case or judgement can become the subject of feverish analysis and dissection.

It is also important for someone in my position to bear in mind that the media audience - the consumers, if you like, of my media product are to a considerable extent segmented and even ghettoised.

I may make a stately defence of the judicial system in a speech in the parliament, or an interview with the *Financial Review*; but 99 per cent of the population will neither know, nor care, what I have said.

Conversely - and this is certainly an experience that I have often had - a law and order issue may be bitterly fought out in the tabloid papers and on commercial radio with most of the legal community never becoming aware that the debate is going on at all.

I vividly recall an occasion on which in the course of a single day I participated in six or seven interviews on commercial radio defending the integrity and independence of a particular quasi-judicial body for which I was then responsible. These interviews were conducted at a level of heat and intensity which amounted to hand to hand combat.

The following day, somewhat exhausted and shell-shocked, I was wandering around the main street of Leura. I was approached by a lady of advanced years but profound civil libertarian views. She reproached me for my silence and my failure to defend this quasi-judicial body.

It transpired, of course, that her daily media diet consisted solely of Radio National, the ABC TV news at night, and the *Blue Mountains Gazette*. On days when she was feeling daring, or wanted a bit of rough trade in media terms, I imagine that she briefly twisted the dial to Radio 2BL.

It is worth bearing in mind that, even amidst the



cacophony of media messages and the saturation of information, media consumers are still highly selective and will take very different lessons from the stream of interviews, press releases and speeches churned out by the political process and from the millions of words of analysis and commentary upon the legal and political process.

It is clear that as media commentators become more willing to criticise the conduct of individual judges, the tensions inherent in the dual role of attorney general as first law officer and as a politician - can become more acute.

And the question as to whether the attorney general should intervene in public defence of the judiciary will inevitably arise.

While there will be disagreement on any particular instance as to whether the attorney-general should comment and what form that comment should take, I have made no secret of the fact that I take the view that it is in fact part of the role of the attorney general to speak out in defence of the judiciary - and indeed of associated institutions such as the Director of Public Prosecutions.

Recent comments by my friend Justice Michael Kirby - comments in defence of the public school system of which he is a most illustrious product - have provoked some recent debate, even prime ministerial rebuke. I am not the first to point out that more politically conservative comments by other judges have provoked no such rebuke.

Tonight is not the occasion for partisanship. But I place on record my own view that if political leaders and attorneys general wish judges to remain silent on legal and social issues, then it places all the higher obligation on attorneys general to speak out on their behalf.

It is customary, I think, to see the person who is for the time being the attorney general as the guardian of the administration of justice. The attorney general is able to play a significant role in maintaining public confidence in the integrity of the justice system and in protecting the rule of law.

In defending the judiciary, the attorney general is not defending the decisions or the reasoning of the judiciary but the institution, its integrity and hence, the rule of law.

The attorney general is in a position to be the voice within government and to the public which articulates and insists on observance of the enduring principles of legal justice and on respect for the judicial and other legal institutions through which they are applied.

It is *not* my contention that the courts are incapable of defending themselves from attack or, for that matter, as I said earlier, that it is the duty of an attorney to weigh into public debate every time any adverse comment concerning a judicial decision comes to light.

It is not an understatement to say that our very system of government and the fundamental freedoms enjoyed by all citizens are at stake if the role of the judiciary is not properly protected.

The international stage provides plentiful instances of the erosion of the power and independence of the courts by unrelenting political attacks.

Justice Kirby himself has noted that,

when you take the independence of the judges away, all that is left is the power of guns or of money or of populist leaders or of other self interested groups.

Charles Hughes, who was president of the American Bar Association during the 1920s said, 'an honest, high minded, able and fearless judge is the most valuable servant of democracy.'

Speaking as a politician, I can say that at the height of a law and order scare, or in the white heat of an election campaign, an honest, high minded, able and fearless judge is an unmitigated annoyance and a pain in the neck.

Speaking as the Attorney General, I can say that it is my role to preserve and protect such pains in the neck so that they increase, multiply and thrive into the future. For all our sakes.



'I can have the privilege of defending six impossible propositions before breakfast.'

# Enduring values and change

*An address by The Hon. Justice D A Ipp, delivered at the Tutors and Readers dinner, on 8 June 2001*

The Bar is an ancient institution. The *Black Books* of Lincoln's Inn contain a continuous record of the Inn's proceedings that date back to before 1450. In them you can read accounts of Bar dinners that took place in the 15th century, where pupils ate with their Masters. What is happening here this evening had its origins in the 15th century, and I doubt whether even the menu has changed.

In the 600 or so years of its existence the Bar has stood for certain values that have had a major influence over the way in which the law has been practised and our society has developed.

The existence of an independent Bar is no accident. It derives from its history, traditions and customs, its rules of conduct and the quality of its members. These days, as we all know, the Bar is under constant threat. It faces attacks by the media, the government and others who demand that fundamental changes be made to the way in which barristers practise the law.

Many of these demands are made by the envious and the ignorant, but I think nevertheless that there is agreement amongst most that the practice of the law must change. Many articles have been written and papers delivered on the need for change and the nature of the changes that should be made. Rest easy. I am not going to discuss that. I have three main propositions this evening. Firstly, there is little that is new in the criticisms that are now being made of barristers and lawyers. Secondly, no matter what changes are made, the traditional values and attitudes of barristers are likely to endure. Thirdly, despite this comforting thought, there is a strong need to protect the institution, to remain vigilant in doing so and to adapt to change.

Let me start with the first proposition, that is, there is little new in the criticism that we hear so often.

Some 50 years ago the great English barrister and judge, Lord Birkett, remarked that 'the courts are open to all - like the Ritz Hotel'. This aphorism was uttered as part of a critical comment concerning the costs of litigation and the fees earned by barristers. Lord Birkett was later asked if the aphorism was his own. He said that he was compelled to answer that it had been attributed to Mr Justice Matthew but, in fact, said Lord Birkett, before that it had been attributed to Lord Bowen and, indeed, before that, to

Lord Justice Chitty. Subsequent research, however, has revealed that words to the same effect were spoken by John Horne Tooke, a radical British politician who was prominent towards the end of the 18th century<sup>1</sup>. Who knows when they were first spoken? They remain as fresh as ever.

Nowadays there is a prevailing view that commercialism in the legal profession is so rampant and such an evil influence that fundamental changes are required. Law reform commissions throughout the country have been occupied in investigating how to reduce lawyers' fees. In the United Kingdom it has been suggested that silks should earn no more per hour than a successful surgeon, which as I understand it is less than half what busy silks in London are presently charging. This is in a context in which the senior partners of Slaughter and May now earn 1.2 million pounds per annum and partners of less than a year 600,000 pounds. The incomes of the leading silks in London are nearing two million pounds per year<sup>2</sup>. Younger lawyers in large firms are also earning relatively high amounts. New York law firms in London are paying New York rates. Millbank Tweed's London office now pays newly qualified lawyers nearly 80,000 pounds per annum. That is over A\$200,000.

What does this all mean? Is it a novel modern phenomenon that will result in the corruption of those who practise the law?

Any such concern should be alleviated by a brief historical examination of like fears. At the end of the nineteenth century there was already a sense that the profession had compromised its integrity by becoming too commercial. In 1895 *The American Lawyer* complained:

The Bar has allowed itself to lose, in large measure, a lofty independence, a genuine learning, a fine sense of professional dignity and honour ... For the past 30 years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.<sup>3</sup>

In other words, the dreaded spirit of commerce had begun infecting the Bar since 1865. There are several instances in the early part of the 20th century of complaints that the law had become a business and profits were the main concern of lawyers. In 1934 the then chief justice of the United States described the successful lawyer as 'the proprietor or general manager of a new type of factory, his legal

product is increasingly the result of mass production methods<sup>4</sup>. He deplored the commercialisation of practice, which he felt was to be profoundly at odds with professional traditions of autonomy and public service.

Against this, it will be a surprise to learn that in the 1870s and 80s the legendary leader of the English Bar, Judah P Benjamin, was earning 45,000 pounds per annum at the London Bar at a time when a successful country doctor was earning 500 pounds per year<sup>5</sup>. 90 times more. The equivalent ratio today would put modern Queen's Counsel at more than 20 million pounds a year. It seems that silks today have a way to go.

Another complaint, frequently heard is that barristers utilise their talents in the service of the wealthy, occupying their time in ways to advise others how to get round the law. This sentiment is not new. About 100 years ago, the American author, John Dos Passos, complained:

It may safely be said that the prevailing popular idea of the lawyer, too often justified by the facts is that his profession consists in thwarting the law instead of enforcing it... It is the common belief, inside and outside of the profession, that the most brilliant and learned of the lawyers are employed to defeat or strangle justice.<sup>6</sup>

But these feelings are much older. The renowned Livia, the wife of Emperor Augustus of Rome was a promiscuous and sexually licentious woman when young. When she grew old, she became puritanical in nature. She thought that there was far too much adultery in Rome. She prevailed on her husband to pass an edict making adultery punishable by death. This law was very unpopular, not least amongst the prostitutes, many of whom were married. It prevented them from earning their living. They persuaded Livia to ask Augustus to exempt them from the edict, which he did. Thereupon, many women, seeing a loophole in the edict, pretended to be prostitutes, and escaped its consequences. On advice from his lawyers, Augustus created a register of prostitutes. Thenceforth no woman not on the register would be exempt from the proscription against adultery. Human nature being what it is, however, several aristocratic women, also on legal advice, registered as prostitutes to circumvent the prohibition. Augustus did not let this pass. He made a further edict to the effect that any registration as a prostitute, solely for the purpose of committing adultery, would be void. The courts in Rome thereupon became clogged with cases involving the question whether woman who had registered as prostitutes were genuinely bona fide prostitutes. Augustus was furious. He made a speech in the Senate damning lawyers for spending all their energies on advising rich women how they could legally commit adultery and not in promoting justice.

The message is obvious: the nature of humans in

general and lawyers in particular is unchanging. The great feature of the Bar, however, is that it trains and produces independent barristers and demands ethical conduct from its members, notwithstanding the inherent defects in the raw material with which it has to work.

Nevertheless, amongst many there is despondency about the decline of law practice from its legendary virtuous and collegiate past. Within the legal profession itself many share the sense that law has freshly descended, from a noble profession infused with civic virtue, to crass commercialism. This sense of decline reflects the gap between practice and professional ideology. In the flesh, working life is experienced as more mundane, routine, commercial, money driven, and client dominated than it is supposed to be. It is doubtful, however, that the belief that the way it is supposed to have been - in whatever golden age is in contemplation - is the way that it truly was.

In other words, I suggest that there is no need to be melancholic about the attacks on the profession. These are but part of the facts of life with which lawyers have always had to live.

I now come to my second proposition, namely, that no matter what changes are made, the traditional values and attitudes of barristers are likely to endure.

I commence by stating the obvious, namely, while many facets of the law have not altered, many changes have been made that represent fundamental alterations in the way that law is practised. Let's look at some of them.

The law is far less closed. Religion and race are no longer matters that prevent participation in the profession, or admission to a particular set of chambers. Women are joining the Bar in far greater numbers. Generally, new barristers are now recruited from a far wider range of universities and schools and new recruits come from a far wider range of socio-economic backgrounds. The Bar is no longer the last preserve of the well connected.

In consequence, the membership of the Bar has become more diverse and the loose consensus that once existed among barristers has largely broken down. But the nostalgia for the narrow non-professional solidarity that the Bar afforded in the past should not obscure the moral and broadening gain that the increase in openness represents.

Then the actual practice of the law has changed so much. In a lecture delivered in Oxford I believe some 30/40 years ago, Patrick Atiyah, the well-known academic, said

The judicial process in modern times lavishes a care and time on fact finding which would have been inconceivable 150 years ago. Time taken by a trial in the High Court was multiplied many times over during this period. Where Lord Ellenborough in the first decades of the 19th century used to try an average of 20

cases a day, Lord Abinger 20 to 30 years later was depressed at his inability to get through more than six or seven. A modern judge would think himself fortunate if he completed two cases in a day<sup>7</sup>

Two cases a day? These days the average Supreme Court case takes between three and five days to complete and the average District Court case around three days. The length and complexity of cases require a different kind of advocacy. Case management has also brought vast changes to advocacy. Much more importance is accorded to written material and brevity and succinctness are very much appreciated by judges. Barristers have to work more quickly and this does not suit everyone.

But changes of this kind do nothing to affect the fabric of the Bar. True it is that styles of advocacy change. The florid melodrama of Marshall Hall would fall flat in the modern Court of Appeal. But it is the essence of a good advocate that he or she will adapt to circumstances. Moreover, the basic elements of great advocacy are universal.

Practice at the Bar breeds an independence of mind and attitude. Sub-consciously, barristers are trained to think for themselves, to be sceptical and critical, not to owe overriding allegiance to an institution or political party, and to resent and combat injustice. The Bar hones the legal mind to these ends.

What you may ask is the legal mind? The best illustration I know is that given by Lord Bowen, who told the story of his seven year old grandson, who was sitting on his grandmother's knee when she explained to him that the Lord created the world in six days and rested on the seventh. The child was silent for some time and then asked: 'What has He being doing since then?' Lord Bowen, who was obviously world weary and somewhat cynical, when told about this suggested that the answer was 'having his portrait painted'. But the boy's inquiry reveals a mind well-suited to a barrister. Taking nothing for granted, questioning everything.

It is this sceptical, inquiring mind, together with a resentment towards injustice, that leads the Bar, generally, to oppose movements to do away with the basic rights of individuals.

There is a long tradition of this kind of behaviour. Outside the forbidding prison in Paris, where Marie Antoinette and Louis XIV were incarcerated, there is a statue of the lawyer who defended the queen at her trial. He was warned that, should he proceed to represent her, he too would meet the guillotine. Notwithstanding this threat he

did so and was shortly thereafter executed. You may think that this is an extreme example of the cab rank rule. It was a demonstration of great courage and self-sacrifice. One that some may find difficult to comprehend.

The illustrious Erskine, in his first decent brief, destroyed the reputation of the corrupt Earl of Sandwich, a powerful cabinet minister. Had he failed

to reveal Sandwich's corrupt practices then, merely because he had acted against Sandwich, Erskine would probably have received no more briefs and his incipient career would have come to an end. This did not deter him. On the contrary, he launched a dramatic attack on Sandwich and concluded by declaring him 'a shameless oppressor, a disgrace to his rank and a traitor to his trust.' Needless to say Erskine succeeded and went on to become one of the greatest advocates ever. The Bar has changed a great deal since the time of Erskine, but there have always been barristers who have

been cast in the same mould. In this country men like Evatt and Byers, to name but a few, are shining examples.

In the worst periods of the apartheid regime in South Africa the Bar and sections of the Church and the press were the only institutions that maintained a practical and public opposition to the injustices that were perpetrated on a daily basis. The Bar made its major contribution by arranging for the pro bono defence of defendants who were charged with political offences. Many of the defendants faced the death penalty for charges of terrorism or sabotage. Others were teenagers who faced mandatory sentences, for burning schools or government buildings, of a minimum of 15 years imprisonment. In the climate of the day, the establishment was inimical to the defendants, and believed that the government was justified in its laws and prosecutions as the defendants were threatening the very existence of their way of life. Those who objected were regarded almost as traitors and subversives, themselves. Nevertheless, at most Bars in the country, there was a large core of barristers who were ready to defend these persons, largely because of a belief that they were the subject of appalling injustice.

It was not an easy task. Firstly, the big commercial clients were uneasy about being represented by barristers who represented people accused of being communists or terrorists. The barristers were identified by some as having the same views as the defendants, or at least being sympathetic

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to them, and the clients felt that they would in turn be identified with the barristers. Some barristers found that after a couple of political trials their commercial practices went into sharp decline.

Then the cases themselves would be really unpleasant. The judge would be hand picked, as would the prosecutor. They would be extraordinarily hostile in every respect throughout the trial to counsel for the defendants. The security police would be strongly in evidence, doing their best to intimidate. The court would be packed with black people who would provide a very hostile counter-balancing force. But perhaps the most difficult aspect was the client, usually a 16 year old kid who had tried to burn down a school and who faced a mandatory 15 years in jail, with the onus of proof switched by legislation. These boys were inevitably themselves hostile to the white defence counsel. Once one told me that I need not think that defending him would get me into credit when the regime changed, I would still be punished like the other whites. If defence counsel were particularly unlucky they would receive anonymous phone calls telling them the route their children went to school and informing them that if they continued representing the accused, they would be fortunate to see their children again. And all this for \$20 per day, day after day.

But many members of the Bar responded to the need - leading silks and busy juniors. This contributed to the consequence that, when the regime changed, very few alterations were made to the legal system. It was felt that it had reasonably attended to the needs of the oppressed.

Curiously, the same response was not shown generally by solicitors, at least not to the same degree. They were far too much under the influence of their commercial clients and their allegiances to political points of view were too strong. The very large majority could not bring themselves to act for people whose views and interests were so much opposed to their own.

Nothing in what I have said is intended to convey that I think that barristers are better people than solicitors or that they show more courage under crisis. All I mean to say is that the institution of the Bar is such that by the nature of its structures it develops an independence of mind, an integrity and spirit that becomes second nature. Its members are trained and become accustomed to guard against injustice, to question authority and to speak up for the disadvantaged. This is truly a wonderful thing for a democratic country, and it is a pity that it is not more widely recognised and understood. But these matters underpin the need to maintain and preserve those structures.

My last point is the need to be vigilant to ensure that there is continuance of the structures and attitudes that I have described. In this context I wish

to say something about the technological developments that have brought a major change to the practice of the law. To my mind, the greatest challenge that these represent is the tendency they have to allow the places of work of barristers to become more spread out. This effect is exacerbated by the huge increase in the numbers of barristers which has caused a loss of collegiality in the Bar as a whole.

One of the foundations of the Bar is the strong discipline that convention exercises over the behaviour of its members. Critical to this is that wrongdoing by a member should become known early and by many. I think I still suffer withdrawal symptoms from not having the daily injection of malice I used to receive from the daily visit to the Bar common room. This important feature of Bar life will be lost if technology and size result in large numbers of barristers working at home or in disparate and scattered venues.

In conclusion, I have noticed that many in this country take our way of life and our rights and freedoms for granted. I have personally, in my lifetime, seen rights of this kind be eroded gradually but fundamentally. It is the task of the Bar to guard against this happening in Australia. It is necessary to guard the ramparts well.

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- 1 Galanter, 'Dining at the Ritz: Visions of justice for the individual' in Stacy, H and Lavarch, M (eds), *Beyond the adversarial system* (Leichhardt, NSW, Federation Press, 1999), p.118
  - 2 *The Lawyer*, 26 June 2000
  - 3 Galanter and Palay, 'Large law firms and professional responsibility', in Ross Cranston, *Legal ethics and professional responsibility* (Oxford, Clarendon Press, 1995), p.190
  - 4 *ibid*, p.191
  - 5 Duman, Daniel, *English and colonial bars in the nineteenth century* (London, Croom Helm, 1983), p. 145
  - 6 Galanter, *op. cit.*, p.191
  - 7 Quoted in Beaumont, B A, 'Legal change and the courts', Keynote address to the Australian Law Teachers Association, July 2000



# Visit by Justice Ruth Bader Ginsburg

By James Remwick

In 6 February this year, Justice Ruth Bader Ginsburg, an Associate Justice of the Supreme Court of the United States, spoke to the Bar Association and its guests in the Common Room on the work of her court.

Justice Ginsburg is the second woman<sup>1</sup> appointed to the United States Supreme Court. She was a Professor of Law for many years and also a fellow at the renowned Centre for Advanced Study in the Behavioural Sciences at Stanford. She was general-counsel for the American Civil Liberties Union, and was instrumental in launching the Women's Rights Project of that organisation. She served as a judge of the United States Court of Appeals for the District of Columbia between 1980 and 1993, and took her seat as an Associate Justice of the Supreme Court on 10 August 1993.

In a wide ranging but informal address, Her Honour dealt with many aspects of the work and life of the Supreme Court. She emphasised that 'the Court is not an error correction instance; it will not take up cases simply because a lower court reached an arguably wrong decision. For the most part, the Court will consider for review only what we call deep splits – questions on which other courts have strongly disagreed.'

Her Honour then described the process of granting review – a daunting task given that 7,000 requests for review are filed with the Court each year, of which about 15 per cent are put to a vote on whether or not to review, and about 70 to 100 cases per term are eventually heard.<sup>2</sup> She noted that there is a unanimous result in nearly 40 per cent of the argued cases.

Her Honour also said that on occasions 'when the court wants to know more about the importance of a case to the sound development of



Justice Ruth Bader Ginsburg

federal law, the justices may invite the view of the Solicitor-General before voting on the review petition'.

Justice Ginsburg then spoke about a typical day in court. She quoted with endorsement a description of a day in the court by journalist Anthony Lewis:

Oral argument does not play a part in the work of the Supreme Court as it did in the 19th century, when counsel would argue a case for days the modern Supreme Court limits arguments severely to half an hour [per side]. But argument still has an important function. It is the one chance the justices have to grapple directly with the lawyers who represent the clashing interests before them. It is also a rare opportunity for the public to gain insights into the minds of those who

actually make the decision. More than any other officials in Washington, the justices still do their own work, assisted only by a handful of young law clerks. To observe them as they question counsel in the courtroom is to see an extraordinarily open process, unaffected, human. In a capital puffed up with bureaucracy and public relations, the Court seems old fashioned, small, personal. For the lawyers, oral argument is a direct opportunity to reach those nine minds – with an idea, a phrase, a fact. Not many cases are won at argument, but they can be lost if a lawyer is unable or unwilling to answer a justice's question [honestly and persuasively].

Her Honour went on to say:

questions from the Bench give counsel a chance to satisfy the Court on matters, the questioner, at least thinks, significant, and might resolve less satisfactorily without counsel's aid. Sometimes, it is true, a question is asked with persuasion of a colleague in mind; at such times, the lawyer may sense she is being talked through, not to. Other times, the question that may be trying to cue counsel that an argument pursued with gusto is a certain loser, so counsel would be well advised to move on or shift gears. Counsel too intent on adhering to a prepared script may miss the cue.

Finally, Her Honour made some remarks about decision making by the Court as a collegial body. At meetings of the Court, the Chief Justice circulates opinion writing assignments made by him whenever he is in the majority, and when he is not he advises

the justices of the assignments made by the most senior justice in the majority. The Chief Justice speaks and votes first on the result of a case, the junior justice speaks and votes last.

Her Honour described her own (admirable) approach to writing opinions as follows: 'I prefer and continue to aim for opinions that get it right and keep it tight, without undue digressions or decorations or distracting denunciations of colleagues who hold different views.'

Her Honour concluded her address as follows:

Most impressive, I think, despite sharp differences on certain issues – the Court's disagreement on the recount of votes in Florida is a prime example – we remain good friends, people who respect each other, and genuinely enjoy each other's company. Our mutual respect is only momentarily touched in most instances, by our sometimes strong disagreement on what the law is. The institution we serve is ever so much more important than the particular individuals who compose the Court's bench at any given time.

A transcript of Her Honour's remarks is held in the Bar Association Library. Her Honour had spoken to an audience in Melbourne the week before she came to Sydney. Justice Hayne of the High Court of Australia then responded with remarks that can be found on the High Court's web site.<sup>3</sup>

- 1 After Justice O'Connor
- 2 Her Honour also noted that on occasion important cases appear so clear to the court that it will decide the matter summarily based on the petition for review and the brief in opposition, without further briefing or oral argument.
- 3 [Http://www.hcourt.gov.au/speeches/haynej/haynej\\_ruthbad.htm](http://www.hcourt.gov.au/speeches/haynej/haynej_ruthbad.htm) 'Reply to The Honourable Ruth Bader Ginsburg: Remarks on judicial independence: The situation of the US federal judiciary'.



Left to right: Richard L. Greene, US Consul-General, Ruth McColl S.C., Associate Justice Ginsburg and Professor Martin Ginsburg.

## ADDRESSES

# Law and literature

On 20 April 2001 the Bar Association hosted a breakfast seminar on 'Law and literature', presented by The Hon. Justice I D Callinan of the High Court.

The seminar, presented as part of the Continuing Legal Education Programme, will be published in the forthcoming edition of *Australian Bar Review*.



Justice Callinan.  
Illustration by Poulos QC.

# Pacific circuit

By Stephen J. Stanton

The ‘cab rank rule’ at the Bar is not only the hallmark of our profession but also a tradition, which in this age of specialisation seems far removed from the practices that some of us follow. In my case I would like to share with you experiences which began in January 1983. As was my custom then, I enjoyed working through vacation in January, in order to keep the wolf away from the door. I’ve relented in recent times.

I recall being briefed by David Ross, who indicated to me that an attorney from Fiji required counsel to settle pleadings quickly in a case that was coming on in Suva. I expressed some disbelief as to whether I would be competent to handle such a matter. Nevertheless, being assured that it would be within the parameters of my professional expertise and skill, as understood by my solicitor, I took the brief and met the attorney, thereby beginning an adventure which has taken me from Fiji to Tonga, to Western Samoa, Kiribati and Tuvalu. In addition, I have also had the opportunity to appear before the Judicial Committee of the Privy Council and to be counsel for various entities in arbitrations conducted in Washington and New York, arising out of matters in the South Pacific.

The benefit of sharing this with our readers and fellow members is to indicate the prospects for portability and mobility of our services, not only within the confines of our own jurisdiction in New South Wales and Australia, but also as professionals in the neighbouring regions. It has shown to me that there are opportunities to participate in the administration of justice with our neighbours in the South Pacific and elsewhere.

What I have learned from practising in Fiji since 1983, a jurisdiction that regrettably has undergone very troubled developments in recent times, has been both sobering and satisfying. I was involved in the formalisation after the second coup, to ensure that law and order prevailed as quickly as was possible.

It was an experience which I regard as unique for any counsel: to take a regime from *de facto* to *de jure* recognition. The opportunity to participate in such a development has both advantages and disadvantages of which I am painfully well aware. Nevertheless, the courage and independence that is required of counsel and which is inculcated in the spirit of an independent Bar is, I believe, a factor which enables delivery of service to the client.

It is in no small measure that when we take our talents overseas we are enriched by the experience and the ability to assist the administration of justice in countries such as Fiji, Tonga and Western Samoa. They will benefit from an exchange between our practitioners and themselves. Equally, it must be said that in these jurisdictions I have mentioned there are many able and talented practitioners who contribute to the exchange and dialogue.

I would like to share with our readers some humorous if not ‘*bête noir*’ episodes that I have enjoyed in my travels in the South Pacific.

I recall being in Suva on 14 May 1987, when I was on my feet attempting to address an expatriate judge whose name I shall withhold for reasons that will become self-evident. Whilst attempting to assist his Lordship as to why the administration that was proposed for a company to which we were opposed should not go ahead, the associate literally charged into the courtroom and handed the judge a note. Upon reading the note the judge looked in utter disbelief and uttered inaudibly, but able to be lip read, ‘Oh F\*!’ I immediately asked his Lordship was the reference to the Australian case which I was relying on so utterly inappropriate that it offended him in terms of its citation. He replied with words to the effect that there had been a military coup and he was not minded to proceed. It was serious, yet funny on reflection, to observe how news of the coup broke in the courtroom that day. The scene outside was amazing, seeing soldiers dressed in balaclavas, bearing arms and people milling around like ants in a nest which had been disturbed abruptly.

On another occasion I was briefed to appear in the Privy Council on a special leave application concerning a very notable murder trial in Fiji - *DPP v Amos*. I recall the settling of the appeal in *forma pauperis* which is invariably the format for most of the criminal matters which go to the Privy Council. In ringing the Registry, usually late at night, to ensure the application was being processed, I became quite friendly over the phone with the registrar’s secretary. She explained to me the registrar’s mother had my surname as her maiden name. She informed me the registrar was very keen to make my acquaintance to see if I was from a possible lost branch of his family. I could not contain my delight and thought fondly of my

Lebanese ancestry, and how the registrar would react when I accepted the invitation to have morning tea with him.

Upon my arrival in London I went to Downing Street and introduced myself to the registrar's secretary. The inevitable soon became apparent as she was immediately taken back by my appearance. She fumbled papers and then indicated to the registrar that I was in attendance. He could not contain his delight, bounding out of his room to welcome me. Upon seeing me, it was reminiscent of Spencer Tracey greeting Sidney Poitier in *Guess Who's Coming to Dinner*. After I assured him that I was from the Beirut side of the family, and that he had nothing to fear as to any infiltration of the gene pool, especially in Cheshire, he welcomed me. We enjoyed a cup of tea and a very long chat.

As often is the case when one goes to another jurisdiction there is a perception that as a foreigner one must try to adapt to the local custom, wearing local dress and taking up habits or practices in which the locals participate. There was a case in which the behaviour of my opponent, who was from Auckland, demonstrates the premise.

In the course of addressing the court I had given written submissions which were replete with reference to Australian authority at both High Court and New South Wales Court of Appeal level, with some New Zealand authorities, as many of the local lawyers are trained in New Zealand universities and New Zealand judges do sit in the Court of Appeal from time to time.

My learned friend's consternation at having to accommodate numerous Australian authorities that I had referred to, resulted in his constant interjection that, surely there were other cases, and in particular from New Zealand, that were appropriate that could be relied upon. I waited my time. Upon adjourning for morning tea the colleague from Auckland enquired of me with words to the effect: 'Where do we get a cuppa?'

I said, 'I don't drink tea here, I drink *kava* as is the custom at morning tea time. The locals go to an area underneath the court building where *kava* is drunk and the usual contribution sought is one dollar per customer.' I then said, 'Have you ever drunk *kava* before?'

He said, 'No, but I'll give anything a go once.'

I then said he was most welcome to join our colleagues and we proceeded to the *kava* bowl. He said to me, as he looked at the liquid in the *tanoa*, 'What does it taste like?'

I said, 'Well, it's much like any substance that looks a little off, once it's past your teeth and down

your throat, what have you got to worry about?'

He then said, 'Yes of course' and proceeded to participate, following the custom of clapping, took the bowl (*bilo*) and drank heartily from it, dropping the bowl into the *tanoa* and proceeding to clap three times, following the example of the others. Having seen him drink, I then took my opportunity and leaned over and made a deliberate attempt to share what to all and sundry appeared to be a very confidential aside to him. I said to him, 'Why did you drink from the bowl putting your lips around it?' and he said 'Why, what's the problem?' I said to

him, 'Can't you see, they've all got advanced stages of gingivitis in their gums!' He then took on a facial pallor that was very much like the *kava* in the *tanoa*. Suitably subdued, he and I returned to court and needless to say he lost a lot of his Kiwi clout for the remainder of the matter. He drank glass after glass of water and at lunch time I asked him whether he would be partaking of more *kava*, to which he replied, 'No, I need to get a large bottle of Listerine as soon as possible'.

Such amusing and, at times, vivid episodes that one can recount from these jurisdictions give great satisfaction. I know that in the South Pacific there is a real opportunity for our association to participate in advocacy training and education and to assist in the administration of justice on a

regional basis.

In concluding, I would like to dedicate this short article to my late friend Vijaya Parmanandam and thank my colleagues in Fiji, Tonga and Samoa for the benefit of many happy and at times demanding professional encounters. I know from other Australian counsel who have gone to Fiji that even though conditions can sometimes be sparse and resources thin, the ability to rise to the occasion always brings out the best in any counsel worthy of their mettle. Sharing these observations with you I trust puts in perspective the reality that the profession has only boundaries which we impose. If we are prepared to market effectively and adapt our skills to the changing times we will flourish as a profession and more particularly will serve society in accordance with our motto.

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# Duty Barrister Scheme

By Kate Traill

## The history of the scheme

Historically, the junior Bar made itself available to indigent defendants through the old 'dock brief' system, without the intervention of instructing solicitors. However, by 1993 this practice had fallen into disuse. In 1993 there was a change to the New South Wales Barristers Rules to allow litigants 'direct access' to the Bar. This allowed the 'dock brief' system to be revived.

The concept of the Duty Barrister Scheme grew out of the New Barristers Committee. In August 1993 I put a proposal before Bar Council for a six month pilot project in the Downing Centre Local Court. Bar Council supported the proposal and the Duty Barrister Scheme commenced operations in August 1994.

## Expanding coverage

The scheme has since expanded its coverage to include the District Court's criminal jurisdiction,<sup>1</sup> the Local Court (in both civil and criminal jurisdictions) the Downing Centre annexes of North Sydney and Central Criminal Local Court, the Australian Industrial Relations Commission and the Bidura Children's Court during the Olympics.

## Objects of the scheme

There are four key objects of the Duty Barrister Scheme. The first is to provide high quality access to justice for members of the public who did not qualify for legal aid and who did not wish to represent themselves and who had not engaged a solicitor or barrister privately. In 1993-4 there was a Duty Solicitor Scheme operating at the Downing Centre, but it only had one participating solicitor.

Secondly, there was a pressing need to assist the courts with the numerous unrepresented litigants, who appeared daily in the Local Court. The scheme would facilitate a more efficient and fairer



Left to right: Temby QC, Tobias QC, Barker QC, Traill, Porter QC, Bellanto QC.

administration of justice, particularly in the local courts, the level of justice encountered most by the public. It would also shorten the delays in the Local Court, as it would decrease the magistrate's time they spent dealing with unrepresented litigants each day.

Third, the scheme would raise the public profile of the Bar, which would be seen by the public as helping those who were less fortunate. The launch of the scheme attracted some media attention and an article appeared in the *Sydney Morning Herald*. The photograph that appeared in the *Herald* accompanies this article.

Finally, in the early 1990s there seemed to be less work for barristers in the lower courts, as solicitors were doing most of the mentions and motions themselves. The scheme was seen as a way to assist the junior Bar, particularly those under five years experience, to obtain greater court experience with increased opportunity to improve their advocacy skills in the local courts.

## Guidelines and brochures

Once Bar Council gave its approval I had the task of drafting the guidelines and putting the scheme into practice. This involved liaising with a range of people and organisations, including the chief magistrate, Mr Pike, other magistrates, the registrar, Graeme Roberts, the Law Society, Legal Aid, the Sheriffs' Office, the Salvation Army, the NSW Probation and Parole Service and the List Office, both civil and



criminal. It also involved visiting Burwood Local Court and speaking with Bill Wheeler, to see how other schemes operated, and spending hours sitting in various courts and recording procedures.

The result was a guideline booklet, which includes details on:

- the operation of the scheme
- the listing procedure in the Local Court, both civil and criminal
- Legal Aid guidelines
- Functions of duty barristers
- Contact numbers
- Fee disclosures
- District Court Downing Centre procedures

The Bar Association also prepared brochures to inform community legal centres and members of the public about the functions of the scheme and to provide general information about barristers. Copies have been further distributed by the Redfern Legal Centre, the Aboriginal Legal Service, the Domestic Violence Advisory Service, the Department of Consumer Affairs, the Salvation Army, police stations and Victims of Crime, to anyone seeking legal assistance.

### How it works

The system was initially set up as a roster system. More than 120 barristers volunteered for the roster in April 1994 and although many come and go, the number remains constant to date. The scheme was launched by our then president, Murray Tobias QC and was supported by mentors such as Ian Barker QC, Chester Porter QC, Ian Temby QC, Tony Bellanto QC and Tom Hughes QC and other senior silks. Their role was to be on call and assist the duty barristers with any problems that may arise and also give advice. Some of them found themselves acting for litigants on the scheme. One lucky duty barrister managed to get Chester Porter QC to appear with him.

In April 1994 the accommodation in the Downing Centre was sparse, so we were given a small conference room on level five which contained table, chairs, telephone and a *Civil Claims Practice* and *Criminal Procedure Practice* and a diary. Today there is a special room on level five that has been built specifically as a duty barrister room which is much more salubrious and contains a locker and many looseleaf services.

A duty barrister that volunteers for the scheme is placed on a roster. There are three barristers rostered per day. It is intended that at least two will cover the Local Court, both civil and criminal, and one will cover the District Court.

If a duty barrister becomes 'jammed' in a part-heard matter, it is their responsibility to pass the brief for that day to another barrister who is willing to take on that duty barrister's brief. Continuity in matters is important in the scheme. Each barrister

has a copy of the duty roster with the names and phone numbers of each participant. When I do the list every three months, I try and list new barristers and readers with more experienced barristers.

### Positive feedback

Over the years, the Duty Barristers Scheme has received many letters from magistrates and litigants who have been impressed by the scheme. At its inception, the then chief magistrate, Ian Pike, was a great supporter of the scheme. He wrote to the president of the NSW Bar Association on many occasions to say 'how impressed he was with the representation provided by many of those barristers who participated in the scheme'.

In September 1996 Magistrate Malcolm Beveridge wrote:

Hurrah, for the Bar's pro bono scheme at the Downing Centre. I am firmly of the view that unrepresented defendants in criminal cases are a menace to themselves, as well as to the justice and efficiency of the courts in which they have the misfortune to appear. As barristers employ no fee earners but themselves, the sacrifice to remedy this through the Bar's pro bono scheme is personal and genuine. All judicial officers should be grateful (letter to president of 18 September 1996).

He then recounted a piece of 'outstanding work by Mr Babb', who was rostered on the scheme.

Experiences of duty barristers on the scheme varies. Some barristers have many matters on a day, some have very quiet days. The more enthusiastic barristers go into court and announce their appearance in a busy court rather than sit in the room waiting for someone to come to him or her. There are small duty barrister name tags in the room for those who wish to be conspicuous.

Initially, it was intended that a duty barrister would negotiate a fee at a very reduced rate. However, over the years a diary, which was kept in the duty barrister room, was monitored periodically and it was found that most did not charge for their rostered day. In 1998, a meeting of duty barristers was called, at which approximately 60 attended. The majority of duty barristers said that they did not want to charge a fee at all. The guidelines were amended to say that on the rostered day there would be no fee charged. If any matter continued after that, the duty barrister could negotiate their own fee. However, there were complaints that many litigants had money and unless they paid some sort of nominal fee, were reluctant to take advice. The scheme has now been changed back to the original practice.

### 2000

Last year the Duty Barristers Scheme was expanded into the Australian Industrial Relations Commission. Ingmar Taylor prepared the guidelines and case material and it was launched in the Bar Association on 13 July 2000 by The Hon. Senior Deputy President L E C Drake. There are approximately 50 volunteers participating in that scheme, sufficient to keep appearances to one or two per year.

Future expansion in 2001 is planned for the Children's Court and Parramatta Local Court and Drug Court.

To assist the duty barristers, there are annual advocacy workshops on apprehended violence orders, bail and plea problems. To date, we have had teachers with enormous experience and wisdom who have tutored and judged the participants. All have been extremely informative and helpful.

The scheme continues to be a valuable community service and we appreciate those who act either on a reduced fee or pro bono and give up their time to participate in the Duty Barristers Scheme.

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- 1 In 1996, when the scheme was expanded to cover the criminal jurisdiction in the District Court, it covered the Appeal Court and the Short Matters Court. Due to a change in the listing procedures in the District Court, it now covers only the Short Matters Court (LG2).

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## TRIBUTE

# Jennifer Blackman

*By Andrew Bell*

Jennifer Blackman retired from full time practice at the New South Wales Bar at the end of last year, having been admitted in 1968. Her association with the Bar and 11 Wentworth/Selborne, in particular, goes back however to 1958 when she was engaged as a 'stenographer to the Society' at a meeting attended by David Hicks, Doug Staff, Preston Saywell and Barry McKenna. The only member of the 11th Floor who remains from the time of her appointment is the evergreen Frank McAlary QC.

In 1965, Jenny Blackman left the 11th Floor to become Associate to Mr Justice Else-Mitchell who had been a member of the floor. It was during that time that Jenny completed the Barrister's Admission Board course, upon completion of which she returned to the 11th Floor and forged, over many years, a successful practice specialising, in particular, in land and environment work.

She also served terms as an Acting Judge of the District Court and as a judicial member of the Administrative Decisions Tribunal of New South Wales. Extra curricula involvements include her position as Chairman of Meridan School and Vice Chancellor of the Anglican Diocese of Bathurst.



Judge Herron QC; The Hon. Ray Loveday QC; Jennifer Blackman;  
Mr Justice Dunford; The Hon. Rae Else-Mitchell QC.

A dinner in her honour was recently held by the 11th Floor with speeches from The Hon. Justice Giles and The Hon. Rae Else-Mitchell QC, who had travelled from Canberra for the occasion. The Bar wishes Jenny all the best for her retirement.

## The Hon. Justice Peter McClellan

Peter David McClellan QC was sworn in as a judge of the Supreme Court of New South Wales on 30 January 2001.

His Honour completed Arts and Law degrees at the University of Sydney and, after a short time as a solicitor at Hall and Hall, was admitted to the Bar in 1975.

His Honour read with John Brownie. His chambers for 20 years were on 6 Selborne and for the last 4 years on 11 St James' Hall. In his speech on his swearing in, His Honour paid tribute to Murray Willcox, who encouraged and inspired him in the law, and to his clerk for many years, Les O'Brien.

His Honour's leadership in the area of environmental and local government law has been widely noted. Commissions of enquiry also became a specialty, with His Honour being counsel assisting the Maralinga Royal Commission, and assistant commissioner at the Independent Commission Against Corruption and more recently chairman of the Sydney Water Enquiry where, as has been said, he rapidly became an expert on giardia and cryptosporidium. At his swearing in, His Honour noted in respect to his role as counsel assisting the Maralinga Royal Commission:

It was truly the brief of a lifetime. It allowed me to examine in detail the history of a significant post-war period of Australian life in which, although the development of nuclear warfare was central, many great issues emerged. One of the most significant was the treatment of Indigenous people by the authorities of the time, and the need to define an effective response in the 1980s. The cruelty shown to Aboriginal people, who were rounded up and put on trains going west from Maralinga to anywhere and thereby dispossessed of their land, with their tribal and social structures destroyed, remains as but one of the legacies of that era of Australian life. The anger expressed by Jim McClelland, sitting in the dust with Aborigines at Maralinga, and the recommendations of the final report, could never repair the damage done to many individuals.

... I was exposed for the first time to the political process, both national and international. Jim McClelland, a dashing figure with an acerbic tongue, well understood the role which publicity could play in achieving effective outcomes for the Commission. I maintain a vivid recollection of drafting an opening statement for him when we sat in Brisbane, gently chiding the British Government for its reluctance to provide classified documents from its archives. The reluctance, I later learned, was based on Jim's former active sympathy for the revolutionary ideals of Leon Trotsky. The judge manifestly disagreed with my gentleness and, tearing up the draft, prepared a stinging attack, not only on the government of Margaret Thatcher but on the whole notion of the British empire. To ensure his statement would not go unnoticed, he finished by remarking on Henry VIII's matrimonial difficulties.

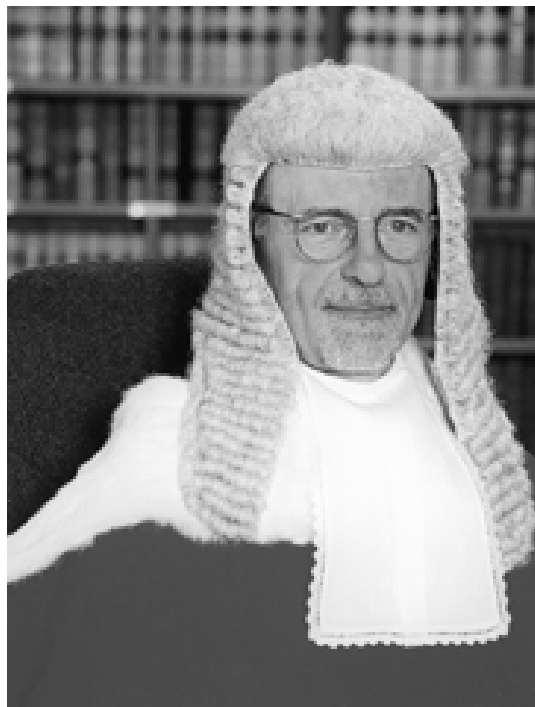
His Honour will sit in the Common Law Division.

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## The Hon. Justice George Palmer

George Palmer QC became a Judge of the Supreme Court of New South Wales on 23 April 2001.

After graduating from Sydney University, he did his articles at Freehill Hollingdale & Page, working



The Hon. Justice George Palmer

extensively in commercial law. From 1970 until 1974 he was employed as a solicitor, and then admitted as a partner, at Messrs Strasser Geraghty & Partners where he specialised in mining and oil exploration and development work and public company securities.

His Honour was admitted to the Bar on 8 November 1974. He read at the Bar with RA Conti QC, now Justice Conti of the Federal Court. He took silk on 12 November 1986. At the Bar, he specialised in company and commercial law and trade practices law.

At his swearing in, the President of the NSW Bar Association, Ruth McColl S.C. said:

Apart from your manifest legal skills, one of the reasons you undoubtedly acquired a large practice lay in your approach to your clients and your cases. While passion is not always a description encouraged in relation to a barrister's work, particularly not in the company list, in your Honour's case it is a fair to say that you have always been passionate about your cases. You have always pursued your client's interests with great zeal at the same time managing to remain objective. You have, of course, always been exceptionally well organised and prepared for each case. You are a lateral thinker but at the same time a person who understands human frailties. You are said to have great patience. You have been exceptionally well prepared for each case, bringing to

that preparation those qualities essential for judicial life being decisiveness, tenacity, extreme logic and the great ability of being able to sort the wood from the chaff.

His Honour was involved in many notable cases at the Bar. So, for example, he was junior counsel to Roger Gyles QC now of the Federal Court assisting the Woodward Royal Commission into Drug Trafficking. He undertook a special investigation on behalf of the National Companies and Securities Commission into the collapse of the Balanced Property Trusts. He appeared in the *Tryart* litigation, parts of *Spedley*, the *Estate Mortgage* case, *Talbot v NRMA Holdings* and many other notable cases.

Outside the law, His Honour is an accomplished composer and conductor, making his conducting debut at the Sydney Opera House in 1998, conducting the Sydney Opera House Orchestra in the curtain-raising programme for the Ray Charles tour.

His Honour sat as an acting judge of the Supreme Court in late 1991.

His Honour will sit in the Equity Division.

## The Hon. Justice James Allsop

On 21 May 2001, before a packed Court 21A, James Allsop S.C. was sworn in as a judge of the Federal Court of Australia. His Honour was called to the Bar in July 1981 and appointed Senior Counsel in 1994. He had been the University Medallist in Law at Sydney University and was Associate to Sir Nigel Bowen. He is the first former Federal Court Associate to be appointed to that court. As was pointed out (kindly or unkindly) at his swearing in, he is the first Sydney resident judge of the Federal Court to be born in the second half of the 20th century.

Apart from his distinguished career at the Bar spanning commercial law, insolvency, tax, trade practices, maritime, intellectual property, administrative and constitutional law, His Honour has devoted his time generously to both the cause of legal education and service to the New South Wales Bar. He has and continues to teach part time at the Sydney University Law School, has lectured to Vietnamese government officials and judges and taught at the Australian Advocacy Institute. He has also acted as a director of the Bar's Sickness and Accident Insurance Fund and as a director of the Bar's Superannuation Fund. More recently, His Honour was heavily involved in the Bar's response to the HIH collapse.

It is rumoured that, immediately after his swearing in, he was *not* overheard having a vigorous debate with Justice Hely. As David Bennett QC said on the occasion of his swearing in:

Your Honour has taken the old description of equity as a whispering jurisdiction to new lows. The hard of hearing have learnt to take their work elsewhere. Secondly, your Honour has a love of dim lighting. A number of theories have been offered for this predilection, most of which can be rejected out of hand. It's unlikely to flow from a desire to conserve energy. It's certainly not from a desire to reduce your electricity bills. Bankrupt and insolvent barristers do not practise at Dame Joan Sutherland Chambers. The most likely theory is that the dim lighting is to prevent those who



The Federal Court at the swearing in of  
The Hon. Justice James Allsop.

have difficulty in hearing your Honour's proffered advice from cheating and obtaining it by lip reading.

Ruth McColl S.C., speaking on behalf of the Australian and New South Wales Bar Associations, made the following observations which reflected the universal acclaim which met Justice Allsop's appointment to the Federal Court:

You have a deep love of the law as a discipline and this may in fact reflect one benefit of your foreshortened years as a disciple of the History Department, for you developed during that period a methodology and analytical approach particularly suited to the legal process. In your practice at the Bar you have honed that skill to perfection. You have a passion for drilling down to ensure that you understood the fundamental principles of the law so that you may expound the doctrines of law correctly. You never accept a principle at face value; you always make sure that you trace its origins and determine why it emerged. Your diligence in presenting cases is legendary. You've always been completely across the facts and the law...

All who have worked with you anticipate you will be a delight to appear before and a model of courtesy to counsel. The Bar is confident you will be a superb judge. On behalf of the Australian Bar I welcome your appointment to this Bench. We are confident you will meet the demands of office with the same distinction and with the same attachment to principle, hard work and to independence of mind that has marked your service as a barrister.

In reply, Justice Allsop, *inter alia*, paid tribute to a number of senior members of the Bar, some of whom are now on the Bench. His Honour said:

It is over 20 years since I was last seated on this side of the Bar table in this courtroom, slightly forward and lower, when I was the associate to someone who I think was a truly great judge and a wonderful person, Sir Nigel Bowen. I spent nine fascinating months with him



watching a court operate and seeing litigation unfolding from the inside. It was an intriguing experience for someone who had never been in a courtroom before. I wish he could be here today.

Others have taught me about the human process of litigation in its infinite variety and difficulty, its subtlety and its brutality, its need for logic and for intuition, its call for caution but also for bold action, its complexity but its foundation on simple common sense. If I may be permitted to mention some of the people whose instruction and example have been a source of professional inspiration to me: Mr Tom Hughes with his clarity of mind and beauty of spoken and written expression; Justice Hely with his use of acidic reduction practised on problems, ideas and people alike, Mr S E K Hulme with his capacity to craft legal argument of such structure and balance that they could have been made by the angels; Justice R V Gyles with his ability to deploy controlled cyclonic power in the aid of his many other legal talents; Frank McAlary with his astonishing command of all areas of the law and his secret personal formula of mixing this with common sense and great cunning; Mr Justice Simos who taught me patience and who cautioned me against ever saying anything to a judge in court unless, and then only insofar as, it were truly necessary. Finally, Mr Andrew Rogers who, as Mr Justice Rogers, taught me and I suspect all my generation the way to approach commercial litigation. I doubt whether he has received adequate recognition for the profound effect he had I think on civil procedure in Australia.

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## The Hon. Justice Janine Stevenson

On 21 May 2001 Janine Stevenson was sworn in as a judge of the Family Court of Australia at a Ceremonial Sitting of the Full Court of the Family Court at Parramatta. Ruth McColl S.C., speaking on behalf of the Bar Association, congratulated her Honour on her appointment to the Bench. *Inter alia*, she said:

Praise for your Honour's approach to practice is universal. You have an acute ability to identify the salient issues of a case; peripheral issues do not distract you. This has always been your approach. I recall when you were a young student you never accepted propositions at face value and you were always determined to test them for their correctness. Your preparation for cases is meticulous. Your submissions are so detailed and precise it is said that they cry out to be adopted as the judgment in the case. The speed with which you attend to your chamber work is such that we can all confidently expect your judgments will be delivered quickly and efficiently.

You have developed a particular interest, as we have heard, in representing children ...your role in representing children has enabled you to develop a particularly good sense of objectivity and insight into one of the main functions of this Court, namely looking after the interests of the child and bringing this quality to the Bench will be an exceedingly valuable attribute.

We all know that this court is a highly emotional jurisdiction. Indeed, as I recall, that was the subject of controversy some almost two decades ago, but this places indeed an extra burden upon appointees to the Bench. You are particularly well suited to take on that burden. Your professional style is calm and considered and you have a great ability indeed to calm emotional clients and

indeed emotional opponents. This characteristic, it is said, will enable you to be an empowering sort of judge to whom counsel will be able to speak openly.

Praise and support for Her Honour's appointment was also reflected in all other speeches delivered on the occasion of her swearing. Her Honour's remarks about her career at the Bar and colleagues in Frederick Jordan Chambers are particularly of interest:

When I came to the Bar in 1981 I found to my surprise and delight that I had joined and been made very welcome by a small group of women barristers who were very supportive of each other and of newcomers like me. At the time there were only 27 other women on the role of barristers and they were people such as Jenny Blackman, Pat Moore, Gay O'Connor, The Honourable Margaret Renaud and Lawrie J. They were strong, determined and warm colleagues who gave generously of their time, practical help and encouragement. They had created a real sense of belonging which was illustrated very well by a lovely tradition of those days. Whenever someone left practice for any reason there would be a lunch at another one of their homes. I would have to concede that many saucers of milk were consumed on these occasions but they were wonderful fun and really added to the sense of support for each other.

At one of these lunches I had the great pleasure of meeting the Honourable Margaret Renaud who was then a crown prosecutor. Today I would like to thank Margaret profoundly for her two very generous gifts to me, they being her friendship and her wig.

I am very grateful to the solicitors of the Legal Aid Commission for giving me the opportunity to do things such as representing children which perhaps really did make a difference. I thank my colleagues in Frederick Jordan Chambers for the friendships and fun times we have shared. It was very important to me to know that I belonged to chambers which had no criteria for entry except the necessary qualifications and a desire to succeed at the Bar. I pay tribute to the founding members who took the view that it did not matter who or what you were. For example, you could be Asian, Arabic, Jewish, Aboriginal or a woman, indeed, but you could still come to Freddie Jordan and try your luck. The consequence is that the members are a diverse, interesting group who generally see our profession as something more than just a means of making money. I will miss them a lot.



## Bertram John Fiennes Wright MBE QC (1903-2001)

*By Malcolm Hardwick QC*

Bertram Wright, who died on 24 April 2001 aged 98, practised as a member of the NSW Bar for 46 years. He was a most courteous man, who brought high professional competence and diligence to anything he undertook. He was always generous with his time and advice.

In various fields, Wright rendered conspicuous service to the profession of the practice of the law.

The son of the Most Reverend John Charles Wright, DD, Archbishop of Sydney and Primate of Australia, he was born on 3 March 1903 and was educated at Shore, the University of Sydney (BA) and New College, Oxford (MA).

In 1928 he became a student-at-law and associate to Sir John Harvey, chief judge in Equity, until he was admitted to the New South Wales Bar on 21 November 1930. He took chambers at 170 Phillip Street until 1933, and from 1934 until the outbreak of war had chambers at 142 Phillip Street.

In 1939 he was a member of the 2nd Armoured Car Regiment and enlisted in the 2nd AIF on 13 May 1940. He served as ADC and later personal assistant to General Sir Vernon Sturdee, chief of the general staff; head of the Australian Military Mission, Washington, and later GOC, I Australian Corps, New Guinea. Wright was present when, on 6 September 1945, the chief of the Japanese forces, Rabaul, surrendered and presented his sword to General Sturdee aboard *HMS Glory*.

Wright received high praise for his service in Washington as personal assistant to the GOC, First Australian Army, and for his untiring and most diligent work, diplomacy and initiative of a high order. He was appointed MBE (Mil.) in 1945 and was demobilised on 29 July 1946 as Lieutenant Colonel.

On his return to the Bar in 1946 he had chambers in University Chambers and from 1957 on 10 Wentworth Chambers.

Wright was honorary secretary of the NSW Bar Association between 1937 and 1940, and a member of the Council of the Association 1959-1964. He took silk in 1969 and was appointed senior counsel assisting the independent inquiry into the Australian Repatriation System 1971-1975. He retired from the Bar in 1976.

Previously he had been a member from 1957 of the Court Martial Appeals Tribunal, of which he was deputy president between 1973 and 1975. He was a member of the Law Extension Committee, University of Sydney, 1964-1976 and a director of the Union Fidelity Trustee Company from 1955 to 1977.

Wright was chancellor of the Diocese of Riverina 1936-1987; a governor of The King's School, Parramatta from 1935 and honorary treasurer 1947-1962.

On retirement from the Bar he moved to Gostwyck, Uralla, NSW, where he was president of the New England Regional Art Museum Association 1978-1983.

In 1948 he married Noreen Dangar, who died in 1991. Wright is survived by one of his two daughters and her two sons.

## Hugh Walker Robson QC (1914-2001)

*By Nicolas Robson*

Hugh Robson grew up in various NSW country towns, the son of a Methodist clergyman. He was articled to Walker Gibbs & Cook (a firm partly the ancestor of the present Dunhill Madden Butler), and after interludes as the private secretary to Billy Hughes, associate to Sir Kenneth Street, and in the Army Legal Corps, he began practice at the Bar in 1947.

He specialised in equity and commercial law and also in admiralty and in crime, including the notorious case of *Roderick*, in which he came second but afterwards had great, if rueful, praise for the quality of the forensic investigations. He appeared with and against most of the famous figures of his day, including Sir Frank Kitto, Sir Garfield Barwick, Kerrigan, Shand and many others. He was a member of the Bar Council from 1950 to 1960, a period which included the decisions which led to the formation of Selborne and Wentworth Chambers. He was appointed Queen's Counsel in 1968. He served on the District Court from 1970 to 1983, spent some months in 1973 as an acting judge of the Papua New Guinea Supreme Court, and after retirement was a member of the Sentence Review Board.

He was twice married, firstly to Nancy Taggart and then to Moira Russel Stokes, who survives him.

He was a keen sportsman, playing rugby for North Sydney Boys' High in a curtain-raiser before a test match at the SCG. He could not recall whom Australia played, but certainly remembered that in his own match he scored a try and kicked some goals. He once caught a 40 pound jewfish, but grudgingly conceded that the line was rigged and set by his friend, the solicitor Gordon Robilliard. Gold is best not mentioned, but he played tennis for many years with the likes of the eminent test cricketer Johnny Taylor, Sir Norman Cowper and Wilfred Francis until, in his seventies, his gastrocnemius forced him to the bowling green. That was the end of the butcher's bill, because the chook for the super-veteran's class came home with him most Saturdays.

He had a great love of music as an organist and a singer. When on a debating tour for the Australian universities, with nuclear physicist Frederick Thoneman, he auditioned at the New York Met and was offered a

scholarship. After agonising, he decided to continue with his plans for the law. If he made the wrong decision, then he is no doubt now being given a second chance (to paraphrase something Jim Poulos recently said).

## The Hon. Russell Bainton QC (1930 – 2001)

By Peter Jacobson QC

Anyone who met Russell Bainton will tell you that he was a very quiet and private man. What many did not know was that he had an extraordinarily dry sense of humour which he delivered, usually, in a modest number of barely audible words. Sometimes they were spoken at the Bar table, but more often over a glass in his chambers. He was quick to laugh, particularly in the company of friends and colleagues.

He achieved an outstanding measure of success in over 40 years of practice. There were two reasons for this. The first was preparation. Bainton was always the complete master of the facts and the law in every case in which he was briefed. If expert evidence was involved he knew as much as, and often more than, the experts retained on both sides of the record. He was one of the few truly numerate barristers.

The second reason was his ability to reduce a case to its most essential propositions in a page and a half of tightly packed prose. This skill was probably innate but it was no doubt refined and reinforced when he read with D A Staff on coming to the Bar in 1955.

Bainton passed on his skills to a number of his readers including P.G. Hely and, later, to T F Bathurst, for whom Bainton was an unofficial pupil master.

Bainton was a man for the really hard case. He knew the issues on which a difficult case could be fought and won. An example of this was his defence of the claim for professional negligence brought against the auditors of the failed Cambridge Credit Corporation. He admitted liability but defended the claim on the ground that the liquidator could not prove causation.

At first instance, Rogers J found against the auditors and awarded \$145 million in damages. However, Bainton's approach was vindicated when he persuaded the New South Wales Court of Appeal to overturn the trial judge's finding of causation; see *Alexander v Cambridge Credit Corporation Limited* (1987) 9 NSWLR 310. His arguments in that case, and their acceptance in the Court of Appeal, were a precursor to the principle subsequently adopted by the High Court in *March v Stramare Pty Limited* (1990-1991) 171 CLR 506 (in which Bainton did

not appear); i.e., the ultimate test for causation is whether, as a matter of common sense, the negligent act or omission is a cause of the loss.

Bainton's skills were not confined to appearances in Australia. He appeared with success in the Privy Council. An example of this is *Cumberland Holdings Limited v Washington H. Soul Pattinson & Company Limited* (1976-77) 2 ACLR 307, an oppression suit, in which he succeeded



The Hon. Russell Bainton QC

in reversing the findings of Sir Nigel Bowen, then the chief judge in equity.

Another of his victories in the Privy Council was in *Borambil Pty Limited v O'Carroll* (1974) 48 ALJR 13. He appeared for the respondent. Their Lordships dismissed an appeal from a judgment of the New South Wales Court of Appeal on a determination of a fair rent under the *Landlord and Tenant (Amendment) Act 1948*.

Bainton was not always successful. He was known, on at least some occasions, to become cross with clients or solicitors who had misheard his advice. After one defeat in the Privy Council he said, 'I did not say you would win. I said you should win. My view has not changed.'

Bainton joined 11 Selborne Chambers on its establishment in 1958. He moved to 7 Selborne in 1974. He did so in order to fill a need which had arisen when the floor lost all of its commercial silks by reason of elevation to the Bench or otherwise. Bainton moved into the room which was vacated when Philip Jeffrey was appointed to the Supreme Court.

Brian Bannon, who was Bainton's clerk on seven, has said that when Bainton joined the seventh floor he had a well-established practice as a QC. He had taken silk in 1969 and Brian just 'polished his practice up a bit for him'.

Polishing up Bainton's practice seems to have included finding briefs for him outside his usual fields, which everyone (except for Bannon) thought were confined to revenue law, commercial law, corporations and securities law and professional liability.

In those halcyon days of the 1970s and 1980s no brief was ever allowed to leave the Seventh Floor. The powers of persuasion of the clerk were not inconsiderable. However, those powers came to an end after Bainton was persuaded to accept a brief for a defendant in a defamation trial. Bannon says that even Bainton's well-known and well-justified self-confidence was shaken by his loss; although only for a short time.

Bainton was a founding member of the Barristers' Superannuation Fund when it was established in 1957. He was a director, and later chairman, until his appointment to the Bench in 1995. During his chairmanship he ran the fund almost single-handedly from his own chambers. Of course this was done without fee and without fuss in the highest traditions of the Bar.

The same can be said of his elevation to the Bench. He accepted it at the age of 64 out of a sense of duty to the court to fill a vacancy which had arisen and for which he was thought to be the best candidate.

Despite his love for the law, Russell Bainton's first love was his family. His profession and his vineyard ran a dead heat for second. His many other interests were not far behind.

## Patrick Costello (1943 - 2001)

*A eulogy by Anthony J Bellanto QC, delivered at the memorial for Patrick Costello on Thursday 1 February 2001.*

At Pat's funeral service on Saturday last, at Byron Bay, following each of three eulogies, something extraordinary occurred. The large congregation applauded. Each eulogist spoke about his life and the response was typically Patrick: unexpected, spontaneous and enthusiastic.

When he was called to his maker on Saturday 20 January at about 11:10pm, his face changed and evinced a look that could only be described as angelic and at peace. The peaceful expression may have been because he had achieved his commitment to face the inevitable head on and complete a seamless transition to a better place. As for the angelic expression, Pat was generous, charming, stylish, flamboyant, gregarious and thoughtful - but he was no angel. The paradox is perhaps emblematic of his life - sometimes there is simply no explanation and he is up there keeping us guessing.

When my wife Trish and I arrived on that Saturday morning he waved his trademark admonishing finger (which has been known to capture the ire of many a

magistrate) and said 'I'll be watching over you two from up there'. He then demanded Chris Watson and I take his clubs and golf cart and have a game of golf - which we did. On returning he enquired who won. Winning was a passion reflected throughout his life, particularly in the law. His zeal in court often brought him into conflict with the bench and opponent and he shares the distinction along with my late father of being the recipient of some barbs from the New South Wales Court of Appeal. A decision which, incidentally, was split 2-1. Whilst such comments may deflate the egos of most of us, Pat embraced the challenge and honed his considerable forensic skills to become a fantastic cross-examiner, at times having the witness agreeing to propositions earlier disavowed or which the witness hadn't heard of.

A good way to judge an advocate is to speak to someone who has been opposed to them. Peter Hastings QC, who prosecuted on behalf of the Commonwealth Crown in a number of cases in which Pat defended, describes him in fond terms. They got on very well although Pat described Peter as his nemesis, commenting that he knew too much about his past.

Testimony to Pat's reputation and standing was reflected on the Monday following his death when Justice Reg Blanch, Chief Judge of the District Court, in open court made special mention of Pat's passing, expressing his and the Court's condolences.

Pat brought a charisma to the courtroom and on a good day would dominate the court. Even a busy court with a long list seemed to revolve around the matter or matters involving Pat Costello. The wake following his funeral last Saturday engendered such discourse that there were people mingling and talking about Pat from 11:30am to 9:00pm in the evening, swapping stories, anecdotes, all reflecting some aspect of Pat's life. It was a very special scene at the Beach Hotel looking out to sea across Byron Bay. Not only is it geographically idyllic, but a scene appropriate for such an occasion.

It is also worthy of note that the press has acknowledged his passing with obituaries and articles, again testimony to his reputation. The press loved him for his flare and colour, which transcended the courtroom.

At the Downing Centre recently I was in conversation with Major Joyce Harmer, the Court and Prison Chaplain and she spoke of Pat giving her a kiss on the cheek, asking how she was and if he could help her with anything. He often gave his time without fee for the underprivileged. He was humble and caring. Joyce said that when he was in the building it gave her a sense of comfort. Pat had this effect on people. She gave me her card and on the back of it were these words 'Never be afraid to trust an unknown future to a known God'. These words say a lot about Pat Costello whose fearless advocacy broke boundaries in pursuit of his commitment to his client but at the same time there was a deep humility and reverence for his God, perhaps the result of his Jesuit upbringing.

He was a straight shooter and expected the same in return. If Pat liked you, you had the feeling he was looking

into your soul. He had an uncanny knack of pre-empting what you were thinking.

At the Woollahra golf club the flag flies at half-mast - he spent many mornings playing golf. It was common to see Pat on the course at 5:30am having a quick nine holes before work. When I played with him it was not uncommon to be on the receiving end of a good humoured but sarcastic barb, such as driving the ball from the tee a few feet sideways and his response being 'Oh, what a terrific putt'.

He was Catholic in faith and in life. He had a wide variety of friends and acquaintances and his interests produced a rich tapestry of intrigue and excitement. There was the roguish fringe, the diverse social interests, his golf, sailing and of course his family and friends that he cherished at Byron Bay.

He was cutting edge. He was always so charming to men and women alike - a people person. In fact, I was in court recently last year when Pat became engaged in a discourse between Bench and Bar and on this occasion he was so persuasive and endearing that the Magistrate started calling him Pat. David Higgs QC who shared a floor at Chalfont Chambers with Pat speaks of those early days at the Bar when Pat was cutting his teeth and very busy. He took David under this wing and gave him mentions in the Local Court but always ensured that he was paid. This was the beginning of Pat's flamboyant period and David speaks with great affection of Pat's assistance and they became very close friends, spending a lot of time together, although David did make the observation that he (David) was pleased he wasn't born a woman.

In those early days there were only two colourful characters on Chalfont, namely Jack Bernie and Pat Costello. There was not enough room for the two of them and something had to give. It occurred when Pat and Jack got involved in a fist fight over the entitlement to a room. This was a floor in which my late father was leader and in respect of whom Pat modelled his career.

Through the thin walls, Pat's admonition to clients could often be heard 'No dough, no show.' A catch phrase that he repeated to the end.

His flamboyance was reflected on one occasion when he was seen going to the Local Court in a chauffeur driven limousine having consumed a glass or two of champagne on the way, only to greet the Magistrate arriving in a tinny Torana.

He organised a large and well-publicised function at the Savoy Hotel in London. Process servers attended on Chalfont Chambers on behalf of the Savoy seeking out Pat for payment. On arriving at Chambers, Pat was sitting in the foyer. When asked if Pat Costello was on the floor, Pat responded that he was in Dubbo. The Savoy wrote to the Bar Association to follow up the matter and were politely told it was private.

His opponents in court were usually Crown or police prosecutors. When news of his illness circulated recently he was told that some of his former opponents were considering sending a card expressing condolences. His

retort was that those who signed it should think carefully because if they did their noses would grow.

He not only was seen arriving at court in a chauffeur driven limousine but he also had a friend who was a pilot who he purloined to fly him to various courts and on one occasion landing on the taxiway rather than the runway.

He was very intelligent and quick-witted. On one occasion he was sought out by a bookmaker for payment of a debt. The bookmaker approached Pat who was holding court in a coffee shop in Double Bay and said: 'Pat you've owed me a substantial amount of money for too long and I am becoming impatient. I'd like you to pay up'. Pat responded with the following, 'Every month I put all my debtors into a barrel and give it a turn or three and the name that comes out gets paid and if you don't behave yourself, you won't even make the draw.'

He also tested the patience of many a judge and magistrate; however he was never malicious and his behaviour reflected his Irish ancestry. Recently he was representing a client before a District Court judge and at the end of the judge's summing up to the jury he asked Pat, 'Is there anything further you would like me to tell the jury?'

'Yes' said Pat. 'I have two directions I'd like you to give them.'

'Very well, what are they?' said the judge.

'I think you should write these down' said Pat. And the judge picked up his pen ready to write. 'Direction No 1' said Pat. 'During Mr Costello's address I wasn't paying attention.'

There was the characteristic heated exchange between Counsel and Bench and then when things settled down and the judge made it clear he considered the matter closed, Pat interjected and reminded his Honour that he hadn't given the jury the second direction that was sought.

'Very well', said the judge.

Pat again reminded him that he should pick up his pen and commence writing. The judge picked up the pen, whereupon Pat said, 'During the Crown Prosecutor's address I wasn't paying attention.'

Pat's favourite colour was yellow and it reminds one of the sunflower and in turn is emblematic of his personality - colourful and bold. Pat's impish charm and good humour, quick wit and style are reflected in his two daughters Chloe and Kate who adored their father and have displayed great courage.

Over the last eight months Pat's life has been enriched and fulfilled through his relationship with Sam and their deep spiritual bond enabled him to cope in the face of the inevitable. At the end, as usual, Pat was surrounded by his harem of women who loved and cared for him. We've all lost something in his passing.

If there is an expression that sums up Pat's life, it is to be found in the phrase '*Carpe diem*'.



## Michael Errington (1953-2001)

By Anne Rees

Michael Errington died suddenly on 29 January 2001. He was 47 years old. Readers of *Australian Family Lawyer* will remember him as a prolific and thought provoking contributor.

Michael graduated in Arts from Sydney University in 1974, majoring in pure mathematics and in Law in 1976. He served articles of clerkship and was admitted as a solicitor in March 1977. In 1978 and 1979 he studied at the London School of Economics and graduated with the Degree of Master of Laws. After returning to Australia he practised as a solicitor in Newcastle, in employment law and industrial relations as well as common law and areas of compensation. At the University of Newcastle, in the Faculty of Law, he lectured in contract law, trade practices, industrial law, forensic psychology and was a lecturer in law and ethics in the Faculty of Medicine. This latter interest led him to co-author *Law for the Medical Profession in Australia*, which was revised and published in its second edition in 1996.

Michael came to the Bar in 1984, practising in Newcastle where he was primarily a family lawyer and, in January 1991 he moved to Sydney and joined Culwulla Chambers. He quickly established a reputation as a clear and concise thinker and as a fearless advocate and relentless opponent. He hated to lose! Michael loved the intellectual challenge of the law and the cut and thrust of cross-examination. Appellate advocacy was his particular passion and he appeared in the Full Court in every state and against most of the leaders of the family law Bar.

In what passed for his spare time, he read widely in philosophy and religion, history, biography and fiction. He sailed and built things – like fences and bookshelves. Indeed no small repair was safe from his tool kit. He had the best repertoire of jokes at the Sydney Bar. He took great joy in his four children and adored his partner, Gayle Meredith, with whom he co-authored a number of articles.

We will miss his fierce delight in the law, but mostly we will miss a beloved friend.

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## Mariusz Pavel Podleska (1955-2001)

By Rick Burbidge QC

Mariusz Pavel Podleska, barrister, was killed in a traffic accident at Balmain on Thursday 8 March.

Mariusz was born in Stalinogrod, Poland on 10 February 1955, the only son of a classical musician and a great Polish beauty. The family migrated to Hobart in 1966. The family was granted Australian citizenship the following year.

Mariusz attended a local high school, where he experienced the problems associated with an absence of knowledge of the local language, a disability which he quickly overcame. At age 18, suffocating within the close confines of the local Polish community, Mariusz escaped to sea, joining a Sydney-Hobart yacht, which was sailing on to New Zealand. He was, alas, quickly tracked down through the international Polish brotherhood, and in a negotiated return to the bosom of his family he agreed to study law, but in Canberra. His sharp intellect enabled him to graduate at ANU as a Bachelor of Arts, with Honours in Philosophy and Politics. Though an excellent student, Mariusz, gifted with European charm, polished and far too good-looking, settled into the life of an antipodean Sebastian Flyte. He revelled in university life, but his leisurely pursuit of learning ultimately came to an end with his graduation in law, again, with Honours, in 1982.

In 1983 Mariusz was admitted as a solicitor in New South Wales and the ACT, and commenced work with Dawson Waldron, with Hugh Keller his supervising partner. In 1986 he was called to the New South Wales Bar, and in subsequent years was admitted to the bars in Tasmania and Western Australia. Mariusz' first chambers were on 10 Wentworth, then lead by Ken Handley QC. He read with Tony Bellanto QC and Martin Einfeld QC, accepting briefs in all jurisdictions, but steering himself towards corporate and equity work where possible. He later joined Windeyer Chambers and in 1991 I invited him to join my new chambers in the State Bank building. He later joined King Chambers under John Dowd QC and 3 Selborne Chambers under Peter Capelin QC.

During his practice years Mariusz involved himself in academic pursuits of many kinds, and his interest in academic law which he implemented by taking on a variety of teaching positions to some extent overshadowed his pursuit of professional eminence. He held at different times the posts of examiner in Constitutional Law at Sydney University, Resident Tutor in Law at St Andrews College, Lecturer in Practice and Procedure for the Solicitors' and Barristers' Admissions Board course and occasional examiner and lecturer at the College of Law.

Mariusz was a gregarious man, with an enviable generosity of spirit. He loved the law, its theatricalities and



its philosophies. He personally sparked the interest of numerous young practitioners, whom he supported with gifts of books, his own boundless enthusiasm and wisdom.

In 1997 he was advised that he had a terminal illness, and he determined to grapple with that issue alone. He gave up practice, and resided for some 18 months in Byron Bay. He succeeded in confounding his medical advisors, and by 1999 was looking to resume part-time practice. He joined Lismore Chambers, headed up by Geoff Radburn, and began intermittent practice in the Northern Rivers District. Mariusz was however not really suited to the demanding circuit court life of the common law, nor did his health prove as robust as he had hoped. He accordingly sought refuge in the academic world, and in 2000 secured work as a part time member of the Southern Cross University Law School, and as a teacher at the University of New England School of Law. Tragically, he had secured a position of a more permanent nature with the University of Newcastle on the day prior to his death.

He was a colourful figure against the increasingly neutral background of the Bar, and his passing at such an early age is a great sadness to all who knew him.

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## John McDonald Evans (1956-2001)

*By Anthony Bartley S.C.*

Jack Evans was 40 when he was admitted to practice as a barrister and solicitor in the Australian Capital Territory, 43 when he was called to the New South Wales Bar and 44 years of age when he died.

He was diagnosed with cancer late in the course of his condition and had only a few months to come to terms with it. He did this with remarkable humour and grace.

Jack had always wanted to be a barrister. Although his career at the Bar was short, he was already very much respected, trusted and liked by his colleagues, and there was no doubt about his qualities as a barrister and the potential for a successful career.

Jack was born in Albury. On the walls of his Chambers in Canberra he had old photographs of his forebears in the stock and station agent world, including a photograph of one of them presiding over a record sale of 44,000 sheep at the Albury Sale Yard. Although he had a country background, he grew up in Sydney. He had two degrees and initially was a librarian. His work as a librarian led him into industrial relations and vocational training fields and in these areas he was as respected, admired and trusted as he came to be later in the law. By the 1980s he had become assistant secretary of the ACT Trades and Labour Council. This was a very active time in the world of industrial relations and Jack often found himself dealing

with the industrial silks on the one hand and the tough and experienced union leaders on the other.

Jack had many joys in his life; the greatest was his family. He was married to Margaret Robson and their three children Caitlin, Johnny and Edmund were the delight of their lives.

His interests were perhaps more typical of an older generation of people who were called to the Bar. He read widely. He loved an extraordinary range of music. He had an abiding passion for politics and Australian history. He rode a bicycle to chambers most days of the week.

Jack loved being a barrister. There was no arrogance or false pride about him but he was immensely proud of his profession and of the duties which attached to it.

Jack's life and his short career at the Bar remind us of much that is good about the profession and much that gets lost in times such as these.

Born 26 June 1956 in Albury, New South Wales. Died 19 May 2001 in Canberra ACT.

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## Getting justice wrong: Myths, media and crime

By Nicholas Cowdery QC  
Allen & Unwin, 2001

Anyone familiar with Michel Foucault's description of the death of French regicide Damiens in 1757 knows that the administration of criminal justice has advanced a long way in western societies during the past 250 years.<sup>1</sup> Damiens was condemned 'to make the *amende honorable* before the main door of the Church of Paris'. His punishment was to be:

taken and conveyed in a cart [to the church], wearing nothing but a shirt, holding a torch of burning wax weighing two pounds; then, in the said cart, to the Place de Greve, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.

As if that sentence was not enough the way it was carried out was badly botched (not surprisingly). The press account of it reproduced by Foucault is not for the faint-hearted.

How advanced is our criminal justice system? Has it regressed recently, due to reactive politicians in search of easy votes, responding to populist ignorance fanned by tabloid journalists and radio 'shock jocks'? These are just two of the questions raised, and partially answered by Nicholas Cowdery QC in his wide-ranging and topical book *Getting Justice Wrong*.

The answers are not always comforting. Cowdery QC quotes the editor of the *Sydney Morning Herald* on mandatory sentencing:<sup>3</sup>

We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.

The editor might have been commenting on the recent notorious Northern Territory case of an Aboriginal youth who was gaoled for a year for stealing a packet of biscuits.<sup>4</sup> The shock of realisation lies in the date of the editorial: 27 September 1883. The editor was criticising a scheme of mandatory sentencing introduced in New South Wales in that year which, after media pressure, was abolished the following year because of the injustice it caused. How has it come to pass that governments within Australian society have chosen policies that were rejected as unjust more than a century ago?

Those with the time or inclination to listen to the talkback 'opinion-makers' (whom Cowdery QC frequently castigates in *Getting Justice Wrong*) will not be

surprised at such a turn of events. In a text richly leavened with quotable quotes, Cowdery QC cites the 'opinion-making' of one notorious 'shock-jock' – Howard Sattler – on the deaths of three hapless car thieves:<sup>5</sup> 'Well, I say good riddance to bad rubbish. That's three less car thieves. I think they're dead and I think that's good.'

The point is enhanced by the juxtaposition of these sentiments with those of Abraham Lincoln on the same page – a polarity of ideas and intelligence about as wide as can be imagined. Lincoln called for 'reverence for the laws' to 'become the political religion of the nation'. No doubt it was the then current crop of media 'entertainers' to whom Oscar Wilde referred when he quipped:<sup>6</sup> 'By giving us the opinions of the uneducated, modern journalism keeps us in touch with the ignorance of the community.'

One of the primary themes of *Getting Justice Wrong* is that ignorance (in particular, ignorance of the criminal justice system) threatens democratic society under the rule of law.<sup>7</sup> Eliminating ignorance of how the criminal justice system operates and what it is capable of achieving in a democratic society under the rule of law is the central aim of *Getting Justice Wrong*.

Which came first: democracy or the rule of law? Unlike the chicken and the egg, it is fairly easy to conclude that the rule of law evolved first. It developed from an arbitrary rule to providing the conditions for democracy to grow and flourish. Democracy under the rule of law requires a delicate balance between meeting the wishes of the people, on the one hand, and curbing them on the other. The criminal justice system is the key to striking a successful balance. Its workings should be well known and appreciated. Instead, populist ignorance fed by an elite band of media 'entertainers' create the conditions for the 'law and order auctions' so beloved of politicians seeking office. With one ear to the radio and one eye on the tabloids, politicians are tempted to reach for simplistic 'solutions', such as mandatory sentencing, in a grab for easy votes. The wheel turns. Arbitrariness returns. The rule of law, without which democracy cannot exist, is threatened.

This is the central thesis of *Getting Justice Wrong*. Against this background a number of important topics are considered, including policing crime, the drug problem, crimes involving children, domestic violence, crime prevention, the right to silence, sentencing, the tension between Australian domestic law and international law and whether there should be an Australian Bill of Rights. As we have come to expect, Cowdery QC does not resile from stating his opinions, even if controversial. For example, he advocates the prescription of heroin to confirmed addicts by licensed medical practitioners in order to reduce harm to the users, reduce the commission of crime to support addiction and reduce the demand for illegal heroin.<sup>8</sup> He also advocates the adoption of a constitutionally entrenched bill of rights.<sup>9</sup>

*Getting Justice Wrong* does not purport to be a

complete treatment of the topics it addresses. Certainly one must agree with the author that most of the topics could become a book, or a number of books. It would be interesting to hear more detailed suggestions in some of the areas considered, for example, on options to counter the problem of drugs other than heroin or alternate ways of dealing with child sex offenders, without recourse to the criminal law.<sup>10</sup>

As a forthrightly independent New South Wales Director of Public Prosecutions since 1994, Cowdery QC is no stranger to controversy. He has drawn from a deep well of experience and knowledge to create a text that manages to be entertaining, despite the serious nature of its subject matter. With the twin aims of dispelling ignorance and promoting debate, the author has eschewed a densely footnoted scholastic approach in preference for a lucid work, which should be accessible to a wide readership. That said, there are facts and figures enough to whet the appetite for more detailed research. The book's topicality, for instance in the consideration of DNA evidence in the final chapter on 'Future Directions', was highlighted by the recent case of Frank Button.<sup>11</sup> On 10 April 2001 the Queensland Supreme Court released Button after DNA testing ordered by the court confirmed his innocence of a charge of rape of a minor on which he had earlier been convicted. Button had served 10 months of a six-year sentence for a crime he did not commit.

Whether this book succeeds in its stated aim of silencing the 'shock jocks' and closing the bidding in the law and order auctions remains to be seen. However, *Getting Justice Wrong* is an educative work that takes a big step in that direction. All with an interest in criminal justice should read it.

To return to Foucault, after enduring unimaginable pain and torment, during which six horses tethered to his limbs failed to quarter his body, Damians told the executioners gathered around him 'not to swear, to carry out their task and that he did not think ill of them' and 'begged them to pray to God for him.'<sup>12</sup> His torments continued until his trunk and hacked off limbs were tossed upon the fire. That one human can show mercy in such extreme circumstances inspires hope that it might become a more common quality. Perhaps then more will ask if the punishment fits the criminal and our society, not just whether it fits the crime.

*Reviewed by Christopher O'Donnell*

## Hell has harbour views

*By Richard Beasley*

*Pan Macmillan Australia, 297pp, \$26.00*

This novel - by member of the Sydney Bar - is about life in one of the mega law firms whose lights blaze late into the billable hours, high above the waters of the Harbour.

The firm, Rottman Maughan and Nash and its truly grisly cast of characters, is brought to life through three pieces of litigation: an investment fund fraud where many millions of dollars are at stake; a personal injury case in which a child has suffered terrible injuries; and a partnership distribute within the firm itself. Our hero and narrator, Hugh Walker, is a senior associate with the firm. His position in the hierarchy is indicated by the fact that his office has View No. 3. The partners - and would-be partners - are studies in egotism, pomposity, vindictiveness and - above all - greed.

Early in the book, there is a sharp sketch of the firm's internal conflicts:

Like wars, large law firms spawn special and unique hatreds. There are factions within factions. The corporate people hate the less profitable litigators and their costly overheads. The commercial litigators sneer at insurance litigators. The professional indemnity insurance litigators say they really are commercial litigators. The information technology people think they're superior to everyone. There are North Shore factions, Eastern Suburbs factions, gay factions, WASP factions, Sydney club factions, ethnic factions, establishment factions and poor-made-good factions. They conspire against each other with the constancy of Caesar's will.

Our hero shows scant respect for his colleagues. One partner is described as 'a black belt in time-sheet fraud.' It is hard, however, to go past the senior insurance partner - Brian Owen - who emerges as a wonderfully repellent character. Bearing a considerable resemblance to Jabba the Hut in *Star Wars*, Owen is a menacing mass of malice, spilling out of his food-stained clothes and slobbering over any female office worker who comes within reach of his pudgy fingers.

As for the trust fund litigation, it is given the firm's standard treatment:

Millions of documents had been read and databased. There had been interlocutory fights over discovery and subpoenas and timetables. Witness statements had been drafted and redrafted. Forty monthly bills had been sent to the group of insurers we acted for. Like every big case I had ever seen, it was one part farce, one part drama and 98 parts lawyers' super fund.

This kind of exuberant cynicism is somewhat reminiscent of Tom Wolfe's *Bonfire of the Vanities*. It is not easy to sustain but Beasley manages to carry it through most of the book. There are also some similarities with Shane Maloney who has written a number of novels about the world of politics, journalism and crime in Australia. It is true that all these books tend to be thin on plots but their real purpose is to capture a slice of contemporary life, if often with a slightly over-the-top style designed to sweep the reader along.

The Bar does not escape unscathed in this cavalcade of legal monsters. Giles Taffy QC is briefed

1 Discipline and Punish – The Birth of the Prison, Penguin (London) 1991 pp 3-6.

2 Ibid, p 3.

3 Sydney Morning Herald, 27 September 1883 cited in *Getting Justice Wrong*, Allen & Unwin (Sydney), 2001, p 108.

4 *Getting Justice Wrong*, op. cit., p 109.

5 Ibid., p 1.

6 Ibid., p x.

7 Ibid., p ix.

8 Ibid., p 37-42.

9 Ibid., p 136.

10 Ibid., p 63.

11 R v Button (unreported, Queensland Supreme Court, 10 April 2001 per de Jersey J).

12 Discipline and Punish – The Birth of the Prison, op. cit. p 5.

by the firm in the investment fund case. He is obsessed with his stocks of special coffee, his expensive chocolates and the seating configuration in the first class flight section. Bill Silverman QC destroys the case of the brain-damaged child and then recalls his early days of acting for plaintiffs. Walker is unimpressed:

Maybe there were bad days, days when he didn't feel all that good about putting the boot into some poor bastard, days with little pangs of remorse, days when he thought a little too clearly about what he was doing. I was pretty sure he'd survive though. There was, after all, plenty of upside for him to contemplate. There was the vigorously used couch he was lying on; his single malt scotch; his silk gown, his luxury car which he would drive home in; his house in Rose Bay which he would drive home to; his attractive wife who kept him happy when he wasn't using the couch; his climate-controlled wine cellar; and the \$5,000 that he collected every day of his working life.

In comparison the trial judge in the investment fund litigation is treated almost benignly. After noting that the court room has been set up with IT equipment to look like the NASA control room of the late 1960s, Walker looks past the Bar table:

Soon the judge's associate disappeared. Then there were three knocks on the door, everyone was told to rise, all fell quiet, and in came the judge. He looked a little Neil Armstrong-ish, but he was not from NASA. He had come to the judiciary via a North Shore suburb, the private school system, the third greatest law firm in the universe, and then Phillip Street Chambers.

The ending - which should not to be revealed at this stage - is not the book's strongest segment. In fact, it loses momentum whenever Walker pauses to reflect on the choices confronting him and the meaning of life. Nor are the women characters entirely successful. Walker ditches his long-time partner after falling heavily for one of his colleagues at the firm. But there is a dearth of passion in these romances. Nevertheless, at its best, the book has a hard-bitten humour that is all too rare in modern Australian fiction.

What next for the author? Perhaps a full treatment of the Bar? This is certainly a chilling prospect. One thing seems certain, however - he can't go back to his old law firm!

*Reviewed by Michael Sexton S.C., Solicitor General of NSW*

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## Banking Law and the Financial System in Australia (5th edition)

*By W S Weerasooria,  
Butterworths, 2000*

The author's preface states that the intended audience of this book is: 'bankers and staff of financial institutions; students of banking law and practice; and lawyers handling litigation relating to banking, cheques and other negotiable instruments'. It also states that the author's objective was to be 'clear rather than clever'.

Professor Weerasooria certainly achieves this objective. The book is written in a readable, almost racy, style. It appears to deal with almost every conceivable aspect of the Australian banking system. In addition to subjects traditionally dealt with in texts of this type, the author has included lengthy chapters on the history of reforms in the banking industry, 'the public image of banks', foreign currency loans, money laundering, and branch banking, to give just a few examples. The chapter entitled 'The Public Image of Banks' contains analysis of recent media coverage and events, including the John Laws 'Cash for Comment' inquiry, of which the author states:

These revelations were treated with disgust as they are an underhand and sinister manipulation of the unbiased comment that the public expects from the media.

The author provides a large quantity of background information and history of aspects of the banking system, including the various pieces of legislative reform of the industry. The level of detail provided is considerable: in his discussion of the *Cheques Act 1986*, for example, the author discusses its passage through the houses of parliament and the political reasons for its central provisions. All of this makes the text very digestible indeed for the casual reader, but renders it more difficult to use as a research tool.

When discussing the relevant legal principles, Professor Weerasooria quotes from a wide variety of sources, including sources of a novel nature for texts of this type. For example, in discussing the distinction between 'order' and 'bearer' cheques, the author quotes at length from a National Australia Bank pamphlet (*Your Guide to Personal Banking*) and refers to no other source. This is not particularly helpful for a practitioner (except perhaps when writing cheques to pay bills).

However, most topics appear to have been dealt with in a more thorough way with reference to the relevant authorities. The chapters on the banker-customer relationship, in particular, are comprehensive and well organised.

It is the author's writing style, however, which makes the most vivid impression. The chapter on foreign currency loans, for example, commences in the following manner:

The foreign currency loans saga or fiasco is a sad chapter in Australia's history that banks would be both eager and happy to forget and put behind them. It was one of the most embarrassing ventures where bankers' greed to make a quick profit boomeranged on them.

It continues in a similar style. The surrounding events



(including the floating of the dollar) are discussed, and then the cases are analysed in very general terms. The cases are listed under two headings: 'Bank/financier won' and 'Borrower won'. The analysis tends to obscure real differences between the activities of the banks that led to liability in some cases but not in others, and the nature of the circumstances which will be required to exist before a financier will be under a relevant duty of care.

When discussing the relevant authorities, Professor Weerasooria often provides a detailed analysis of the facts of the case and even of the arguments of counsel. Thus, in his discussion of the case of *Burnett v Westminster Bank Limited* [1966] 1 QB 742 (which runs to three pages) the following appears:

Mr Richard Yorke for the bank conceded that a customer may, in theory at least, write his or her order to the bank on any substance he or she chooses, even on a hard-boiled egg.

The footnote at this point is notable. It is as follows:

For a cheque written on a cow, see the *fictitious* case *Board of Inland Revenue v Haddock* (The negotiable cow), in Herbert, AP, *Uncommon Law*, Methuen & Co, London, 1979, p201.

As a text book to which reference is had to ascertain a particular proposition and extract relevant authorities, this text may be of marginally less utility than other textbooks in the field. However, the particular virtues of this book are to place developments in their proper historical context, and to provide coverage of topics not covered elsewhere.

The author concludes his account of the Australian banking system with a chapter devoted entirely to banking jokes and quotes. For example:

A banker is a fellow who lends his umbrella when the sun is shining and wants it back the minute it begins to rain.  
[Mark Twain]

It will be a grim day in court when a barrister is required to have recourse to this chapter.

*Reviewed by Cameron Moore*

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## SPORTING BAR

### Lady Bradman Cup cricket

*By Andrew Bell*

Once again, this annual fixture between Edmund Barton Chambers and 11 Wentworth/Selborne was held at the picturesque Bradman Oval in the Southern Highlands.

Edmund Barton, led by the redoubtable Thos Hodgson, emerged from their dressing shed resplendent in new floor colours, logo, caps and jumpers. This gave a splendid appearance of unity and competence.

Hodgson called correctly and sent the 11th Floor in to bat. This decision became increasingly controversial amongst his cohorts as the 11th Floor passed 160 without the fall of a wicket, that total being contributed to by Greenwood (42 retired), Durack (40 retired and no apparent hamstring twinges), the balding Robert Weber (38 retired) and Joe, son of Bruce, Collins (41 retired). After 40 overs, the 11th Floor score had reached 220 with a portly 18 contributed by one Poulos.

In reply, Edmund Barton started well but the opening partnership was broken by the ageing but legendary firebrand John Griffiths, coming off a preposterously long run. Rod Mater was the star of the Edmund Barton innings making his way to 40 before retiring. Skipper Hodgson was deceived in flight by Durack and returned to the pavilion for an uncharacteristically modest six. Edmund Barton were finally dismissed for 157.

As ever, this was a tremendously enjoyable fixture.



Poulos practicing with an unusually straight bat.



11 Wentworth/Selborne take the Lady Bradman Cup.