Bar News
The JOURNAL of the NSW BAR ASSOCIATION
Winter 2005

Design and production
Weavers Design Group
www.weavers.com.au

Cover
Portrait of Tom Hughes AO QC by Jiawei Shen which hangs in the National Portrait Gallery, Canberra

ISSN 0817-002

Contributions are welcome and should be addressed to the Editor, Andrew Bell
Eleventh Floor Wentworth/ Selborne Chambers
180 Phillip Street,
Sydney 2000.
DX 377 Sydney

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Editor's note

The current issue of *Bar News* is very much a mixture of past and present. We feature the recent publication of *Dowling's select cases 1828 to 1844* jointly edited by Professor Bruce Kercher and Tim Castle. The story of this monumental and significant historical project is tracked by David Ash, a fresh face on the Bar News Committee and a name well known to readers of the letters page in the *Sydney Morning Herald*. In keeping with the historical theme, but moving forward, is a note by Steven Rares SC on the occasion of the 50th anniversary of Counsel's Chambers Limited. Overlapping with that period is, of course, the career of Hughes QC whose forensic presence was brilliantly captured by Jiawei Shen in a portrait, which was an Archibald Prize finalist in 2004. A number of senior members of the Bar, in an act of admirable generosity, acquired the painting and it was presented to the Bar Association on 18 March 2005 at a ceremony in the Common Room. (The portrait of Hughes QC on the cover of this issue is a different portrait by the same artist and hangs in the National Portrait Gallery, Canberra). Another giant of the NSW Bar, Justice Michael McHugh, spoke about Hughes's career as an advocate at the presentation. His remarks on that occasion are reproduced.

Bar News is also delighted to publish two of the excellent papers delivered at the 'Working with statutes' conference. On that topic, the full text of the Sir Maurice Byers address delivered this year by Justice Gummow will be published in the next issue of *Bar News*. We also publish opinion pieces by Molomby SC, Barker QC and Toner SC, together with a reply to the latter by the federal attorney-general. There are also substantive pieces by Justice Peter Hall on 'The role of counsel assisting in commissions of inquiry' and by Alister Abadee on advocates' immunity. Cassidy QC, having clocked up 50 years, writes on the topic of reasonable prospects. There is also a series of notes on recent important cases as well as a significant number of book reviews. Coombs QC, for many years a contributor, has now achieved exalted status as a columnist and Poulos QC continues to display his artistic talent.

As members would appreciate, there was a spate of appointments to the Federal, Supreme and District courts in the first four months of the year, in particular to the Common Law Division which, as Spigelman CJ observed at the swearing in of Justice Latham, 'is losing a considerable amount of accumulated experience in an unusually short period of time.' As *Bar News* went to press, the appointments of Graham QC and Edmonds SC to the Federal Court had been announced but their Honours had not been sworn in. Their appointments will be covered in the next issue.

Bar News also records with great sadness the untimely deaths in recent months of two outstanding judges of the Federal Court, Justice Richard Cooper and Justice Brad Selway. Although based in Brisbane and Adelaide respectively, they were both highly regarded and respected by members of the New South Wales Bar who had the privilege of appearing before them. Our sincere condolences are extended to their families.

I wish to pay tribute to the unstinting and outstanding work performed by Justin Gleeson SC in his role as editor of *Bar News* over the last five years. That work, together with his membership of the Bar Council over a number of years and the leading role he played in the establishment of compulsory professional development programme and in the application of the professional standards legislation to the Bar should be and is acknowledged and applauded. Special mention should also be made of Rena Sofroniou who has left the Bar News Committee this year because of her numerous other commitments. Her interviews, in particular, have been a highlight of recent issues.

It is my aim as the incoming editor of *Bar News* to maintain the high standard which the publication has achieved, to seek to ensure that it 'speaks' to as many members of the Bar as possible in its treatment of issues, and is an organ for debate, publication and analysis of important developments both in substantive law and matters affecting practice, as well as remaining an accurate and interesting journal of record.

Contributions are warmly encouraged.

Andrew Bell

Letter to the editor

Dear Sir,

My attention has been drawn to an article in the summer 2004/2005 number of *Bar News*, a journal which I understand is now published under your editorship. The article is attributed to AW Street SC and deals with amendments to the *Trade Practices Act 1974 (Cth)*.

On page eight of the journal, the article cites a passage that is said to be from 'paragraph 224 of De Iniuriis in Book II of the *Institutions of Gaius*'. It is not. Both you and your predecessor as editor should well know that Gaius Book II.224 refers to the *Lex Falcidia*. '*De Iniuriis*' is the title heading of Justinian's Institutes Book IV.4, where Gaius III.224 is substantially reproduced, at IV.4.7. Both Gaius and Justinian refer to the XII Tables.

If two recipients of the Thomas P Flattery prize were unable to discern the difference between the *Lex Falcidia* and the XII Tables, what hope would there be for the *iuventus legum cupida* of the future? I can only assume, therefore, that the solecism was, to employ a term used by my predecessor, as Challis Lecturer, when addressing the predecessor of Mason P, merely intended to tease.

Arthur Emmett

Professional standards now firmly in place

By Ian Harrison SC

The current issue of *Bar News* comes on the heel of approval of a scheme limiting liability for barristers under the professional standards legislation. Members will by now be familiar with the provisions of the Act and the ways in which compliance with its provisions is necessary to ensure that the limitations which it provides are attracted. Some attempts were made to undermine the scheme as it applied to barristers, arguing that the $1 million cap on liability was inadequate. However, approval of the scheme by the statutorily independent Professional Standards Council and then the attorney general was only granted following external consultants' advice which took into account, among other significant factors, that no claims against barristers for professional negligence have succeeded in awards of damages in excess of, or closely approaching, $1 million.

The practice year is also about to come to an end. Applications for renewal of practising certificates will, following 30 June this year, be considered under the provisions of the new national legal profession legislation, expected to be proclaimed on or shortly after 1 July 2005. The *Legal Profession Act 2004* will contain some significant advantages for barristers, particularly those with practices beyond New South Wales. The so-called travelling practising certificate, long foreseen as necessary and desirable, has at last become a reality. It remains to be seen whether or not professional indemnity insurance premium rates will be more or less competitive than in previous years. Received wisdom would tend to suggest that in the light of the limitations on liability, some softening of rates should be expected. At the time of going to press, however, only some rates are available. Members are encouraged to familiarise themselves with all four companies' rates before making any final decision about who to insure with in the coming year.

There has been much media comment recently about the performance of judges and the effect upon the rights of litigants in circumstances where some judges have been thought not to be attending to in-court events as carefully as they should. I mention this only for the purpose of drawing attention to the fact that advocates appearing in courts where problems arise in adversary litigation have an obligation themselves to raise matters which may imperil, or may be thought to have the potential to imperil, a proper outcome in the proceedings. The notion of a sleeping or intoxicated judge is something which the media love to promote. Indeed, an apocryphal story which I told as part of a speech given by me upon the retirement of Justice Meagher has been reproduced more than once in newspapers as if it were true. I doubt that my experience differs from most barristers but I personally have never had any involvement with a sleeping or intoxicated judge or magistrate in over 28 years at the Bar. Nor do the reported decisions of the Court of Appeal or Court of Criminal Appeal seem to have much to say about these types of problems. The reason for that may well be obvious. At all events, it is the duty of counsel to raise such matters if they consider that it is necessary to do so on behalf of those for whom they appear and, quite frankly, in fairness to the judge or magistrate whose performance is being questioned.

I am painfully aware that many practitioners found the last 12 months extraordinarily difficult and that all efforts by them and, to the extent possible, by the Bar Association on their behalf, to ameliorate the consequences of contractions in available work have been only mildly successful. There will undoubtedly be a smaller number of barristers renewing their practising certificates for the coming year, even taking into account the influx of new barristers currently undertaking the reading programme. Recent speeches by the chief justice of Queensland and powerful submissions made on behalf of the New South Wales Bar Association to the New South Wales Legislative Council inquiry into personal injury legislation have served significantly to promote the interests of those members of the public whose rights to compensation for injury have become so limited. I would like to think as well that the oppressive provisions limiting costs in cases which do not succeed in achieving damages awards above $100,000 may be given a reconsideration by the legislature, particularly having regard to the apparently healthy condition of the insurance industry over the last two years.

Corrections

The Summer 2004/2005 edition of *Bar News* included an article; 'Edmund Barton Chambers celebrates its silver jubilee' (p.68). In that article, it was claimed that Edmund Barton Chambers, established in 1979, was 'the first set of chambers off Phillip Street'. That is not correct. Suzie King, the clerk of Ground Floor Wardell Chambers, informs us that her chambers were incorporated on 31 August 1965.

The same edition also included an article; 'Cross examination and international criminal law' (p.39) The article began with a bloc quote from Judge David Hunt in *Prosecutor v Milosevic*, IT-02-54-AR73.4. Due to a typesetting error, the text was not in the style required for a bloc quote, giving the reader the impression that the words were those of the author. *Bar News* regrets any confusion this may have caused.

Fair trial for all

By Tom Molomby SC

Over the past year, the *Sydney Morning Herald* has published several articles by Paul Sheehan attacking the criminal justice system. Their tone can be gauged from the following excerpts:

> Packaged in silk and horsehair, two judges, Keith Mason and James Wood, managed, at a single stroke, to damage the public's faith in the judiciary, impugn the professionalism of the crown prosecutor's office and psychologically brutalise a young woman who had already been brutalised by criminals.
>
> …
>
> Mason and Wood … presented a judgment based on nothing more than a stew of speculation cooked on a flame of insularity. Their bald finding that there was a miscarriage of justice is saturated with the subtext that ordinary people, jurors, are malleable drones.

'The contempt is mutual, your honour', 8 March 2004, p.12.

> What the public saw … was a rape victim in tears, more road kill in the legal system's fetish about appearances.

'Scales fall when a jury isn't trusted', 15 March 2004, p.17.

> Our Frankenstein criminal justice system is engaged in a cultural war with the society it has failed.

'Cold-blooded law heats up cultural war', 7 February 2005, p.15.

Other articles (there may be more) in the *Sydney Morning Herald* were:

'Victims sacrificed to god of due process', 14 June 2004, p.17

'Ass of a law means the rights of rapists override those of their victims', 6 September 2004, p.13.

'The law adjourns and rapists win', 29 November 2004, p.15

After the most recent attack, I sent an article to the editor of the *Herald*, with a covering letter which said:

> You've given a large amount of space over many months to attacks on the criminal justice system by Paul Sheehan. It seems to me time for another view. I enclose an article.

My article was not published. Here it is:

* * * *

A friend of mine used to say that the health of the criminal justice system required that every year a prominent politician and a prominent policeman be put on trial for a serious offence – and acquitted. To that should be added a prominent journalist.

It is a mystery that the *Sydney Morning Herald*, a newspaper which often has a sense of social responsibility, should through Paul Sheehan be so set on destroying public confidence in the criminal justice system. 'Cold blooded law heats up cultural war' (7 February 2005) is only one in a series of almost demented diatribes by Mr Sheehan against the system.

A little exposure to the criminal justice system alerts one to the fact that there are rather more people willing to make false allegations than one normally imagines.

Much of his criticism is motivated by the difficult, sometimes tragic, position of victims of crime, in particular serious sexual assaults. He highlights the trauma to them of delay and having to give evidence. All that is true.

He disregards, however, two fundamental points. First, the only proper test for a fair trial is how well it serves the innocent person wrongly accused. Second, in any true system of justice, the same standards apply to all. This means among other things that the guilty are tried according to the same standards as the innocent.

Just as there are ruthless and cynical people who commit crimes, there are on occasion ruthless and cynical people who make false allegations. Some victims do not tell the whole truth, and some who claim to be victims are not victims at all. Some are mistaken.

This produces another sort of victim: the innocent person who is interrogated, arrested, locked up, refused bail, tried and convicted (or any of these).

A little exposure to the criminal justice system alerts one to the fact that there are rather more people willing to make false allegations than one normally imagines. It is not easy to sort them out. Stereotypes do not hold; truth tellers are not always the ones with the forthright and sincere manner, and liars are not always shifty. Sometimes the person telling the truth is one whose manner is the least convincing.

What this means is that there is no escape from the rigours of the trial system for the true victims, because that is the only way the false victims can be discovered.

Even then, they are not always exposed. In my own experience I can cite two people acquitted on appeal after being convicted on obviously false complaints. One had spent 14 months in gaol. There is no compensation at all for people wrongly accused.

These sorts of victims of the justice system have no voice. They do not know each other. They have no organisation to speak for them. Nearly always, they want to keep their misfortune quiet, because they can only lose from any publicity. The occasional exception, such as Lindy Chamberlain, has had so much publicity that more makes no difference.

Their lives are often shattered. After even a few months in gaol, jobs are lost, houses sold because mortgages can no longer be paid, families split up. I have seen all this. It can be inflicted on someone who is refused bail after being charged, and acquitted at the trial.

Victims of crime have a justifiable cause, and a number of beneficial changes, long overdue, have been made in their interests in recent years.

But some of the changes made in their name have seriously undermined the chance of a fair trial. Too often, so called reforms have been made in a knee jerk fashion in response to outbursts of shock jock criticism similar to Mr Sheehan's in all but his veneer of civil language.

There is one striking example in Mr Sheehan's favourite area of sex crimes.

There used to be a common complaint that victims of sexual assault were questioned about their sexual history generally. That was a justified complaint in many cases, though not in all. The sensible solution would have been to require trial judges to disallow such questions unless shown to be necessary in the particular case. Unfortunately the sledgehammer to crack a nut approach produced a rigid statutory amendment barring such questions except in very limited circumstances. This section was interpreted by the Court of Criminal Appeal in 1993 to exclude even questions designed to show that the witness had made previous false complaints of sexual assault against others. This cannot have been the intention of the section, but it was the result of the way it was drafted. Nevertheless, for the last 12 years the section has remained unchanged. Who knows if there is anyone in gaol now because he was not allowed to prove that his accuser had made previous false complaints.

Deaf mute Darryl Beamish, who served 15 years for the 1959 murder of heiress Jillian Brewer, pictured outside the Supreme Court in Perth, after his conviction was quashed. Photo: Ross Swanborough / News Image Library

Restrictions on committal hearings have substantially reduced the chances of catching out the liar.

Progressive restrictions in bail laws mean that larger numbers of people spend months if not years in gaol before being acquitted.

The most recent 'reform' in this area by the guardians of liberty in Macquarie Street is to allow the evidence of a complainant from a first trial to be read from the transcript at a later trial. Test the sense and justice of this by imagining a trial in which all the evidence is dealt with this way. If that seems absurd, why is it any less so to deal with the most important witness that way. Not to speak of the conundrum if the reason for the second trial is the incompetence of the accused person's representative at the first.

Too often, so called reforms have been made in a knee jerk fashion in response to outbursts of shock jock criticism similar to Mr Sheehan's in all but his veneer of civil language.

A major subject of Mr Sheehan's recent ire is the Court of Criminal Appeal's order for a retrial because two jurors made a private investigation of lighting at the scene of a crime where identification was a key issue.

It is practically impossible that the jurors were not influenced by what they saw. The defence had no chance to challenge the results of their investigation. Say, for example, the lighting had changed since the time of the attack?

Mr Sheehan attacks the retrial order because of its effect on the victim. So, do we demand a fair trial when there is no traumatised victim, but no fair trial when there is?

Mr Sheehan has yielded to the same impulse which has corrupted many crime investigations: this one looks guilty - fix up the evidence and fix up a confession and move on. The problem is that sometimes people who look very guilty are not, sometimes even the usual suspect did not do this one. The only protection for the innocent is a fair trial process for all.

Rule by deception

By Ian Barker QC and Robert Toner SC

(This article was originally published in the Sydney Morning Herald.)

According to traditional legal theory, the attorney-general is the first law officer of the Commonwealth. One of his traditional duties is to resist abuse of liberties bestowed by law.

It is difficult indeed to see a single decision made by Attorney-General Ruddock which would suggest he has much interest in resisting abuses of liberty either here or overseas. In the creation of Australian statutes he constantly attempts to confer the maximum investigative and coercive powers upon anonymous agents of secret government organisations, and to put the powers beyond reach of any judicial interference. In the process of this repressive legislation, the government takes from every member of the community a right, corresponding to each power bestowed.

Along with the rest of the government, Mr Ruddock has long displayed an indifference to the treatment of the two Australian prisoners in American hands. He has long maintained that he has no concern about the incarceration of Hicks and Habib by a foreign power, unprotected by judicial scrutiny, in defiance of the Geneva Conventions, and beyond the reach of habeas corpus. He has no complaint about proposed trial by military commission and sees no potential for unfairness in the procedure. He sees nothing wrong with rule by presidential decree, in defiance of the US Congress and its statutes.

We do not know what Mr Ruddock's view is of the US judicial decisions which have turned all this on its head; presumably he was disappointed at the emergence of some appearance of the rule of law.

The release of Habib seems to have thrown the Australian Government into a tailspin. His release without charge should be a matter of the greatest embarrassment to Mr Ruddock; we cannot detect even a blush.

Habib was arrested in Pakistan, not in the Afghanistan war zone. The Americans can offer no proof he was any sort of enemy combatant. He could have been sent straight to Guantanamo Bay, but was sent firstly to Egypt, for interrogation by Egyptian methods. It is reasonable to infer that our government knew of this when it happened, but it has made no complaint then or since.

Whenever allegations are publicly made about abuses by the US military of those held at Guantanamo Bay, in particular Hicks and Habib, Mr Ruddock's response is to say that he accepts the American assurance that all is well and allegations of torture are suspect. Since 11 September 2001 the governments of Australia and the USA have collaborated very closely in the so-called war against terrorism, part of which resulted in the imprisonment without trial of Hicks and Habib. One 13 November 2001 President Bush made a military order for the *Detention treatment and trial of certain non-citizens in the war against terrorism*. The order was followed by the secret publication on 6 March 2003 of the report of a Pentagon working group of lawyers called *Working group report on detainee interrogations in the global war on terrorism*. The principal author of the document is about to become the attorney-general of the United States. The document purports to be a justification of interrogation by torture by the authority of presidential decree. It is legal nonsense, and deeply offensive nonsense at that, apparently now disowned even by the president.

The ASIO building part of the Russell Defence complex.
Photo: Michael Jones / News Image Library

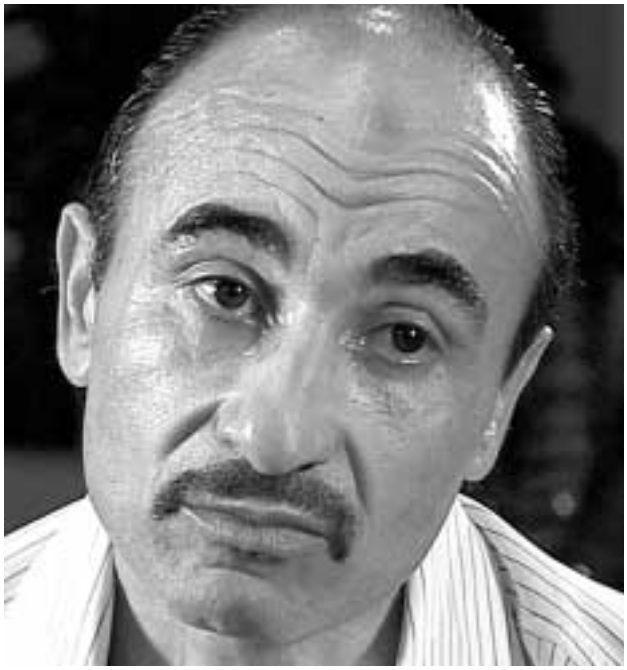
But given the status of Habib and Hicks, it is not unreasonable to assume the Australian Government knew of this document when it was created. If they did not know of it then, they know of it now, but we have yet to hear a word of concern from the attorney-general that Australian citizens might have been interrogated by torture perhaps pursuant to the legal justifications offered to the president in the working paper.

In 2004 American methods of interrogation became public when the awful Abu Ghraib photographs were published. But, we were told, no-one in senior office knew about such goings-on, either here or the United States. But Australia did know about it. In spite of Senator Hill's obfuscation, a Senate inquiry got half way to the truth, after publication of the letter of 24 December 2003, drafted by the Australian military lawyer Major O'Kane, to the International Red Cross.

We now know that the Red Cross expressed deep concern to the coalition forces about the treatment of prisoners, following a visit to Abu Ghraib in October 2003. It seems that O'Kane drafted the response from the coalition. The letter blandly brushed off the Red Cross' concerns. It asserted that every effort was made to uphold the Geneva Conventions, at the same time talking about different rules for 'high value detainees'. The letter was nonsense, but must have been known to the Australian Government. It is little wonder the government kept O'Kane away from the Senate inquiry.

The release of Habib seems to have thrown the Australian Government into a tailspin. His release without charge should be a matter of the greatest embarrassment to Mr Ruddock; we cannot detect even a blush. The attorney-general has said several times that Mr Habib is to be singled out for special treatment. He will not have a passport, he will be kept under surveillance, and his freedom to speak to the press may be inhibited. Is this Australia? Usually one would expect the attorney-general to give some recognition to the presumption of innocence. In the meantime Mr Ruddock continues to support a military commission trial for Hicks.

Nothing suggests that our attorney-general has the slightest problem with events at Guantanamo Bay or Abu Ghraib. It all sits uneasily with traditional concepts of his high office.



Mamdouh Ahmed Habib shedding a tear as he is interviewed on the channel's 60 Minutes programme on 13 February 2005. During the exclusive interview Habib claimed that he was regularly tortured by his US captors, who electrocuted and beat him and threatened him with sexual assault by specially trained dogs. Photo: AFP Photo / Channel 9 / News Image Library

Attorney responds: what about the right to security?

In their haste to criticise me, Messrs Barker QC and Toner SC have resorted to views based on unsupported assumptions and misrepresentations of fact. Of course, they are entitled to their opinion, but in some cases, they are just plain wrong.

Mr Hicks is, and Mr Habib was until his release, detained by the United States as an enemy combatant. Mr Hicks has been charged with three military commission offences and proceedings in his trial were held in August and November 2004. Further proceedings have been delayed pending the outcome of an appeal from a decision by the United States District Court of Appeal.

Since Mr Habib was detained in May 2002, the Australian Government consistently urged the United States either to bring charges against him or to release him. The government repeatedly impressed on the United States our desire to see his case dealt with expeditiously and fairly. In January 2005 United States authorities advised they did not intend to charge Mr Habib with a military commission offence. In those circumstances, the Australian Government requested Mr Habib's repatriation and he was returned to Australia in January 2005.

Mr Habib will remain of interest in a security context because of his former associations and activities. This is not to say he is not entitled to the right to a presumption of innocence in relation to any alleged criminal offence. However, that is a different matter entirely to relevant agencies lawfully and legitimately undertaking appropriate measures to ensure he does not engage in any terrorist activities or any acts that support such activities.

The Australian Government does not condone the use of torture. The government has taken an active interest in the welfare of Mr Hicks and Mr Habib. Government officials have visited Mr Hicks 14 times since he was first detained by United States in December 2001. Mr Habib was visited 11 times during his detention in Guantanamo Bay and three times during his detention in Pakistan. Visiting officials have never seen any evidence of torture.

It is disappointing legal counsel of the eminence of Barker and Toner would seek to diminish their points of view by subscribing to a theory that does not recognise a government's duty to protect its citizens; or that pursuing this objective is somehow an affront to human rights.

In addition to visits, the government has received assurances from former deputy secretary of defense Wolfowitz that Mr Hicks and Mr Habib have been humanely treated at Guantanamo Bay and Mr Hicks will continue to be so treated.

As a result of the government's representations, the United States undertook a comprehensive review of the treatment of both men at all times while in United States custody. As part of a concluded investigation, an examination of medical records and other documents concerning the detention of both men revealed no information to support the abuse allegations. In addition to that investigation, the Naval Criminal Investigative Service is currently conducting an independent investigation. The findings of this investigation are pending but a preliminary report states that as yet there is no evidence to support the allegations.

Attorney-General Phillip Ruddock at a press conference responding to allegations of torture on Australian terror suspect Mamdouh Habib.
Photo: Graham Crouch / News Image Library

In relation to Mr Habib's allegations of torture in Egypt, Australia sought consular access to Mr Habib in Pakistan immediately upon notification of his arrest. Access for non-consular purposes was granted on three occasions in October 2001 and Australian officials reported that he showed no signs of physical maltreatment. Australian officials have recently made public statements confirming this. Subsequently, the government became aware he may have been moved to Egypt. Although Mr Habib is an Australian citizen, Egypt also considers him to be an Egyptian citizen. The Australian Government had no role in his transfer to Egypt.

The government made numerous requests to the Egyptian Government for consular access, including at the highest levels. Egypt has, however, never acknowledged it had Mr Habib in its custody. In such circumstances, the government was unable to confirm Mr Habib's presence in Egypt.

The government will continue to impress on the United States our desire to see Mr Hicks' case dealt with expeditiously and fairly and we will continue to take an active interest in his welfare.

It is disappointing legal counsel of the eminence of Barker and Toner would seek to diminish their points of view by subscribing to a theory that does not recognise a government's duty to protect its citizens; or that pursuing this objective is

somehow an affront to human rights. In doing so, Barker and Toner overlook the most fundamental right of all – the right of citizens to live safely and securely in their communities. I would simply direct them and other detractors to Article 3 of the Universal Declaration of Human Rights which states: 'everyone has the right to liberty, safety and security of person'.

The government's domestic efforts to combat terrorism balance our duty to protect Australia and its citizens with the need to protect the civil liberties that are part of our great democratic tradition. The government has never sought to remove the activities of intelligence or law enforcement agencies from any and all forms of scrutiny or sought to put the acts of those agencies beyond the reach of the courts.

The very nature of the role and function of the Australian Security Intelligence Organisation (ASIO) means much of its work cannot be conducted in the public domain. However, ASIO must exercise its powers in accordance with the law and is subject to vigorous parliamentary and judicial oversight.

Any legislation relating to ASIO is subject to extensive scrutiny and debate. For example, the passage of the legislation conferring terrorism-related questioning and detention powers was examined by various parliamentary committees and was the subject of significant media attention. The legislation contains extensive reporting, accountability and oversight mechanisms. The government will continue to create appropriate legislation to counter the evolving threat of terrorism and ensure that Australians remain safe and secure and free to exercise their civil liberties.

Australian Law Reform Commission review of the Evidence Act 1995

By Les McCrimmon[1]

Introduction

In July 2004, the Commonwealth attorney-general asked the Australian Law Reform Commission to review the operation of the *Evidence Act 1995* (Cth). The New South Wales Law Reform Commission received a similar reference from the attorney general of NSW to review the operation of the *Evidence Act 1995* (NSW). The Victorian Law Reform Commission has also been asked to review the *Evidence Act 1958* (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the Uniform Evidence Act (UEA) into Victoria. To promote the UEA goal of greater harmonisation of the laws of evidence in Australia, the ALRC is conducting its review in conjunction with the NSWLRC and the VLRC with a view to producing joint recommendations. An ongoing consultative relationship has also been established with the Tasmania Law Reform Institute and the Queensland Law Reform Commission.

The *Evidence Act 1995* (Cth) and (NSW) were enacted in 1995 in response to the ALRC's 1987 report no. 38 on the law of evidence. With the enactment of the *Evidence Act 2001* (Tas), Tasmania joined the UEA regime, and most recently Norfolk Island passed the *Evidence Act 2004* (Norfolk Is).

The recommendations of the *Evidence report* no. 38 and the provisions of the enacted Acts have been considered by the following bodies, all of which recommended enactment:

- 1988 - The New South Wales Law Reform Commission – *Report 56 on evidence*
- 1994 - The Senate Standing Committee on Legal and Constitutional Affairs – *Final report on Evidence Bill*
- 1996 - Law Reform Commissioner of Tasmania – *Report on the Uniform Evidence Act and its introduction to Tasmania*, No 74
- 1996 - Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements (Western Australia Legislative Assembly), *Evidence law*, 18th report of the 34th parliament
- 1996 - The Victorian Parliament Scrutiny of Acts and Regulations Committee – *Review of the Evidence Act 1958*
- 1999 - Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia final report*, Project 92 (1999), Ch 20
- 2003 - The Victorian Bar Council and the Law Institute of Victoria

A primary objective of the current ALRC review, commenced on the eve of the tenth anniversary of the *Evidence Act 1995* (Cth), is to capitalise on a decade of operation of the UEA regime. It is hoped that the identification of pressure points that have arisen, and addressing aspects of the Act which require fine-tuning, will facilitate the UEA's take-up in all Australian states and territories. While the passage of the *Evidence Act 1995* (Cth) had the effect of achieving uniformity in all federal courts, in non-UEA jurisdictions a different evidence law operates in the state and territory courts. This is confusing and costly to litigants, and requires legal practitioners to master two different evidence regimes. Clearly this is an undesirable state of affairs.

ALRC issues paper 28

In December 2004, the ALRC released IP 28. The issues paper identifies the main issues relevant to the review, and provides background information for 100 questions designed to encourage informed public participation. To maximise the opportunity for interested stakeholders to participate in the review, the ALRC will hold consultations in all states, the ACT and the Northern Territory. Concurrently, the NSWLRC and the VLRC will be conducting their own consultations, often with the participation of the ALRC. The consultations and submissions on IP 28 will form the foundation of a joint discussion paper to be released in mid-2005, which will contain proposals for reform.

The issues paper follows the organisation and structure of the UEA, with the inclusion of a chapter addressing areas currently outside the ambit of the UEA. Topics addressed include:

- examination and cross-examination of witnesses;
- documentary evidence;
- the hearsay rule and its exceptions;
- the opinion rule and its exceptions;
- admissions;
- tendency and coincidence evidence;
- the credibility rule and its exceptions;
- identification evidence;
- privilege;
- discretions to exclude evidence;
- judicial notice;
- directions to the jury; and
- matters outside the Uniform Evidence Act.

Emerging themes

From the consultations conducted and the submissions received to date, some emerging themes can be identified. The change of evidence regimes occasioned by the introduction of the *Evidence Act 1995* (Cth) and (NSW) resulted in judicial officers and legal practitioners in jurisdictions covered by the UEA having to master the UEA provisions and, in some areas, adapt to significant modifications of common law evidentiary principles. After a period of adjustment, it is clear that the UEA has 'bedded in', and the overwhelming view is that the UEA regime is working well. While judicial officers and legal

practitioners in UEA jurisdictions have an adequate knowledge of the legislative provisions, more needs to be done to familiarise those using the UEA with the policy underpinning the Act.

Further, the decade of operation of the UEA in NSW, the ACT and in the federal courts has reduced the obstacles to introduction facing those jurisdictions considering adopting the UEA. For example, the commission's consultations in Tasmania indicated clearly that judicial interpretation of UEA provisions, coupled with the publication of a number of excellent evidence texts and annotations of the UEA, facilitated the implementation of the UEA in that state.

For those familiar with the UEA provisions, some specific themes relating to the operation of the legislation can be identified:

- Judicial officers are using the discretionary provisions in ss135-137 to exclude or limit the use of evidence in appropriate circumstances.
- There is widespread support for the application of the UEA privilege provisions in pre-trial contexts.
- If a recommendation is made to amend the *Evidence Act 1995* (Cth) to include privilege in relation to professional confidential relationships, the preferred view appears to be that the privilege should be qualified rather than absolute.
- There are divergent views as to whether offence specific provisions, such as those dealing with cross-examination of a complainant in a sexual assault case, should be in separate federal, state and territory legislation, or in the UEA.
- There is a general view that s60 (which provides that the hearsay rule does not apply to evidence of a previous representation admitted for a non-hearsay purpose), s98 (dealing with the admissibility of coincidence evidence) and s102 (the statement of the credibility rule) require amendment, however views differ as to the form that any amendment should take.

Conclusion

The joint discussion paper to be released in mid-2005 will include draft proposals for change to the UEA. The ALRC, together with the VLRC and NSWLRC, will be undertaking further consultations to gather feedback on the draft proposals. Submissions are also invited in response to the discussion paper. A final report will be completed in December 2005. The report's recommendations, when implemented, will improve the UEA, and hopefully encourage non-UEA jurisdictions to 'follow the path to a uniform evidence law'.[2]

1 Les McCrimmon is a commissioner of the Australian Law Reform Commission

2 S Odgers, *Uniform evidence law* (6th ed, 2004), [1.1.10].

Recent criminal cases

Regina v Petroulias 11 March 2005 [2005] NSWCCA 75

This was an appeal from a decision of Sully J to grant a permanent stay of proceedings against the accused Petroulias on a charge of defrauding the Commonwealth under the now repealed provisions of s29D of the *Crimes Act 1914* (Cth). It was alleged that the accused, while an officer of the Australian Taxation Office, put the revenue of the Commonwealth at risk by causing private binding rulings and advance opinions to issue to taxpayers, by dishonest means. The court held unanimously that the decision of Sully J should be set aside. But the majority, comprising Spigelman CJ and Hunt A-JA, reached a different conclusion from Mason P as to how the trial for defrauding the Commonwealth should be conducted.

The charge against the accused was framed in the second 'economic imperilment' category of fraud identified by Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493 (at paragraph 30) and McHugh J in the same decision (at paragraph 73). The revenue of the Commonwealth was put at risk, it was alleged, because the binding (on the Commonwealth) nature of the rulings and opinions prevented the commissioner of taxation from assessing and recovering tax payable if the rulings and opinions were wrong. The rulings related to fringe benefits tax and deductibility.

The majority held that the issue raised was whether 'the commissioner of taxation has an arguable case to put that the rulings were wrong and, accordingly, that the risk to the revenue was such that the Commonwealth was in fact deprived of something of value' (at paragraph 11). According to the majority the resolution of this issue involved, first, a question of law for the trial judge and, second, a question of fact for the jury. The question of law was whether there was a possibility that the commissioner would win a case in which he was allowed to dispute the private rulings. The question of fact was whether the arguments of the commissioner that the rulings were wrong were sufficiently strong to justify the conclusion beyond reasonable doubt that the Commonwealth was in fact deprived of something of value by the issue of the private rulings.

The majority held (at paragraph 19) that it 'would not be appropriate for the trial judge to direct the jury that, depending on the view they have formed of certain factual matters, the Australian Taxation Office *did* lose something of value – or even that the rulings *did* put the revenue of the Commonwealth at risk.' The majority said this might lead to confusion of the jury. The safer course was for the trial judge to define the issue, set out the arguments of both parties on it and invite the jury, if satisfied that the Crown had established that issue, to move on to the next issue. Mason P differed from the majority in this respect, stating (at paragraph 134) that:

> It would be open to the trial judge to inform himself of the state of tax law as it stood when the rulings were issued. If that state of law permitted the commissioner genuinely to advance a tax outcome … otherwise than in the taxpayer-favoured rulings promoted by the respondent, then the judge could so direct the jury. The jury would then be directed that, if the factual elements of the Crown case were established, it would be open for them to find the necessary imperilment of the revenue of the Commonwealth.

R v Studenikin (2004) 147 A Crim R 1; 182 FLR 324

R v Bezan (2004) 147 A Crim R 430

The effect of the repeal of s16G of the *Crimes Act 1914* (Cth) has recently been considered in two decision of the New South Wales Court of Criminal Appeal. Section 16G required a court sentencing a commonwealth offender in a state or territory where sentences were not subject to remission or reduction to take that fact into account and adjust the sentence accordingly. The intent of the provision was to achieve parity between the sentences imposed on commonwealth offenders for like offences where one sentence was subject to remissions and the other was not. Prior to its repeal on 6 January 2003, s16G was interpreted as requiring the courts in New South Wales to provide commonwealth offenders with a discount for the absence of remissions in this state, which, typically, amounted to a one third reduction in sentence: *DPP (Cth) v El Karhani* (1990) 51 A Crim R 123.

In *R v Studenikin* (2004) 147 A Crim R 1 the New South Wales Court of Criminal Appeal considered whether the repeal of s16G should affect the current sentencing range for narcotics offenders. The court held that the repeal of s16G has the effect that the courts of New South Wales, when sentencing commonwealth offenders, can no longer reduce sentences because of the absence of remissions now that the statutory authority in s16G to do so has been withdrawn. Howie J, with whom Newman AJ agreed, stated (at paragraph 62) that:

> it is wrong, in my view, to approach this matter on the basis that it involves a question of whether the courts in this state should increase sentences as a result of the repeal of s16G. The issue is rather whether the courts in this state have the power to continue to apply the discount authorised by s16G after the repeal of that provision. If this issue is stated in this way, the answer is obvious. In the absence of a statutory warrant to do so, a court has no power to reduce a sentence that has been determined by a proper application of the sentencing principles laid down by the statue of the common law to the facts and circumstances of the particular case. It seems to me, with respect, to be a matter of common sense and simple logic, that, if the courts of this state have been reducing the sentences imposed upon federal offenders by reason only of the operation of a specific statutory provision, the courts can no longer reduce sentences in that way once the statutory authority to do so has been withdrawn.

Later in his judgment, Howie J noted (at paragraph 67) that:

> any increase in sentences consequent upon the repeal of s16G is not a result of the courts voluntarily exercising a choice to increase sentences, but rather a result of the fact that the courts no longer have the power or authority to continue discounting them. The resulting increase in the sentences for federal offender[s] that must, in my view, inevitably follow the repeal of s16G is not a result of an intention on the part of the courts or the government to make the punishment for federal offences more effective. It is the result of a different objective being pursued by the government.

In *R v Bezan* (2004) 147 A Crim R 430 the New South Wales Court of Criminal Appeal considered *R v Studenikin* and a number of later decisions that considered the effect of the repeal. Wood CJ at CL, with whom Buddin and Shaw JJ agreed, held that while the repeal of s16G would be likely to result in an increase in the sentencing range compared to that which pertained prior to the repeal, it would be inappropriate merely to adjust the pre-repeal range upwards by a bare mathematical formula. Given that the 'rule of thumb' reduction prior to the repeal was a reduction of the sentence by one third, a bare mathematical increase would be 50 per cent. The court held in *R v Bezan* that an automatic adjustment in the order of a 50 per cent increase would be an inappropriate resort to a 'mathematical approach'.

The court held (at page 434) that the proper approach is 'to set a sentence that meets the requirements of s16A(1) of the Crimes Act [which sets out the substantive matters relevant to sentence, apart from general deterrence], and the relevant objectives of sentencing, without giving a s16G discount.'.

By Christopher O'Donnell

Baker v The Queen (2004) 78 ALJR 1483

In *Baker*, the High Court considered provisions of the *Sentencing Act 1989 (NSW)* that allowed for certain prisoners to apply to the Supreme Court for a re-determination of their life sentences. It is also the most recent case with comment on the expression 'special reasons.'

Baker and his co-accused had been sentenced in the early 1970s to a number of life sentences for horrific crimes committed in the NSW country and southern Queensland. The facts of the cases are notorious and do not bear repeating here.

The appellant was unsuccessful in his application to the New South Wales Supreme Court and on appeal in the Court of Criminal Appeal. The appellant's case had foundered on being unable to demonstrate 'special reasons' for a determination to be made by the court. This provision has been introduced by an amendment to the Sentencing Act which had been directed at the appellant and other indeterminate life sentence prisoners and had been accompanied by the widely reported 'never again be free' comments in parliament.

The court held in *R v Bezan* that an automatic adjustment in the order of a 50 per cent increase would be an inappropriate resort to a 'mathematical approach'.

The Court of Criminal Appeal was of the view that for reasons to be 'special' they '… must be out of the ordinary, unusual and not to be expected.' Rehabilitation simpliciter would not ordinarily be regarded as 'special'.

The High Court dismissed Baker's appeal by majority on a number of grounds. In the main, the expression 'special reasons' was not dealt with at length. However, the chief justice was of the view that there was nothing unusual about a court being required to find special reasons or circumstances. He said at page 1487:

> This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

Re: Attorney-General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 3 of 2002) (2004) 147 A Crim R 456

This case dealt with an application by the attorney general for a guideline judgment with reference to the driving offence known generally as high range prescribed concentration of alcohol ('HRPCA').

The New South Wales Court of Criminal Appeal convened a five-member bench with the chief justice presiding. The judgment details were delivered by Howie J.

The judgment deals at length with the history and legislation governing the offence and the need for a guideline judgment. It would be trite to attempt to summarise such important and socially relevant considerations in passing.

Suffice to say that the court was of the view that this offence was prevalent and extremely serious with a high social and economic impact on the community. It remains a commonly occurring offence despite an extensive media campaign over the years to stress its seriousness and the consequences that flow from it. It also continues to be committed regularly despite the introduction of random breath testing in 1982.

It is also difficult to summarise the details of the guidelines briefly. The following are some of the salient points. At paragraph 146 of the report the court listed the criteria for what can be described as an ordinary case of HRPCA, e.g. the offender was detected a by random breath test, had prior good character, plea of guilty, or little risk of re-offending.

In such a case the court indicated that it will rarely be appropriate for no conviction to be recorded and that a conviction cannot be avoided only because the offender is involved in a driver education course. Further, the automatic disqualification period is appropriate unless there is good reason to reduce it. A good reason may include employment, absence of viable alternative transport or sickness of the offender or another person.

The guideline judgment also dealt with a second or subsequent HRPCA offence and the factors increasing the 'moral culpability' of a HRPCA offender e.g. the degree of intoxication above 0.15, collision with another object.

A combination of repeat offending and an increase in moral culpability required a term of imprisonment of some kind leading to full-time custody.

Subramanian v The Queen (2004) 79 ALJR 116; 211ALR 1

The High Court in *Subramanian* dealt with the procedure at a so-called 'fitness hearing' under the *Mental Health (Criminal Procedure) Act 1990* (NSW).

After a lengthy court history, in November 2001 the NSW attorney general directed that a special hearing be conducted of charges against the appellant under s19 of the Act. For that purpose a special hearing commenced in 2002 before a judge and jury in the District Court.

The High Court in its judgment found that the special hearing had not been conducted in compliance with the Act, in particular s21(4). Those requirements the court said were mandatory and the Act required them to be not just touched upon but explained. Section 21(4) of the Act is in the following terms:

> At the commencement of a special hearing, the court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts.

At page 124 of the report the court has set out a draft direction to be followed by a trial judge allowing for adaptation to the facts of a particular case.

Interestingly enough at p125 of the judgment the court indicated that it was unable to immediately see the purpose behind such a detailed explanation to the jury of the purpose of a special hearing but suggested it may be to reassure the jury regarding the future conduct of the case following their verdict.

By Keith Chapple SC

Recent commercial cases

Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 79 ALJR 129; 214 ALR 644

This case, decided by the High Court on 11 November 2004, was an appeal from the NSW Court of Appeal (Sheller JA, Young CJ in Eq, Bryson J) raising two issues:

(a) first, whether an exclusion clause and/or an indemnity clause contained within the terms and conditions on the back of a signed application for credit formed part of a contract of carriage made between the appellant ('Finemores') and the third respondent ('Thomson'); and

(b) secondly, if so, whether the exclusion clause bound the first respondent ('Alphapharm') on the footing that Thomson entered into the contract of carriage as Alphapharm's agent.

The first of these is referred to as the 'terms of contract issue', the second as the 'agency issue'.

The material facts were as follows. Under a sub-distribution agreement with the second respondent ('Ebos'), Alphapharm was the exclusive distributor of an influenza vaccine ('Fluvirin') in Australia. Ebos arranged for Thomson to look after collection, storage and regulatory approval for the Fluvirin sent to Australia. Thomson proposed to Alphapharm that Alphapharm use Finemores, which Thomson was using to transport the Flurivin from Sydney airport to Finemores' Sydney warehouse, to transport the Fluvirin from the Sydney warehouse to Alphapharm's customers. Alphapharm agreed and left it to Thomson to enter such contractual arrangement with Finemores as was necessary for this.

Having been informed by Thomson of the transport and storage requirements for Fluvirin, on 12 February 1999 Finemores faxed a quotation to Thomson. The covering letter invited Thomson, if it accepted the quotation, to complete Finemores' credit application and sign its freight rate schedule. On 15 February 1999, Thomson informed Alphapharm of its decision to engage Finemores. On 17 February 1999, at Finemores' premises, Thomson's operations manager completed and signed Finemores' credit application and signed the freight rate schedule. Immediately above the place for signing on the credit application appeared the statement 'Please read 'conditions of contract' (overleaf) prior to signing'. Those conditions of contract contained the exclusion and indemnity clauses in question. They were not read by Thomson's operations manager before he signed the credit application.

The relevant clauses of the conditions of contract were clauses 5, 6 and 8. Clause 5 provided:

> 5. The customer warrants that in entering into this contract it does so on its own account as agent for the customer's associates.

Clause 6 relevantly provided:

> 6. Notwithstanding any other clause of this contract…under no circumstances shall the carrier be responsible to the customer for any injurious act or default of the carrier, nor, in any event, shall the carrier be held responsible for any loss, injury or damage suffered by the customer either in respect of:
>
> (a) the theft, misdelivery, delay in delivery, loss, damage or destruction, by whatever cause, of any goods being carried or stored on behalf of the customer by the carrier at any time (and regardless of whether there has been any deviation from any agreed or customary route of carriage or place of storage);
>
> (b) any consequential loss of profit, revenue, business, contracts or anticipated savings; or
>
> (c) any other indirect consequential or special loss, injury or damage of any nature and whether in contract, tort (including without limitation, negligence or breach of statutory duty) or otherwise.

In this clause 'customer' includes the customer's associates.'

Clause 8 relevantly provided:

> 8. The customer agrees to indemnify the carrier…in respect of:
>
> (e) any demand or claim brought by or on behalf of the customers' [sic] associates arising out of, related to, or connected with this contract.

There was no dispute that under the conditions of contract, Finemores was 'the carrier', Thomson was 'the customer' and Alphapharm one of 'the customer's associates'.

Two shipments of Fluvirin were damaged while in Finemores' custody and Alphapharm (rather than Ebos) was on risk. One shipment was damaged while being transported from Sydney to Queensland by Finemores. The other was damaged while in storage at Finemores' Sydney warehouse. In both cases, the damage resulted from the Fluvirin, which was sensitive to changes in temperature, being exposed to the wrong temperatures. The result of the damage to these shipments was that the intended recipients rejected them.

Alphapharm, accordingly, sued Finemores for damages.[1] Finemores relied on the exclusion clause in the conditions of contract against Alphapharm and cross-claimed against Thomson relying on the indemnity clause. Alphapharm said that the exclusion clause was not a term of the contract between Finemores and Thomson and that, in any event, Thomson had not contracted with Finemores as Alphapharm's agent. Thomson said that the indemnity clause was not a term of its contact with Finemores.

At trial, and unanimously in the Court of Appeal, Finemores lost. It won, unanimously, in the High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ delivering a joint judgment). The High Court's judgment focused on the exclusion clause, there being no issue about the indemnity clause if Alphapharm was bound by the former clause.

On the terms of contract issue, the court stated (at [57]) the general rule which applied in these terms:

> where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.

The courts below had not applied this rule. Rather they had held that the critical question was whether Finemores had given Thomson reasonably sufficient notice of the conditions (including the exclusion clause) on the reverse side of the application for credit. This approach involved an application of the principles relating to ticket cases to a signed contract, something which had been rejected by Scrutton LJ in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403. The High Court, too, rejected that approach.

Two other particular aspects of the court's reasoning on the terms of contract issue warrant attention. First, it was noted that much of the evidence consisted of largely irrelevant information about the subjective understanding of the individual participants in the dealings between the parties. Uncritical reception of such inadmissible evidence, the court said, 'is strongly to be discouraged' (at [35]). Secondly, the court's reasoning reinforces the dominance of the objective theory of contract and gathers together a number of authorities on that subject (at [36]-[49], generally).

The agency issue had been decided against Finemores by the trial judge, but was not considered in detail by the Court of Appeal because of its decision on the terms of contract issue. The High Court's resolution of the issue in favour of Finemores did not turn on any question of principle, but on a reconsideration of the evidence. Noting that, at the very least, rates of freight and terms of payment had to be agreed between Finemores and Alphapharm, the court held (at [81]) that the evidence compelled the conclusion that Alphapharm had authorised Thomson to contract with Finemores and to agree on these matters and such other standard terms and conditions as Finemores required.

In the result, the Finemores appeal was allowed and the orders of the trial judge and the Court of Appeal set aside.

By Matthew Darke

[1] In fact, Ebos joined Alphapharm in suing Finemores, and the trial judge gave judgment in favour of both of them. It was common ground in the High Court that judgment should have been entered in favour of Alphapharm only.

Misconceptions about the role of defence lawyers

By Dina Yehia

While it may be understandable that some members of the general public sometimes confuse the reality of the work defence lawyers in New South Wales carry out with that of American defence lawyers on the 'Practice' or 'Law and Order', it was thought that people within the profession understood the role of defence lawyers.

Not so. The recent remarks made during the Sir Ninian Stephen Lecture at Newcastle University reveal that misconceptions exist even within the profession about the role of those defending people accused of criminal offences.[1] The text of the lecture includes a reference to some in the criminal justice system who suffer from a 'kind of misplaced altruism that it is somehow a noble thing to assist a criminal to evade conviction'. This accusation appears to be levelled at 'some' defence lawyers.

The remark is of course both patronising and offensive. But more importantly it demonstrates a dangerous distortion of the presumption of innocence and the onus of proof. The accusation is based on the false premise that just because an individual is charged with a criminal offence they become 'criminals' attempting to evade conviction.

Fortunately, that is not the approach taken in our legal system. It is precisely to ensure against such impermissible reasoning that trial judges all over NSW are careful to direct juries about the presumption of innocence and the onus of proof.

What are potential jurors now to make of the accusation contained in the text of the lecture:

An accusation that some in the criminal justice system engage in a conspiracy to assist people they know to be 'criminals' to evade conviction? How do potential jurors reconcile that view with the directions they are given by judges?

It is also regrettable that the lecture did not take the opportunity to correct the erroneous perception that the 'pendulum has swung rather too far in the direction of the rights of the accused'. Instead, some of the remarks contained within it perpetuate this misconceived view.

For instance, there was no mention during the lecture of the initiatives taken by the New South Wales Government to protect the position of complainants. A number of legislative amendments in recent history have been directed toward assisting complainants by introducing measures to reduce embarrassment and emotional trauma in the trial process. For example:

- Defence counsel cannot cross-examine complainants in sexual assault trials about past sexual experience except in some limited circumstances and only with the leave of the court.[2]
- Defence lawyers generally cannot access the counselling notes of sexual assault complainants.[3]
- They cannot obtain access to files relating to victims' compensation claims.[4]

Our community expects the diligent application of the processes that protect against wrongful conviction. Our community expects the legal system to provide a process whereby allegations made by the state are tested.

- Complainants under the age of 16 give their evidence by way of closed circuit television and their evidence in chief is presented by way of their initial video taped account to police.[5]
- Unrepresented accused are prevented from personally cross-examining sexual assault complainants.[6]
- The state government has put together the 'Sexual Offences Task Force' to consider 'reform' to the process of dealing with allegations of sexual assault including the presentation of the evidence of complainants by way of transcript in re-trials.

By simply making no mention of these initiatives the lecture suffers from the very same limitations it accuses defence lawyers of suffering from, namely presenting an unbalanced and incomplete view.

The *New South Wales Barrister's Rules* require that defence counsel protect their client's interest to the best of the barrister's skill and ability.[7] Their task necessarily involves making appropriate applications for the exclusion of evidence. That task is of course to be carried out in a manner that is not inconsistent with the barrister's duty to the court.

Decisions by trial judges to exclude evidence are not taken lightly and, in my experience, are only taken in circumstances where there has been a serious impropriety or, where to allow the evidence would lead to a miscarriage of justice.

Such decisions are not 'decisions in favour of the defence and against the community'.[8] Our community expects the diligent application of the processes that protect against wrongful conviction. Our community expects the legal system to provide a process whereby allegations made by the state are tested. Indeed our community would accuse us of negligence if this were not done with skill and determination.

Defence counsel test evidence in a number of different ways. One way is to challenge methods used by investigating police. Another is to object to 'expert' evidence. For instance, there is a misconception about the evidentiary value of DNA evidence. A misconception, which was demonstrated by remarks made during the Sir Ninian Stephen Lecture.

During the lecture DNA evidence, in certain circumstances, was referred to as proof of guilt 'beyond any shadow of a doubt'. Of course in certain cases DNA evidence is compelling evidence against an accused. However elevating the science

to evidence beyond a shadow of a doubt points to a misunderstanding of the science. Indeed some judgements of the Court of Criminal Appeal have referred to this misconception as 'the prosecutor's fallacy'.[9] The expression refers to the error inherent in treating DNA evidence as evidence that the accused is the person who committed the offence as opposed to the proposition that an accused, in a given case, cannot be excluded as a suspect.

That DNA evidence is not infallible was demonstrated in the Western Australian decision of *R v Bropho* [2004] WADC 182. That was a case involving an allegation of sexual assault against the accused. The accused was Aboriginal living in an Aboriginal 'camp' just near Perth. The assault was alleged to have taken place some years prior to the complaint. As a result of the incident the complainant became pregnant.

DNA evidence was being relied upon as strong circumstantial evidence to support the proposition that the accused was the father of the child and therefore the sex offender. An initial report was provided by the Western Australian equivalent to the Division of Analytical Laboratory, which expressed the opinion that the probability of paternity was 99.999%.

A paternity index of one in 233,000 was provided as well. In other words, it was being asserted by the prosecution that the DNA results established that it was 233,000 more likely that the accused was the father than a randomly chosen member of the public.

Aboriginal elder Robert Bropho outside the West Australian Parliament on 20 June 2003, alleging a government conspiracy in sexual assault charges against him. Photo: Ian Munro / News Image Library

Defence counsel sought a second opinion from experts outside Western Australia. As a result of the litigation it became clear that the use of the product rule in calculating the statistics could produce misleading evidence in circumstances involving an Aboriginal person. When there is a sub-population that has not randomly bred, the product rule will not comply with the Harvey Weinberg equilibrium.

The objection to the DNA evidence was successful and as a result the National Institute of Forensic Medicine Standing Committee on sub-population data was convened. Part of their brief is to investigate whether an appropriate mathematical formula can be used to compensate for the effect of sub-population on the product rule.

And to think that without the challenge to the DNA evidence by some 'tricky' defence lawyer in Western Australia we may have continued to rely on statistical interpretation of DNA evidence which is not necessarily reliable in cases involving sub-populations.

The *Bropho* decision is only one of many cases which demonstrate the need for defence lawyers to continue to fulfil their role of challenging and testing evidence with vigour and determination.

It is the prosecutor's role to fully disclose all material relevant to the guilt or innocence of an accused. It is also the prosecutor's role to present their case objectively, dispassionately and in a balanced way. Those who do should be applauded and encouraged.

It is not the role of a defence lawyer to prosecute. It is no part of their role to moralise. It is their role to diligently protect against the prospect of wrongful conviction. Perhaps it is apt to remind ourselves of the full text of Rule 16 of the *New South Wales Barrister's Rules:*

> A barrister must seek to advance and protect the client's interest to the best of the barrister's skills and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these rules'.

That we as defence lawyers are sometimes unpopular with members of the public is a burden we necessarily bear. However, it is highly regrettable that such burden was added to in and by a lecture that mis-characterizes the proper role of defence counsel and the operation of the criminal onus of proof.

1 'Living Within the Law', the 2005 Sir Ninian Stephen Lecture, delivered by Margaret Cuneen at the University of Newcastle, 10 March 2005.

2 *Criminal Procedure Act 1986*, s293

3 *Criminal Procedure Act 1986*, ss295-306

4 *Victims Support and Rehabilitation Act 1996*,:s84.

5 *Evidence (Children) Act 1997*, s9.

6 *Criminal Procedure Act 1986*, s294A

7 Rule 16

8 'Living Within the Law' 2005 Sir Ninian Stephen Lecture

9 *R v Keir* [2002] NSWCCA 30.

EZY trials for 'guilty people': Porter QC delivers inaugural lecture for the Bar Association's Speakers Program

On Wednesday, 18 May 2005, Chester Porter QC delivered the inaugural lecture of the Bar Association's Speakers Program, entitled 'EZY trials for guilty people'.

Members of the public and the profession braved the inclement weather and gathered in the Dixson Room of the Mitchell Library. They came to hear the retired silk dispel eloquently some of the common misconceptions about the role of barristers in our criminal justice system: in particular, the notion that 'tricky lawyers' can use 'technicalities' to defend 'guilty people'.

Chester Porter QC. Photo: Murray Harris

Drawing upon more than 50 years of experience at the Bar, Porter QC explained why the 'technicalities' and 'lawyers' tricks', so often criticised by the media, are vital for the protection of our civil rights: including the presumption of innocence and the fundamental right to not be unjustly imprisoned by the state. Attempts to 'reform' or simplify procedures in the criminal justice system (hence the title 'EZY trials') are sometimes, he warned, knee-jerk reactions that may increase the risk of unsafe verdicts. Porter QC, with customary eloquence warned that: 'Conviction of the "guilty" on inadequate evidence will inevitably be followed by conviction of the innocent'.

Photo: Murray Harris

He discussed a number of instances, both in Australia and abroad, where there was a proven miscarriage of justice, often involving emotionally-charged allegations of child sexual assualt or terrorism. Porter QC reviewed the more common causes of wrongful convictions: including police corruption, tainted evidence and mistaken identification of the accused. The aim of his address was to reinforce in the minds of the public the necessity for all evidence and allegations to be challenged and tested in court. In respect of this, Chester delivered a powerful argument in support of the common sense and reliability of juries.

A number of the cautionary cases also illustrated key premises of the New South Wales Barristers' Rules: particularly the requirement for a barrister to diligently and skilfully represent the client, uninfluenced by public condemnation, and to let the court and the jury determine guilt or innocence based upon the evidence before it.

A copy of Chester Porter QC's lecture is available on DVD from the Bar Library.

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Statutes: context, meaning and pre-enactment history

The following paper was presented by the Hon Justice James Allsop at the 'Working with statutes' conference, hosted by the New South Wales Bar Association and the Australian Bar Association, in Sydney, on 18-19 March 2005.

By way of preliminary comment, the search for context in any given case may increase the burden of work in resolving any particular problem. That consideration is real, and reflected in the law itself: see s15AB(3) of the *Acts Interpretation Act 1901* (Cth) and state equivalents. The law, however, requires what can be called a contextual and purposive approach and this must be recognised in approaching problems of statutory interpretation.

The framework for consideration of enactment and pre-enactment history is both common law and statutory. The difference in scope of, and the interplay between, the relevant statutory provisions and the common law should be recognised.

The development of the common law attending the interpretation of statutes in the last 20 to 30 years has seen the passing of the so-called 'literal approach'. Under this approach, the language of the statute (both as a whole and in the respective provision) was examined first. If the ordinary and natural meaning was clear and lacked ambiguity, that meaning was obeyed and no further enquiry was required. It mattered not that the meaning so ascribed led to inconvenient, impolitic or improbable consequences, unless this inconvenience amounted to absurdity or repugnance or inconsistency with the rest of the statute. There was a degree of uncertainty as to whether the identification of the 'mischief' to which the statute was directed permitted recourse to at least some extrinsic material, in contradistinction to interpreting the statute.[1]

In the place of the literal approach has grown the so-called 'purposive approach'. This grew from understanding the 'mischief' with which the statute or provision was seeking to deal. You will find, however, statements which seem to require the identification of ambiguity before the purpose of the statute or provision becomes relevant. This sometimes led to what might be said to be an extended notion of ambiguity. The modern Australian common law (as distinct from s15AB of the *Acts Interpretation Act 1901* (Cth)) does not require ambiguity to be demonstrated before context is examined. Rather, it demands that context and purpose be examined first as basal considerations. This modern Australian approach to the construction of statutes has been recently stated by the High Court on a number of occasions.[2] In *Network Ten* the matter was summarised as follows by McHugh ACJ, Gummow J and Hayne J at [11]:

In *Newcastle City Council v GIO General Ltd*, McHugh J observed:

> [A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context.

'Working with statutes' conference at the Westin Sydney. Photo: Chris D'Aeth

His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*. There, Brennan CJ, Dawson, Toohey and Gummow JJ said:

> It is well settled that at common law, apart from any reliance upon s15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. … Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.…Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty* Ltd,… if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent….

This notion of context, used in this 'widest' sense, may make relevant a number of bodies of material which can be seen as pre-enactment and enactment history:

(a) the state of the law at the time of the enactment;

(b) through the understanding of the law at the time of the enactment, the mischief to which the enactment was directed;

(c) especially in statutes of some pedigree, the historical development of the enactment;

(d) in areas of law with some pedigree, the historical development of the law;

May I suggest that you use skilled librarians. They exist, and they are usually very helpful.

(e) statutes *in pari materia* (not necessarily only of the polity in question);

(f) in areas of the law where the enactment wholly or partly reflects an international agreement, the history and background to the development of that agreement and how that agreement has been considered by other legal systems; and

(g) the sources reflecting the enactment history of the statute – being the corpus of knowledge relating to its introduction as a Bill, its progress through parliament, including amendments, and its passing by parliament.

As can be seen from the arguments in *Newcastle City Council v GIO*, the scope of the common law is potentially wider than ss15AA and 15AB of the Acts Interpretation Act (and like state provisions), although those provisions stem from the same jurisprudential development. This difference can be seen starkly in *Newcastle City Council v GIO*, especially in the judgment of McHugh J. The argument of the appellant that s15AB permitted reference to extrinsic material was rejected. McHugh J said at 112-113 that s15AB required linguistic ambiguity or obscurity before resort could be had to the extrinsic material. Nevertheless, the common law, in the manner referred to in *CIC Insurance*, permitted resort to the extrinsic material in question, being the Australian Reform Commission (ALRC) report on the *Insurance Contracts Act 1984* (Cth).

Indeed, when one looks at the text of s15AB one sees its direct (and ameliorating) relationship with the 'literal approach' (as recognised by McHugh J in *Newcastle City Council v GIO*). In s15AB(1)(a) the words: 'ordinary meaning conveyed'; in s15AB(1)(b)(i) the words 'ambiguous or obscure'; and in s15AB(1)(b)(ii) the words 'manifestly absurd or … unreasonable'.

The development of this common law approach, wider in important respects than ss15AA and 15AB, is very important. It unifies, as part of the Australian common law, an approach that makes less relevant state and territory statutory differences. It also makes it unnecessary to consider the issue of identifying the relevant statute governing statutory interpretation in the exercise of federal jurisdiction and the operation of s79 of the *Judiciary Act 1903* in the way that section picks up state and territory statutes as surrogate federal laws. That question may remain, however, to the extent that the interpretation statutes are wider than the common law, a proposition which is by no means clear.

Other interpreting questions may arise in the exercise of factual jurisdiction in any state or territory which has human rights legislation which purports to affect the way statutes of that polity are interpreted.

Three comments are appropriate at this point. First, whilst the above common law approach as to purpose and context is mandatory, it will vary from case to case how much work and analysis is involved. Not every case will cause any particularly large amount of work. Secondly, the matters of context and background may not be either determinative or decisive; one is not redrafting the statute, one is attempting to place the words chosen by parliament in their context. Thirdly, a recognition of the importance of what the law is may avoid counsel appearing in matters not even having begun to think about what assistance the court should be given on these questions. For instance I have been a member of a full court before which senior counsel submitted (Scalia J-like) that only the words of the statute should be examined and the historical context of the Act could not, by law, be considered. Senior counsel on the other side dealt with the matter by referring to two nineteenth century English cases of little relevance. The court was left either to construe the statute with that assistance (and so risk misunderstanding it) or to do the work itself. The court's responsibility in interpreting an Act of parliament goes beyond choosing between the competing contentions of the parties. It has a responsibility to decide upon the interpretation it considers to be correct: *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529, 547-48. The professional judgments about these matters are not straightforward; but they should be thought about, and not merely as an afterthought. It should be a process at the beginning of your consideration of any serious piece of statutory interpretation. It is rare that an inordinate amount of work needs to be done. If it does, I would suggest that your responsibility to the court and the public requires a decent fist to be made of it, and not necessarily at one client's expense. This is part of your goodwill and is an aspect of the underpinning of your status as a learned profession.

(a) – (d) The state of the law at the time of enactment and in some cases its historical development

The subject matter of the provision in question will assist you to understand the extent of the relevant universe of discourse. Once you have identified that, you need to find sources to assist you. May I suggest that you use skilled librarians. They exist, and they are usually very helpful. Find the contemporaneous texts of quality, the nearest *Halsbury*, any report of a law reform commission or equivalent body, the leading appellate case (including the argument of counsel), any papers at seminars of recognised professional organisations. Often the explanatory memorandum, parliamentary debate or professional discussion will help identify the relevant legal framework to which the provision was directed.

Unfortunately, and this will become a major problem as years go by, the loose-leaf services which the commercial publishers

insist on forcing on the profession disguise rather than elucidate in this area. Because of the constant replacement of material in the search for utter contemporaneity in what otherwise should be textbooks, one is deprived of understanding the state of the law at a number of different times in the past, as one can by, say, referring to past editions of major texts. What you can do is buy and keep annual legislative compilations of statutes in your field of expertise. These will provide an invaluable and ready annual resource if kept.

The law at any given point cannot be divorced from how it reached that point. The deficiency in the law, to which the statute was directed, may be best understood by recognising how the law came to grow to that point. For instance, that growth may reflect an outdated social value which, though the value itself may have fallen from currency, has given rise to the independent legal rule that has lived on through precedent. The recognition of that historical growth, of the death of the informing social value and of the need for statutory change may give added perspective and illumination to the mere mechanical deficiencies of the law prior to enactment.

Because of the constant replacement of material in the search for utter contemporaneity in what otherwise should be textbooks, one is deprived of understanding the state of the law at a number of different times in the past.

This need for an understanding of the past is likely to arise most clearly in statutes with a clear pedigree. The *Bankruptcy Act 1966*, the *Corporations Act 2001*, and the *Patents Act 1990* are examples of legislation that has grown over many years. Of course, the latter years' development is often the most relevant, but an understanding of the major legislative steps and the historical development may be vital in illuminating the context of the posited recent provision.

Even where there is no long standing statutory pedigree, an understanding of the depth of legal context may be essential. For instance, one cannot begin to construe workably and reliably the *Insurance Contracts Act 1984* or the *Admiralty Act 1988* without reading the erudite and well written reports of the ALRC that preceded each. Similarly, a problem under the *Evidence Act 1995* should not be essayed without careful recourse to the ALRC discussion paper and report.

Let me give you an example of a statute with a pedigree and the relevance of context and historical development. The Bankruptcy Act 1966 is the lineal descendant of legislation commencing in 1825 in England. Its development can be traced in learned texts, Halsbury and reports of enquiries and law reform commissions with the expenditure of not too much time. (Done once, the location of the sources should be kept to avoid future duplication.) In one case, the relationship between the operation of the Bankruptcy Act and the fundamental common law privilege against self-incrimination arose. The issue was whether by implication and not express words, the particular provision in question (the obligation of the bankrupt under s77(1)(a) to deliver all his or her documents to the trustee) overrode the privilege. Integral to the consideration of this question was understanding how the Bankruptcy Act had evolved and how the issue in question, and cognate issues, had been dealt with in England and Australia in the past. That assisted in understanding the lack of relevant importance of an absence of express words dealing with the topic: see *Griffin v Pantzer* (2004) 207 ALR 169, [80]-[186] and see esp. [126], [148], [174], [175] to [181].

(e) statutes *in pari materia*

Similarity of expression is assumed in similar statutes, whether in the same polity or, especially in a federation, in another polity dealing with similar subject matter in a similar social context e.g. the phrase 'mining operation' was construed in the *Income Tax Assessment Act 1936* (Cth) having regard to like expressions in state mining Acts. What is a similar Act may be a question of judgment. A number of Acts may comprise a scheme, e.g. Acts dealing with conveyancing, real property and trustees.[3]

(f) statutes with an international background

Some statutes have provisions reflecting the language of international agreements. Some adopt international agreements into domestic or municipal law. In such cases it may be necessary to understand the extent or substance of the international agreement as an antecedent step to construing the municipal statute.

There is an international treaty on the interpretation of international treaties: The Vienna Convention on the Law of Treaties 1969. It is easily obtained from the Internet. You should print it off, bind it and keep it next to your copy of the Acts Interpretation Act. Articles 31 and 32 are important. A reading of Articles 31 and 32 will reveal a striking similarity to modern common law principles referred to above and s15AB of the Acts Interpretation Act. Indeed, with the possible exception of the use in interpretation of later treaties or later practice (see Art 31(3)), the similarity between the modern approach to the interpretation of domestic statutes and the correct approach to the interpretation of international treaties can be seen. Although, there is perhaps a parallel municipal rule in the use of later statutes in cases such as *Grain Elevators Board v Dunmunkle* (1946) 73 CLR 70, as to which see generally Pearce and Geddes (5th Edn) pp 74-6. (It should be noted, however, that the High Court views this technique of assuming parliament legislates in the knowledge of particular cases as artificial and has said generally weight should not be

given to it. See the comments of McHugh J in *Commissioner of Taxation v ERA* [2004] HCATrans 509 (30 November 2004)).

The body of authority dealing with the interpretation of international agreements can be expressed as follows: Subject to any contrary intention revealed by the domestic statute making an international instrument relevant, the ascertainment of the meaning of, and obligations within, an international instrument is to be ascertained by giving primacy to the text of the international instrument, but also by considering together in a holistic way the context, objects and purposes of the instrument.[4] The manner of interpreting the international instrument is one which is said to be more liberal than that ordinarily adopted by a court construing exclusively domestic legislation. That proposition, to a degree, may rest on a perception of the guiding techniques for interpreting domestic legislation to be the literal approach. Nevertheless, the interpretation of international instruments is to be undertaken in a manner unconstrained by technical local rules or precedent, but on broad principles of general acceptation.[5] Most importantly, this approach recognises the use of language in a broader, more liberal framework to embody compromises of people and governments of different cultures and legal systems. This last point and the reasons for a more liberal approach were described by Lord Diplock in *Fothergill* at 281-2, as follows:

> The language of that convention that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to *travaux préparatoires*, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text.
>
> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in James *Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd*. [1978] A.C. 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.'

The need for a broad or liberal construction is seen in the matters which can be taken into account under Articles 31 and 32 of the Vienna Convention in accordance with which Australian courts interpret treaties: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265; *Commonwealth v Tasmania* (1983) 158 CLR 1, 93, 177; and *Applicant A* at 251-2, 255 and 277. The Vienna Convention is an authoritative statement of customary international law: *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595, 622. The principles enshrined in the Vienna Convention can be seen to be the 'broad principles of general acceptation' referred to earlier.[6]

The real difference between the modern principles governing the interpretation of statutes and those governing the interpretation of international instruments may be seen to arise from a recognition of the subject of the task. An international treaty will generally be the product of negotiation and agreement; and its words will be chosen sometimes to paper over differences and to avoid specificity. The task of interpretation, therefore, calls for a broad and flexible approach with a clear, and sometimes detailed, knowledge of the competing views compromised.

The main type of extrinsic material for international agreements is what is called preparatory work or *travaux préparatoires*.

International agreements are usually the culmination of meetings, discussions, drafting and sometimes the contribution of professional bodies. The term *travaux préparatoires* covers material which records such matters as the proceedings of a conference, records of discussion, drafting at the conference and committees reports, including drafting committee reports. In *Fothergill v Monarch Airlines* Lord Scarman said at 294-95:

> Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful; but an agreed conference minute of the understanding on the basis of which the draft of an article of the convention was accepted may well be of great value.

Recourse to the *travaux* is limited to the circumstances identified in Art 32, as secondary material. However, though in Art 31 context is arguably exhaustively defined (see the word 'comprise' in Art 31(2)), there is also the 'object and purpose' of the treaty (Art 31(1)) to be considered. An understanding of the circumstances leading to the conclusion of a treaty in question is not gained merely by reading, literally, the text of either the convention or what was said and written by delegates at the various meetings and conferences leading up to the making of the instrument. The relevant legal, practical and jurisprudential context and history may need to be understood in order that the compromises inherent in these international agreements be appreciated. This can be seen as very close to the proper approach in relation to the appreciation of context in respect of domestic statutes under municipal law: *Newcastle City Council v GIO; CIC Insurance and Network Ten Pty Limited*.

Care, however, must be taken not to accept too literally or overwhelmingly any particular words by one delegate (however eminent he or she may be or have been) without understanding the context of such words in the preparatory work and in the circumstances of the conclusion of the relevant agreement: cf *Applicant A* at 231 and 254-56; and *Fothergill v Monarch Airlines* at 276, 278 and 294. In the end, to the extent there were compromises, it was the text of the agreement that embodied such compromises. There is a related danger in forgetting the task of interpreting the words chosen (in the statute or convention) in their context and slipping into the irrelevant task of interpreting the extrinsic material itself. An interesting illustration of the danger of taking too literally the words of the *travaux* concerns the negotiation of the amendments to Art IV Rule 5 of the Hague Rules in 1967 and 1968 that led to the Hague-Visby Rules dealing with the carriage of goods by sea under bills of lading and other similar documents of title. The package limitation in connection with the use of containers was an important subject of negotiation. One American delegate, who thought that he and like-minded negotiators from 'cargo interest countries' had got the better of the English delegation (then still a 'shipowning country') in the drafting committee sessions, was angry, distraught, but impotent, as he stood at the back of the conference hall in the final plenary session and heard the chairman of the drafting committee describe the 'intent' of the words that had been agreed on (which were a tad ambiguous). The chairman was Sir Kenneth Diplock (then a lord justice of appeal and head of the English delegation) and the 'intent' expressed by him in one small, but important, respect was, in the view of the American delegate, the very opposite of what had been agreed on the night before in the final drafting committee meeting. So, the English gave in on the words decided on, but wrote the *travaux*. (See DeGurse (1970-1971) 2 Jo Mar Law and Commerce 131)

To the extent that there exist persuasive and considered authorities in jurisdictions administering cognate laws based on internationally adopted conventions, it is appropriate to give weight to such decisions in order to strive for international uniformity.[7] For similar reasons, the work of foreign jurists (la doctrine) may also be considered: *Fothergill v Monarch Airlines*.

Some cases in England appear to stand for the proposition that unless the *travaux préparatoires* clearly point to a definitive legislative intention they do not assist.[8] Professor Tetley has described this as a cautious approach: see (2004) 10 Jo of International Maritime Law 30. It may be no less correct for that. Nevertheless, some care needs to be taken in its application. It may perhaps best be seen as a sensible judicial control on diverse material which is not always freely available or easy to divine. However, with the utmost respect, it is possible that putting the matter that way may mislead. It is no doubt true that *travaux préparatoires* (or, indeed, any extrinsic material) should not be viewed as an open cut mine from which to extract helpful tonnage of verbiage. But the *travaux* can be an invaluable source of understanding the bargaining and the compromises which are incorporated in, often general, language. The *travaux* may not point directly to the answer; but they may clearly reveal the ebb and flow of debate which was compromised by the words in question. As such, they may not themselves point to a definite intention, but they may give depth to any understanding of the foundation of any compromise involved in the words of the convention, and in that way help confirm or determine the meaning for Art 32.

This need for an understanding of the past is likely to arise most clearly in statutes with a clear pedigree. The *Bankruptcy Act 1966*, the *Corporations Act 2001*, and the Patents Act are examples of legislation that has grown over many years.

Where do you find *travaux préparatoires*? The Attorney-General's Department can assist. They are often collected and published by international professional societies. Scholars sometimes prepare them. Your librarian can help. If they are not publicly available, they may not be seen as part of the public corpus of material legitimately available for use.

(g) extrinsic material and enactment history

Section 15AB(2) in terms incorporates material which may be seen to be both pre-enactment as well as enactment history.

Enactment history is not, however, only accessible through s15AB(2). It can be viewed, as Bennion says (4th Edn p 520), as one aspect of the 'informed interpretation rule' (reflected in Australia by *CIC Insurance*) being the 'surrounding corpus of public knowledge relative to [the Act's] introduction into parliament as a Bill, subsequent progress through, and ultimate passing by, parliament' (ibid).

In one sense, one of the most obvious and often helpful pieces of assistance is the second reading speech: s15AB(2)(f). This may demonstrate, often with some clarity, the aim of the promoter. But it is not to be forgotten that the promoter is also likely to be a senior member of the executive. On occasions, the courts have refused to take as determinative the words of the minister in setting out the meaning or intent of the provision. In speaking of controversial proposed amendments to the *Migration Act 1958* (Cth) to introduce a privative clause based on earlier High Court authority (*R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 and *R v Murray; Exparte Proctor* (1949) 77 CLR 387), the relevant minister stated, with some clarity, the government's aim in using words, in effect as a code that had been used in earlier High Court cases, to bring about a result (so stated) which conformed with one

interpretation of what the court had earlier done. The High Court (in *Plaintiff S 157 v Commonwealth* (2004) 211 CLR 476) did not feel constrained by this, and read the Act as a whole to reach a different conclusion as to the words chosen by parliament in the whole context of the Act. The constitutional considerations of an over-reliance on what the executive says should be understood by the proposed words of parliament can be seen. This is so even if (and perhaps especially so) another Act of parliament purports to require that course.

This case raises, importantly, the principle of legality discussed by the chief justice in his paper.[9] In *Plaintiff S 157* Gleeson CJ (at [37]) refused to accept the coded method of parliamentary language and meaning. If, as appeared to be the case, the government's aim in the provision was to have parliament authorise the executive to exercise powers in a way which could be unreasonable, capricious and arbitrary (as long as it was bona fide and apparently bearing a relationship with the posited power) or to remove the common law right of procedural fairness, then that needed to be stated explicitly. Parliament needed to confront, within the democratic process, in an explicit way by the use of the *words of the parliament* not the words of the executive, any proposed change to important aspects of fundamental legal rights. This mechanism may be seen to deal with the notion of limiting or constraining parliament's legislative power by the operation of the democratic process itself, rather than by seeking to identify, through a *priori* reasoning, a stated limit to parliament's power in the absence of a concrete posited piece of legislation. In the reasons of Gaudron, Gummow, Kirby and Hayne JJ in *Plaintiff S 157* a question was raised whether any statute so explicitly framed would be a law of the parliament: see [102]-[104]. It is unnecessary to discuss these enormously important questions, save to say that integral to each approach is the process of statutory interpretation and the underlying principle of legality discussed by the chief justice in his paper.

In a more recent case *(NAGV v Minister* [2005] HCA 6) the High Court, in a close examination of the textual amendments to the Migration Act, solved an interpretation problem that had divided the Federal Court, where the debate had proceeded at a more general level of analysis. The High Court divined the meaning of the relevant provision after a close analysis of its amendment history.

The effect of statutes always speaking

Time passes and statues remain, amended or unamended. Unless an Act is intended to speak in a fixed and unchanging way, the usual presumption is that an Act is 'always speaking'. This may mean, in any given case, with changing circumstances and the passage of time, that the need to understand the original context or mischief becomes less critical or more attenuated. This is not to change its meaning but to recognise that parliament intended the Act to be applied in the future so as to give effect to its original intention. One approach to construction which is both accommodated and encouraged by this approach is to perceive legislative acceptance of judicial exegesis of a statute. If courts have ascribed a meaning to a statute, parliament may be seen to have adopted or approved of that interpretation in the way it has later amended or not amended the Act.

As to statutes always speaking see Bennion (4th Edn) pp 762 ff and Pearce and Geddes (5th) pp 93-97, 168-72.

1 Pearce, DC & Geddes, RS, *Statutory interpretation in Australia*, (5th ed) (Sydney, Butterworths, 2001) pp. 53-5 and *Wacando v Commonwealth* (1981) 148 CLR 1.

2 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384, 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1. (It is a development reflected in similar terms in the construction of contracts: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35 at [22].)

3 Pearce, DC & Geddes, RS, *Statutory interpretation in Australia*, (5th ed), pp.77-80.

4 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230 (per Brennan CJ, agreeing with McHugh J), 240 (per Dawson J), 251-56 (per McHugh J), 277 (per Gummow J, also agreeing with McHugh J); and *Morrison v Peacock* (2002) 210 CLR 274 at [16] (per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

5 *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 350; *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-2, 285, 293; *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, 656 at [78]; *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142, 159; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 412-3; *Applicant* A at 255; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (1998) 196 CLR 161 [19]-[24]; and *Morrison v Peacock* at [16].

6 see *CMA CGM S.A. v Classica Shipping Co Ltd* [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460 at [10]. See generally *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co* SA [2004] FCAFC 202; [2004] 2 Lloyd's Rep 537 [139] to [148].

7 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The' Muncaster Castle')* [1961] AC 807, 840 and 869; *Brown Boveri (Aust) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448, 453, 468; and *Effort Shipping Co Ltd v Linden Management* SA [1998] AC 605, 615.

8 See Lord Wilberforce in *Fothergill* and Lord Gill in *Landcatch Ltd v IOPCF* [1998] 2 Lloyd's Rep 552, 566-7 (C of S); Lord Steyn in *Effort Shipping Co Ltd v Linden Management SA* at 623 and in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Company Jordan Inc* [2005] UKHL 49.

9 'The principle of legality and the clear statement of principle', Opening address by the Hon JJ Spigelman AC, Chief Justice of New South Wales, New South Wales Bar Association's 'Working with statutes' conference, Sydney, 18 March 2005. A copy of the speech may be obtained from the Supreme Court's web site at www.lawlink.nsw.gov.au/sc

Judges and statutes

The following article is an edited version of a presentation by the Hon Justice Frank Callaway, Victorian Court of Appeal at the 'Working with statutes' conference, hosted by the New South Wales Bar Association and the Australian Bar Association, in Sydney, on 18-19 March 2005.

Mr Chairman, Your Honours, ladies and gentlemen, so that your expectations are not raised unduly, I shall first read to you part of the letter that I wrote to Mr Walker in reply to his invitation to participate in this conference. He had suggested that there was room for more rigour in the analysis and interpretation of statutes. I replied as follows:

> I am not sure that statutory interpretation is susceptible of a great deal of intellectual rigour. The factors bearing on the construction of any given statute are so many and various that the problem can rarely be solved by applying a rule or method. What is required is an exercise of sound judgment. It is not a discretionary judgment but, with that qualification, it bears an analogy with sentencing as practised in this state, i.e. an instinctive synthesis of all the relevant factors.
>
> This may sound somewhat like the 'masters of equity' doctrine: correct equitable principle is what good Chancery judges do and the true construction of statutes is what good judges say it is. Although that is a parody, there is a grain of truth in it. You do not need to be a post-modernist or a judicial activist to appreciate that there is often a very considerable range of choice. What is required is not so much intellectual rigour as moral rigour, a sense of responsibility and of the limits of the judicial office.

In any event, the best way to get a bad statute repealed or amended is to enforce it. The moral for counsel is that you should not give the impression that your argument is an invitation to defy the will of the legislature.

I went on to say that those views probably disqualified me from participating but that, if pressed, I would come and make some ex tempore remarks for (say) half an hour and then, if you wished, field questions.

Even in the case of ex tempore remarks, as opposed to a structured paper, it is desirable to have an aim. My aim is quite simple: it is to tell you, as frankly as I can, how I go about construing statutes. Because most of you are barristers, I hope that that will be of practical use. (For those of you who are solicitors, let me say that, in the rest of these remarks, 'barrister' has the same inclusive meaning as in Justice McHugh's judgment in *D'Orta-Ekenaike.*[1]) Advocacy is about persuasion and, as every advocate knows, half the battle is to understand the mind that you are seeking to persuade. I do not think that my mind is idiosyncratic. I believe that most appellate judges approach the interpretation of statutes in much the same way.

I shall say nothing of constitutional interpretation, because the approach is significantly different, even if the text and structure of the Constitution are ultimately controlling. All my remarks this morning will be directed to what might be called 'ordinary statutes'. Nevertheless, some of you will observe a family resemblance between my approach and something Justice McHugh said last year in the inaugural Sir Anthony Mason lecture.[2] He remarked that Sir Anthony saw precedent as 'an exercise in judicial policy which calls for an assessment of a variety of factors in which judges balance the need for continuity, consistency and predictability against the competing needs for justice, flexibility and rationality' and that he adopted a similar attitude in relation to constitutional interpretation. It is a dangerous attitude, but unavoidable. The hazard it presents is the reason for my reference to moral rigour in my letter to Mr Walker.

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Just as most questions at common law or in equity are susceptible of one good answer, or at least a relatively narrow range of good answers, so the meaning of most statutes is clear, or at least there is a relatively narrow range of truly available meanings. Those statements pre-suppose a reasonable consensus among judges about common law and equitable principle and about the way in which statutes are to be construed. They also pre-suppose that good lawyers will be appointed to the bench and that, once appointed, they will not be self-indulgent. I admit that there are exceptions to the rule that there is a relatively narrow range of good answers. One exception is statutes drafted at a high level of generality, like Part 1A of your *Civil Liability Act 2002*[3] and s398A of the Victorian *Crimes Act 1958*.

In most cases, however, in my view, it is not difficult to construe a statute. Of course, you need to be aware of technical rules of the kind found in the relevant Interpretation Act. They are the framework in which the exercise of construction takes place. The exercise itself is an act of the mind, partly unconscious, not a process of applying rules. You read the provisions fairly, in context, and you say what they mean. Modern 'precision drafting', as it is called, should make that task easier. Usually, although not always, it does. Cases at the cutting edge are not typical. That is why later, in the three or four examples I propose to give, I have included an instance

of words that are clear and not to be twisted, however beguiling the arguments of counsel.

In his correspondence with me, Mr Walker suggested that it might be fruitful to compare the interpretation of statutes and the interpretation of private instruments. There are obvious differences, but there are similarities too. Some of them are unexciting. They follow logically from the fact that both exercises are concerned with language. There are only two similarities that I wish to mention at this stage. It may be that you will raise others in the course of questions.

When a contractual provision is ambiguous, a judge will prefer a construction that is reasonable and convenient. When a statutory provision is ambiguous, a judge will prefer a construction that is just and convenient. Authority could be cited for those propositions, but they are really common sense. They are inherent in the nature of the process. The interpretation of contracts is part of doing justice between the parties. The interpretation of statutes is an element in the system of justice as a whole.

But that does not mean that the parties to a contract should be rescued, by a spurious process of interpretation, if they have made an unreasonable or inconvenient bargain. The oft repeated proposition that a term cannot be implied in a contract unless it is 'reasonable and equitable' flies in the face of contractual autonomy.[4] An unreasonable or inequitable contract may well contain an unreasonable or inequitable implied term. The remedy lies not in interpretation but, for example, in consumer protection legislation or the jurisdiction of equity to relieve against unconscionable bargains.

So, too, if a judge thinks that the true construction of a statute produces injustice or inconvenience – and I emphasize the *true* construction, which is not the same thing as the literal construction – it is the judge's duty to give effect to it. To pretend that the statute means something else is to detract from parliamentary sovereignty as surely as the corresponding approach to contracts detracts from the parties' autonomy. In any event, the best way to get a bad statute repealed or amended is to enforce it. The moral for counsel is that you should not give the impression that your argument is an invitation to defy the will of the legislature.

Let me digress for a moment. Lord Reid famously remarked that the declaratory theory of the common law was a fairytale. Lord Reid was a great judge but, in doing so, he did a disservice to the law and to public confidence in it. More importantly, he misunderstood the declaratory theory. For the most part, it was not meant to be taken literally. It was an ideal. Some of you will be familiar with Pericles' funeral oration. It paints an idealised portrait of Athens; of an Athens that never was. But, by doing so, it tells us a good deal about the real Athens, as well as the ideal for which the Athenians, or some of them, strove. So, too, the declaratory theory told us a good deal about judges and the ideal of the common law. The law does change, but it should change in ways that pay heed to consistency and continuity. To adapt Professor Dworkin's analogy, there must at least be successive chapters in the *same* novel.

Similarly the common law ideal is that, in construing a statute, a judge divines the intention of parliament. In a sense, that, too, is a fiction. But, in the vast majority of cases, it should be possible to speak plausibly of what parliament did or did not intend. That is one of the control mechanisms, preventing a judge from going on a frolic of his or her own. I respectfully differ from Justice Kirby on this subject. Reading Chief Justice Spigelman's paper, I find that I am not alone.

Second reading speeches and explanatory memoranda are of limited use and are often a distraction.

The other similarity between statutes and private instruments to which I wish to refer is of a quite different kind. It has to do with technique. In the case of both contractual and statutory provisions, or for that matter the provisions of a will, sometimes, no matter how hard you try to understand them, they simply do not make sense. The draftsman (a word, like 'chairman', that I regard as common, and not masculine, in gender) may have made a fundamental error that can no longer be identified or the text may have been repeatedly and inconsistently amended or the provisions may represent a compromise between irreconcilable ideas, as can easily happen in the course of contractual negotiations or in the course of legislation being hammered out to accommodate the interests of competing stakeholders. The judge must then simply do the best he or she can and the true construction may come as a surprise to the parties to the contract or the participants in the legislative process. Like André Gide, they wait for others to tell them what they meant.[5]

Very often, however, the contractual or statutory provisions did once make sense to someone. The trick is to find the right perspective and, all of a sudden, you understand the words as the parties or the draftsman did. Such provisions are like an impressionist painting: unintelligible dots until you find the right place in the room, and the right distance, from which to view them. Mr Bennion mentions a statutory requirement that the inside walls of factories be washed every 14 months. To understand that apparent anomaly, you need to know that factory spring cleaning in England took place at Easter and Easter Day may fall at any time between 22 March and 25 April. Never give up too soon in the search for the right perspective.

If you are a barrister, you then have to convey that perspective to the judge. When I was a junior, my leader and I once lived with a provision in an iron ore royalties agreement over a period of years until eventually it made its way from the Supreme Court of Western Australia to the Privy Council. In the course of time the scales fell from our eyes and we saw

what the parties meant but, although we won the case, we were unable to communicate that vision to any of the nine judges who heard it.

In searching for the right perspective, you may find it helpful to read Hansard, but I wish parliament would repeal the legislation that enables you to cite Hansard to the court. The real value of reading parliamentary debates used to be to suggest ways in which the language of the statute could plausibly and sensibly be construed. Provisions like s15AB of the *Acts Interpretation Act 1901* and s35(b) of the Victorian *Interpretation of Legislation Act 1984* have made advice and litigation more expensive and, in my view, have burdened judges unnecessarily. Cases take longer to prepare and to argue. Judgments take longer to write. Justice delayed is justice denied. It would have been better to take a liberal view of the mischief rule and to authorise recourse to specific extrinsic material on a case by case basis. By the 'mischief rule' I mean the rule in *Heydon's* case[6] in its modern *CIC Insurance*[7] guise, not Sir Frederick Pollock's ironic remark 'that parliament generally changes the law for the worse and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds'.[8]

Second reading speeches and explanatory memoranda are of limited use and are often a distraction. The primary task is always to construe the words of the statute.[9] In *Hilder v Dexter*[10] Lord Halsbury, LC said:

> My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done. For that reason I abstain from giving any judgment in this case myself; but at the same time I desire to say, having read the judgments proposed to be delivered by my noble and learned friends, that I entirely concur with every word of them. I believe that the construction at which they have arrived was the intention of the statute. I do not say my intention, but the intention of the legislature. I was largely responsible for the language in which the enactment is conveyed, and for that reason, and for that reason only, I have not written a judgment myself, but I heartily concur in the judgment which my noble and learned friends have arrived at.

It is a case that deserves to be better known.

Judges do not decide cases by the mechanical application of rules. I cannot remember the last time I opened my copy of Bennion before receiving Mr Walker's invitation. (I had opened Pearce and Geddes more recently, but not so recently as I should like to pretend out of courtesy to one of our distinguished speakers yesterday.) You are very unlikely to win a case just by saying that the meaning for which you contend is required by one of the so-called canons of interpretation.

The starting point is to find a plausible reading of the provisions that does not do violence to the words, their context or the purpose of the legislation and then to persuade the judge that that reading is consistent with the kind of intention that parliament may be taken to have had. You endeavour to persuade the judge that it produces a result that is both just and workable not only in this case but in other cases. Appellate courts, in particular, always have an eye to the effect of their decisions on other cases.

Elegance and simplicity help too. It is said that, when one of the researchers into DNA was shown a model of the molecule as conceived by Crick and Watson, she said that it was too beautiful not to be true. Just as it is easy to underestimate the attraction of elegance in science, so it is easy to underestimate the attraction of elegance in the law, and yet the expression *elegantia juris* goes back to the Roman lawyers. It is an aspect, not just of culture, but of the wiring of the human mind that you are trying to persuade and perhaps, as Keats said, 'Beauty is truth'.

You endeavour to persuade the judge that it produces a result that is both just and workable not only in this case but in other cases. Appellate courts, in particular, always have an eye to the effect of their decisions on other cases.

Let me give you some examples. They are all Victorian[11] , but that is better than if I pretended a familiarity with New South Wales cases about which you know more than I do.

The first example illustrates the proposition that judges are not free to do what they like, that the words of the statute are ultimately controlling and that there are some interpretations that cannot be accepted.

One of the questions in *Village Roadshow Ltd v Boswell Film GmbH*[12] concerned the meaning of s257D(1) of the *Corporations Act 2001*. That section is concerned with selective buy-backs. It speaks of a special resolution passed at a general meeting with 'no votes being cast in favour of' the resolution by persons whose shares are proposed to be bought back or their associates.

I said earlier that the literal construction is not the same thing as the true construction. Section 257D(1) does not mean that the resolution is invalid if, through incompetent chairmanship, a proscribed vote happens to be cast in favour of the resolution. It simply means that that vote is not counted. Santow J decided that, in relation to comparable legislation, in *Re Tiger Investment Co. Ltd*.[13] In *Village Roadshow* we rejected the proposition that the words 'no votes being cast in

favour of' could be read as if they said 'no votes being cast in favour of *or against*'. The explanatory memorandum, which supported counsel's argument, was simply inaccurate. The language of the statute was clear and persons seeking to comply with the law, or like ASIC seeking to enforce it, were entitled to rely on it. An argument from alleged anomaly, as well as the explanatory memorandum, was wholly unpersuasive.

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The *Civil Aviation (Carriers' Liability) Act 1961* applies to a contract for the carriage of a passenger 'between a place in Victoria and another place in Victoria'. (I am simplifying, but that is sufficient for present purposes.) In *Mt Beauty Gliding Club Inc. v Jacob*[14] the plaintiff was a passenger on a glider flight from Mt Beauty that was intended to return to Mt Beauty. Instead the glider became lodged in the canopy of a tree and the plaintiff suffered injury. His action was statute barred if the Act applied. Counsel for the defendant submitted that the words 'between a place in Victoria and another place in Victoria' simply meant 'wholly within Victoria' *or that* they should be read as if they said 'between a place in Victoria and a place in Victoria' (omitting the word 'another') or even 'between a place in Victoria and that or another place in Victoria'.

The trial judge and the Court of Appeal rejected all those submissions, because they all involved rewriting the statute. Indeed the third was reminiscent of *Village Roadshow*. It is one thing to say that *p* includes *q*. It is another thing altogether to say that *p* includes not *p*. The plaintiff nevertheless failed. The construction adopted by the majority of the Court of Appeal was that, for the reasons explained in the judgments, the words 'between a place in Victoria and another place in Victoria' refer to a place of departure in Victoria and a place of destination in Victoria respectively. It matters not that they are the same geographical place. That was a bridge too far for the dissenting judge, but the important point is that, rightly or wrongly, it ascribes a meaning to the words that parliament used. It does not supply words to fill a *casus omissus*.

There are other points of statutory construction that *Village Roadshow* and *Mt Beauty Gliding Club* illustrate. Some of you may find them interesting to read. For those with strong stomachs, I commend *R v Best*[15] and *R v TJB*[16]. Both cases illustrate the choices that sometimes have to be made in construing legislation, the common law context in which it may fall to be construed and given effect, the need to devise new rules of practice as a result, the mischief rule and the use of extrinsic material.

Cato the Censor used to conclude every speech in the Roman Senate with the words *Delenda est Carthago*, Carthage must be destroyed. It might have been a motion concerning the sewage system of the eternal city. Cato ended with a reminder that the real problem was Carthage. Let me end with one of my own deep concerns. Everything I have said, beginning with my letter to Mr Walker and ending this morning, reflects my belief that the quality of statutory interpretation and, to that extent, the quality of justice depend upon the judge rather than upon rules that can be put into a textbook or expounded as such. We therefore rely on lawyers with the right qualifications being willing to accept appointment to the bench, notwithstanding the fact that judicial life is much less attractive than it was 30 years ago. Unless we can roll back the rate of refusal, to which Chief Justice Gleeson referred in his speech on 'A changing judiciary' four years ago[17] , it is not only statutory interpretation that will suffer. It is the whole common law system, which is fundamentally dependent on the quality of the judges.

1 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at fn.133.

2 Banco Court, Sydney, 26 November 2004.

3 Compare the Victorian *Wrongs and Other Acts (Law of Negligence) Act 2003*.

4 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

5 Compare *Vardon v The Commonwealth* (1943) 67 CLR 434 at 444.

6 (1584) 3 Co.Rep.7a.

7 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

8 Sir Frederick Pollock, *Essays in jurisprudence and ethics* (1882), 85, quoted in Glanville Williams, *Learning the law* (7th ed. 1963), 102-103.

9 Compare *R v Young* (1999) 46 NSWLR 681 at 686 [5].

10 [1902] AC 474 at 477-478.

11 Three examples were given at the conference, together with some discussion of *R v Best* [1998] 4 VR 603 and further discussion of the two examples that are retained in this edited version.

12 (2004) 8 VR 38.

13 (1999) 33 ACSR 438 at 445 [40].

14 [2004] VSCA 151 (to be reported).

15 [1998] 4 VR 603.

16 [1998] 4 VR 621.

17 Judicial Conference of Australia, Uluru, 7 April 200

The role of counsel assisting in commissions of inquiry

By Justice Peter M Hall

Introduction

There is public benefit derived from briefing counsel to carry out the usual duties imposed upon an advocate in an inquiry established to investigate serious matters: *Bretherton v Kaye & Winneke* (1971) VR 111 at 123.

The appointment and role of counsel assisting a commission of inquiry is central to the inquiry process. It may arise under or in the context of state or federal royal commission legislation or other forms of inquiry established on an ad hoc basis under legislation such as the *Special Commissions of Inquiry Act 1983* (NSW). Additionally, there are, in Australia, today many standing or permanent commissions of inquiry and it is customary for members of the private Bar to be called upon to act as counsel assisting in the conduct of proceedings in relation to a particular investigation[1].

Statutory provisions providing authority for the appointment of counsel assisting are in a fairly standard or common form but one will search in vain to find provisions that address in any specific way the role or the functions to be performed or fulfilled by a person so appointed.

Given the varying nature of commissions of inquiry and the diverse issues that they may be called upon to investigate, it is hardly surprising that relevant legislatures do not attempt to either prescribe or address such issues.

Leaving to one side, for the moment, the factors which influence the function and the role of counsel assisting, it is generally true to say that, once appointed, he or she will be required to assume obligations to the commissioner(s), to the members of the legal profession acting in the proceedings on the inquiry, to commission staff and to witnesses.

In this paper, attention will be given to some of the specific functions and responsibilities that fall upon counsel assisting. In general terms, they fall to be considered in terms of:

1. The management and administration of inquiry processes and procedures.
2. The development of investigation strategies and investigation programmes.
3. The proper and effective conduct of commission hearings (in public or, as appropriate, in private).
4. The report writing phase of the inquiry and the constraints that operate in that respect.

Appointment of counsel assisting

As indicated in the introduction to this paper, the statutory provisions for the appointment of counsel are usually in fairly common form. It is sufficient here to refer to the provisions of s7 of the *Royal Commissions Act 1923* (NSW).

Section 7(1) of that Act, dealing with the right of appearance, specifies:

Counsel assisting, Wayne Martin QC (right) at the start of proceedings of the HIH Royal Commission at Sydney's Federal Court.
Photo: Lindsay Moller / News Image Library

> Any counsel or solicitor appointed by the Crown to assist the commission may appear at the inquiry.

As to his or her participation, s7(3) of the Act provides:

> Any counsel or solicitor so appointed, and any person so authorised or his counsel or solicitor, may with the leave of the chairman or of the sole commissioner, as the case may be, examine or cross-examine any witness on any matter which the commissioner deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by the commissioner.

These provisions, it can be seen are confined largely to an aspect of the role counsel may play at hearings conducted by a royal commissioner. There is no guidance to be found there as to what is expected of counsel assisting in terms of the four areas indicated above. Those will be separately discussed later in this paper.

The terms of reference and inquiry statute

The functions of counsel assisting to a significant extent will be shaped and influenced by two instruments. The first is the terms of reference (often contained within letters patent), which prescribe the subject matter of the investigation or inquiry. The second is the statute under which the inquiry is conducted.

As to the first, inquiries vary greatly in subject matter as determined by the terms of reference. Questions of interpretation sometimes arise concerning their scope. It is the subject matter which will influence and sometimes determine what procedures, methods or approaches are to be adopted for a commission of inquiry to effectively and properly discharge its responsibilities. The subject matter may be broad ranging, such as an inquiry into a whole enterprise or undertaking (e.g. the functioning of a whole industry such as the building and construction industry[3]) or it may concern particular allegations, e.g., allegations of maladministration or suspected illegality,

impropriety or corrupt conduct by one or more government officials.

Plainly, as the subject matter will have a far-reaching influence on the approach and method considered appropriate and to be employed, it will also shape and influence the role that will be expected of counsel assisting.

The statute under which an inquiry is to be conducted will have an impact upon the way in which it is conducted and it will be essential for counsel assisting to be well-acquainted with the coercive powers at the disposal of the commission and how those powers may and are to be best employed and in what circumstances.

Apart from these general observations, there is one other matter, a matter of legal principle, which is fundamental to the inquiry process and which again counsel assisting must attend to. I refer in this respect to the principles of procedural fairness. These have application, of course, both during the conduct of the inquiry in relation to the hearing process and also towards the end of it in relation to possible adverse findings at the report-writing phase.

Investigation v litigation

The ordinary litigation processes for determining rights and liabilities call for specialist knowledge and skills that are also valuable in the conduct of most commissions of inquiry. However, as the inquiry process does not involve the resolution of issues between competing parties, its landscape will exhibit both familiar and exceptional features. Some of the latter may be readily identified. They include:

1. The fact that counsel assisting does not have, or act on behalf of, a client.
2. The proceedings of a commission of inquiry do not arise out of charges laid against specific individuals.
3. The proceedings do not involve issues in the same way or sense as occurs in inter-partes litigation.
4. Counsel assisting may, in appropriate circumstances, choose to examine witnesses before a commission by leading questions.
5. The right to claim privilege may be wholly or partly abrogated by statute.
6. There is, strictly speaking, no onus of proof upon counsel assisting and no specific requirement to prove any particular matter or thing[4].
7. There is a relationship between counsel assisting and the person or persons constituting a commission of inquiry that exists and operates both inside and outside the hearing room.
8. An investigation of unlawful or criminal conduct by a commission of inquiry does not in any sense constitute criminal proceedings.
9. There are no remedies to be awarded or final orders made at the end of the inquiry process.
10. The rules of evidence are usually not binding on a commission of inquiry (unless otherwise specified in the terms of reference).
11. There is no *outcome* of an inquiry which is dependent upon who establishes what.

In summary, it has been stated:

> It is well recognised that the discipline of royal commissions or boards of inquiry is essentially different from that of the courts. On the one hand, there is also a well recognised adaptation by commissioners of those principles to which judges and jurors traditionally resort when engaged upon the critical process of fact finding …[5]

I will turn to examine aspects of the specific functions and responsibilities referred to in the introduction.

1. Functions of counsel assisting in the management and administration of commission processes and procedures

Additional to counsel assisting's advocacy role, there are other diverse functions to be performed in relation to the co-ordination, management, administration, direction and control of commission processes and operations. He or she may be responsible for ensuring that appropriate processes are in place including those necessary for document control and document registration, data analysis, intelligence gathering operations, investigative procedures, target development, profile analysis and financial analysis. These are important functions involved in the investigation of widespread illegal activities. They are not applicable to all inquiries which may call for a particular approach that reflects the subject-matter to be examined.

Counsel assisting will often then be expected to undertake particular advisory functions in the establishment of

The HIH Royal Commission.
Photo: Jeff Darmanin / News Image Library

Commissioner McInerney at the Waterfall Inquiry. Photo: Robert Pearce / Fairfaxphotos

commission processes having specific regard to the terms of reference. A commission of inquiry should always be conducted upon a disciplined and accountable basis. It is for that reason that appropriate processes and controls need to be designed, documented and implemented thereby ensuring the due and proper exercise of its compulsory powers. To this end, documented guidelines are often drafted and as necessary periodically revised.

The integrity of commission processes (e.g., search warrant applications) may influence later criminal proceedings. The ability to demonstrate that officers of a commission of inquiry have complied with statutory requirements in the event of a challenge to evidence sought to be adduced in such proceedings and obtained through commission processes upon an application to exclude it can be therefore critical.

It is accordingly usually the responsibility of counsel assisting to ensure that appropriate processes are established and that they are appropriate to the particular statutory powers available to a commission of inquiry. The issue of summonses for production of documents pursuant to the compulsory powers for example should, wherever possible, be supported by an application made by the relevant officer of the commission that records the basis and grounds for the issue of a summons. This is merely an illustration of the principle that, given the extensive and sometimes invasive nature of compulsory or coercive powers, a corresponding obligation exists on commission officers to use them responsibly and in an accountable manner.

In some inquiries, there may be a need to create groups or teams with specialist or multi-disciplinary staff who are to develop and progress strategies, methodologies and operational procedures for the inquiry. This will occur in the case of broad-ranging inquiries that possess extensive powers. Examples include the Fitzgerald commission of inquiry and the Wood Royal Commission. Counsel assisting will usually play something of a co-ordinating and, in some circumstances, a managing role to ensure proper liaison, supervision and co-ordination between the various arms or groups within a commission of inquiry. The obligation of accountability includes the duty to ensure that commission resources are properly and efficiently employed and that necessary advice from appropriate specialists is taken on matters such as the strategies and the methodologies considered necessary or appropriate to achieve the purpose of an investigation.

2. The development of investigation strategies and investigation programmes

It is a primary role of counsel assisting to participate in determining the evidentiary issues, the order in which they are to be pursued and to assist the commissioner(s) in the approach that is to be taken with respect to them. This will include the obligation:

- to ensure that relevant witnesses are identified with a view to them being called to give evidence. This will include determining the means for identifying witnesses whose identity may be unknown and who may have relevant information or knowledge;
- to ensure that the commission's compulsory powers to acquire information are effectively used to obtain, from relevant sources, documentation or records necessary for both the effective examination of witnesses and in generally establishing the facts in relation to relevant issues.

In all of these matters, the terms of reference provide the metes and bounds for the inquiry and they, in turn, will determine what matters are to be investigated and sometimes by what method they should be investigated.

The advisory role, of which I have earlier spoken, requires counsel assisting to advise the commissioner on the conduct of hearings and this may embrace the question as to whether such hearings should be conducted initially in private or in public or in both. There are particular considerations which will determine whether or not evidence from particular witnesses ought be taken in private or public. The approach to be taken in this respect, for example, by a royal commission established to investigate a public scandal or an allegation of corruption or maladministration or a disaster, generally speaking, will favour public hearings although not necessarily without exception. There may be good reason for evidence to be taken, at least initially, from relevant persons in private hearing. In the case of standing or permanent anti-corruption commissions, private hearings may often be indicated or required or may be preferred for strategic, tactical or for operational reasons. This is but an illustration of the subject matter of an inquiry influencing the selection of alternative processes.

In relation to witnesses, counsel assisting has the obligation to ensure that there is a sound and cogent basis for calling evidence from witnesses in public hearings of a commission. It follows that often there will be a need for pre-hearing interviews to be conducted. This, of course, will not always be possible as there will often be unco-operative witnesses who will only give evidence in response to the exercise of the coercive powers of the commission.

The general point here is that, wherever possible, attempts should be made to minimise the risk that, for example, scandalous material will emerge for the first time in public hearings from unreliable persons or persons who are motivated by malice or otherwise acting in bad faith and which can cause serious, if not irreparable, harm to the reputation of others. The risk of such material emerging of course will often be unavoidable and necessary. Counsel assisting will need to assess that risk and determine whether it is avoidable or not.

Sam Bargshoon and Nabil Gazal answer questions at the ICAC's Orange Grove inquiry. Photo: Robert Pearce / Fairfaxphotos

Reference has already been made to the fact that in some commissions of inquiry, inter-disciplinary teams of specialists, will be engaged on behalf of the inquiry. Counsel assisting may be called upon to tender advice as necessary to commission officers, including investigators as to the commission's powers and processes in order to ensure that coercive and invasive powers are invoked properly and according to law. As discussed earlier, it may, for example, be important to ensure that search warrant applications are properly made and, where other powers are available to a commission of inquiry (e.g., listening or surveillance device or telephone interception surveillance) applications for authorisation are made in accordance with the relevant statutes.

In inquiries involving broad ranging issues, counsel assisting may be required to establish an appropriate division of labour so that individual issues are referenced or allocated to specific teams headed by a legal officer. In such cases, counsel assisting necessarily will, to some extent, participate in the co-ordination and conduct of diverse investigations. In doing so, he or she effectively acts as a filter and offers some separation between investigative staff and the commissioner who may wish to remain somewhat independent on particular day-to-day investigative issues.

3. The role of counsel assisting in the commission hearing process

General matters

It is conventional for counsel assisting to call witnesses before a commission of inquiry and to adduce evidence from them[6]. In some limited circumstances, there may be exceptions. There could, for example, be a specific reason as to why counsel for an 'affected person' may be permitted to adduce evidence from his or her client rather than that being done by counsel assisting. There is no hard and fast rule in this respect but, having said that, it is usually an exceptional procedure.

In some circumstances, evidence may be adduced partly by written statement and partly by oral evidence during the course of examination by counsel assisting. Once again, the nature of the issue will determine whether it is appropriate for prepared written statements to be utilised in this way and whether the legal representatives acting for affected persons or witnesses should be permitted or asked to draft the statements. In some investigations, including those involving unlawful or corrupt conduct, this may not be the preferred or advisable option and there may be tactical considerations that favour a witness being called on short notice and without providing the opportunity to prepare a statement of evidence. In other cases, such as accident investigations, for example, it may be appropriate to receive prepared statements on historical and technical matters. It will often depend upon the particular witness and his or her role or involvement in the matter under investigation.

In adducing evidence, the object of counsel assisting should be to elicit material in the fullest and fairest manner in relation to the subject matter of the inquiry. That said, it is not possible to comprehensively state the full scope and extent of obligations in respect of the leading of evidence from witnesses. However, a number of general propositions may be stated:

- As an aspect of that duty, counsel assisting has the responsibility for establishing the truth or the facts concerning a particular matter and that responsibility may include eliciting evidence that tends to support or contradict a matter or issue of importance (or both) leaving it to the commissioner to make the necessary factual findings.
- On some issues it may be appropriate to adduce evidence without leading or making direct suggestions to a witness. On some issues of importance, it is preferable to allow the witness, as far as possible, to rely upon his/her own independent knowledge or recollection of events.
- In other circumstances, it may be necessary or desirable in the interests of establishing the true facts to cross-examine a witness or to put matters to a witness[7].
- The conduct of counsel assisting in the examination of witnesses, of course, must be in accordance with standards of fairness, but what is *appropriate* conduct, may vary according to the circumstances. In this respect, for example:
    - The fact that there is no contradictor to a particular witness or in relation to a particular issue may mean that counsel assisting will need to take an active role in confronting or challenging a witness in an endeavour to establish the truth on a particular matter.

- Particular investigative material available to counsel assisting may justify, and indeed require, vigorous examination in the nature of cross-examination.

Procedural fairness and the responsibilities of counsel assisting

In general terms, following the practice of courts, it is part of counsel assisting's function in the hearing process to formulate and present opening and closing submissions: *Bretherton v Kaye & Winneke* [1971] VR 111-125.

In some circumstances, a detailed opening submission may be regarded as inappropriate and indeed inadvisable. This is especially so with respect to inquiries into illegal activity or suspected corruption or other forms of impropriety. An inquiry will often proceed along the lines of a criminal investigation in which the hearing process is but part of a broader investigation with a view to establishing the relevant facts concerning the conduct of persons of interest. However, where a royal commission is established there is usually an expectation that its proceedings will largely be conducted in public with some form of opening address by counsel assisting.

Where an opening is appropriate, it can serve the purpose of providing notice of issues and as well provide a context for the examination of witnesses and matters of likely inquiry[8].

Whilst a topic opening cannot be definitive, it can serve a purpose in facilitating procedural fairness. However, consistent with the note of caution made above, ordinary prudence indicates that it is very often unwise for counsel assisting at the outset to predict or forecast where the evidence is likely to go or what it is anticipated will be established by it. An investigative inquiry, almost by definition, is an open-ended process and often unpredictable, in terms of issues and evidence.

Counsel assisting should take, at least as a starting point, the decision of the Privy Council in *Mahon v Air New Zealand Limited* (1984) 1 AC 808 as a guide to what is required in ensuring that the commission of inquiry adheres to the relevant rules of procedural fairness. In that matter, the board, inter alia, expressed the view that:

> Any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding, even though it cannot be predicted that it would inevitably have that result.

See also *Annetts v McCann* (1990) 170 CLR 596 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

Counsel assisting is directly concerned with ensuring that the necessary steps are taken to comply with this 'rule'. Accordingly, he or she must be familiar with procedural

Steven Rushton SC and the Hon Joe Tripodi MP depart from the ICAC's Orange Grove inquiry. Photo: Ben Rushton / Fairfaxphotos

fairness requirements as they affect the inquiry process. It has been observed that the following questions may arise as to what procedural fairness entails[9].

1. *Is it necessary to observe the rule in relation to persons who have not sought and received leave to be represented?*

As a practical matter, it would seem unwise to proceed on the basis that the relevant duty is not owed to any person to whom a grant of representation has not been made. As has been pointed out in the first place, the status of an unrepresented person may change later in an inquiry[10]. Additionally, it is difficult to accept that findings might properly be made which were adverse to the reputation or other relevant interests of a person who had not sought representation, but who had not been called or otherwise notified of evidence given to his or her discredit. In other words, such persons, one may safely assume, are not excluded from the benefit of the rule. Accordingly, the preferable course is for notice of adverse material and of the possibility of an adverse finding to be given to such a person by appropriate means[11]. In other words, there is usually, or often, a coincidence of the requirements of natural justice with the objective of establishing the truth about the matter in question[12].

2. *Is it necessary to provide written or other particulars of matters adverse to a person which, in the expectation of counsel assisting, will be established by the evidence to be called in the inquiry?*

The short answer is no. It again is to be remembered that proceedings of a commission of inquiry are investigative in nature and not adversarial. There is a solid body of authority which establishes that there is no necessity for notice to be given in advance of evidence to be led or to include an outline by way of notice of matters adverse to one or more of the participants in the inquiry. Indeed, as it has already been indicated above, the search for the truth may be prejudiced by such an approach.

3. *Must the tribunal give written notice of any tentative adverse conclusion to the person concerned before bringing down its report?*

The answer to this question must be that it is not always necessary. There is some authority to support the proposition that if witnesses who have had matters or issues raised with them in the course of examination whilst giving evidence before the inquiry, then they are to be taken to be sufficiently on notice. In *Bond & Ors v Australian Broadcasting Tribunal (No. 2)* (1988) 84 ALR 646, Wilcox J stated that it may be sufficient if, 'the subject matter of a potential criticism has been flagged as an issue, in the presence of the affected person, during the course of the inquiry'.

However, in other circumstances, more may be required as additional material may have been subsequently received during the course of the inquiry's proceedings or alternatively a revised view may be taken as to the significance of material that has been received at an earlier point in time[13].

In some circumstances it may be necessary for counsel assisting to recall a witness in order that such additional matters or revised perceptions be put to him or her. Apart from procedural fairness considerations, the search of truth may require that to be done in any event.

Counsel assisting has an obligation, at the conclusion of the evidence, to provide notice by way of closing submissions of the issues upon which adverse findings may be made. Written submissions may need to be forwarded both to persons who have been granted leave to be represented at the inquiry in relation to particular matters and also to persons who have not been represented and against whom adverse conclusions have been proposed in the submissions of counsel assisting. Such persons can be provided with particulars as to the way in which they may respond.

As a practical matter, counsel assisting, wherever possible, ought to put matters that are adverse to the interests of a person whilst they are giving evidence. If that is not done but is left to be raised in submissions at the end of the hearing process, practical problems may arise in the need to recall witnesses to obtain their version upon any matter of importance. That can disrupt the orderly programme of an inquiry given particularly that often there is a finite reporting date which must be met.

It has been stated that in relation to final or closing submissions, it is the function of counsel assisting to:

- provide notice to all persons who might be adversely affected (whether or not that they have been granted authorisation to appear and be represented) of possible adverse findings;
- make final submissions as to:
    - the possible of findings of fact that could be made by the commission including references to the evidence that support such findings and references to contrary evidence; and
    - the possible findings that should be drawn having regard to the terms of reference.[14]

Particular issues may arise which require counsel assisting to take steps to ensure that witnesses who are unrepresented are not unfairly prejudiced or unfairly suffer detriment. This may, for example, arise in respect of claims for partial immunity in respect of evidence to be given. Unrepresented witnesses may be unaware of their rights. The question has arisen as to whether or not it is the responsibility of counsel assisting to ensure that such persons are made aware of their rights[15]. There is no universal rule. Relevant issues are discussed in the text referred to in footnote 15.

4. The report writing phase of the inquiry - constraints

In some circumstances, it is appropriate for counsel assisting to assist in the compilation of factual and expert material for the purposes of the commissioner's report. There is no universal rule or principle that applies in determining what role, if any, counsel assisting should play in the compilation of the commission's interim and/or final reports.

Generally speaking, there is much to be said for the view that it is inadvisable for counsel assisting to be involved in those activities in inquiries where allegations of criminal or illegal conduct are involved and, in some cases, where serious impropriety has been alleged.

Reference in this respect may be made to the New Zealand Court of Appeal in *Re Royal Commission on Thomas' Case* [1982] 1 NZLR 252. In an application for review of a report of a royal commission, closing observations were made in relation to counsel assisting's participation in the formulation of the report with respect to persons who had been the subject of the inquiry being police officers against whom very serious allegations of impropriety had been made. The court stated at 273:

> Before parting with this branch of the case we add that it emerged in evidence before us that, after the commission concluded its hearing, counsel who had assisted the commission at the inquiry took part with the commissioners in the conferences on the contests of the report, which were arrived at by a process of seeking consensus, and in the actual drafting of the report. When a commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of prosecutor. It is not right that they should participate in the preparation of the report. But as this was not a ground of complaint by the applicant in the present proceedings, we merely draw it to attention so that it is not treated as a precedent.

The question of the role of counsel assisting in the report writing phase, then, is one to be determined by reference to general principle, having regard to the particular nature of the issues that fall for determination. It is inappropriate, in my view, for counsel assisting who has put submissions before a commissioner calling for adverse findings involving illegality or serious impropriety to then, as it were, cross over and participate in the fact-finding necessary to determine whether

or not counsel assisting's submissions should be accepted or rejected.

Ethical standards of advocacy and conduct of counsel assisting

Counsel assisting may be called upon to make ethical judgments in progressing particular investigations and in dealing with internal controls by which the commission is required to function and operate, including the steps to be taken to obtain evidence and to otherwise ensure accountability in the use of the commission's powers and procedures.

Earlier in this paper, I have made reference to the obligation upon counsel where possible in some situations to evaluate witnesses before they give evidence in public hearings having regard to the nature of the evidence that they are likely to give. In this respect it has been said that evidence that may be relevant for it to be admissible may not meet a standard of *sufficient materiality* in respect of particular named individuals, at least for the purposes of public hearings[16].

The point has been made that relevance, cogency and overall fairness are all factors that must bear upon the decision to make use of evidence in any particular way[17]. It was also there pointed out that each inquiry will present its own considerations in the decision to call evidence and that a number of matters have been identified in the context of balancing the rights of the individual and the need to conduct a full and fair proper inquiry:

(a) In striking the balance between probative and unreliable evidence, it is not to be overlooked that counsel assisting is bound by the rules of conduct of the Bar, which require standards of fairness to be adhered to and inhibit the use of scurrilous or irrelevant material.

(b) Suppression orders or the use of pseudonyms may be appropriate in the conduct of a public inquiry, having regard to considerations in relation to the protection of the name and identity of informants. This may be subject to specified qualifications and will be a matter for the commission to determine.

(c) Circumstances in which it may be appropriate to suppress the name of a person or other material, having regard to overall considerations of fairness, include:

- cases where there is a need to protect the interests of a person awaiting trial;
- where the person involved is young, or shown on expert evidence to be ill, psychiatrically vulnerable or deceased;
- it is necessary for the person's physical protection, because of a perceived risk to their safety;
- public interest immunity considerations;
- the evidence does not meet the standard of *sufficient materiality* referred to above;
- evidence is shown to be no more than suspicion or rumour and/or unassociated with the terms of reference.

Attention should be given to the provisions in New South Wales of the *New South Wales Barristers' Rules*, in particular Rule 72 which incorporates by reference Rules 62, 64 and 65[18].

1 E.g., *Independent Commission Against Corruption Act 1988* (NSW); *Police Integrity Act 1996*, *Crime & Misconduct Act 2001* (Qld); *Corruption & Crime Commission Act 2003* (WA).

2 see, for example, the *Royal Commission Act 1902* (Cth), s5FA.

3 eg. Royal Commission into Productivity in the Building Industry in New South Wales (the Gyles Royal Commission) and the Royal Commission into the Building and Construction Industry (2003) (the Cole Royal Commission).

4 The question of the appropriate standard of proof of a matter may, of course, be significant to fact-finding by a commission of inquiry.

5 *Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly and Other Matters* (1991) Tasmania, Vol. 1 at p.37.

6 See in relation to programming evidence and procedures, Peter M Hall *Investigating corruption and misconduct in public office: Commissions of inquiry – powers and procedures*, Law Book Co. (2004) at p.673-676

7 See discussion 'Procedural aspects of the royal commission, Part 1', by MV McInerney QC. (as he then was) (1951) 24 ALJ 386 at 387-388.

8 HIH Royal Commission: the failure of HIH Insurance, Vol. 1, *A corporate collapse and its lessons*, paragraph 2.15 at p.41.

9 The points below area derived from 'Some notes on natural justice in relation to inquisitorial proceedings', by John Stowe QC. Seminar at New South Wales Bar Association, 2 November 1992 at p.4.

10 ibid.

11 ibid at p.5.

12 ibid.

13 ibid at p.7.

14 Royal Commission into the Building and Construction Industry, Vol. 2, *Conduct of the commission – principles and procedures* (February 2003) para.39 at p.55.

15 see discussion in Peter M Hall *Investigating corruption and misconduct in public office* Chapter 12, 'Commissions of inquiry' at 12.180.

16 See the discussion of the approach adopted by the Fitzgerald commission of inquiry: *Investigating corruption and misconduct in public office*, ante at pp.678-679.

17 See 'Reputation: does it matter and can administrative law protect it?' A paper by Gary W Crooke QC at the 1996 Administrative Law Forum, Hotel Inter-Continental, 11-12 April 1996 at p.7.

18 See discussion in *Investigating corruption and misconduct in public office* at pp.679-680.

The further divergence between UK and Australian law on barristers' negligence

By Alister Abadee

Introduction

Ever since the House of Lords abolished the advocates' immunity in *Arthur J S Hall v Simons* [2002] 1 AC 615, the Australian Bar has been apprehensive as to: (a) whether the immunity would be abolished by statute or judicial abrogation; and (b) what consequences may flow from the abolition of the immunity in negligence suits for work intimately connected with the presentation of a case in court.

As to the former the High Court has now confirmed by clear majority (6 – 1) the advocate's immunity in common law for work in court or work outside of court intimately connected with work in court in *D'Orta - Ekenaike v Victoria Legal Aid* [2005] HCA 12. The common law immunity applies to civil and criminal (and other hybrid) proceedings. The High Court confirmed the correctness of *Giannarelli v Wraith* (1988) 165 CLR 543 and did so, of course, after reviewing *Hall v Simons* and expressly noting differences between the administration of justice in England, Wales and Australia. The matter is now in the hands of the state and territory attorneys who, at the time of writing, are considering whether and, if so on what terms, the immunity may be abrogated by statute.

As to the latter, the House of Lords has recently delivered opinions in *Moy v Pettman Smith (a firm)* [2005] 1 WLR 581, a case concerning alleged negligent advice by a barrister with respect to a settlement offer received from an opponent on the court doorstep. Arguably, had the case been determined under Australian law recognising advocate's immunity, now confirmed by the High Court in *D'Orta*, it may not have been necessary to determine questions of breach and causation. Be that as it may, the decision in *Moy* raises several significant issues for Australian lawyers in handling barrister negligence cases founded on advices on settlement.

Preservation of advocate's immunity in the common law of Australia

Factual context

D'Orta concerned the advice of an advocate (and legal aid office) in conference to an accused charged with rape to plead guilty two days ahead of committal proceedings. The accused entered a plea. On arraignment at the subsequent trial, he pleaded not guilty and the prosecution led evidence of his guilty plea at the committal. The accused was convicted and imprisoned. On his appeal, the Victorian Court of Appeal quashed the conviction and found that the trial judge failed to give proper directions about the use that the jury might make of the guilty plea at the committal. On retrial, the evidence of the guilty plea was not admitted. The accused was acquitted. He later brought an action against his barrister and legal aid office. He alleged (inter alia) that the advice to plead guilty was negligent and sued the barrister and legal aid office for loss and damage (including loss of liberty and loss of income) and the costs of expenses of the criminal proceedings (including the appeal and retrial). The barrister and legal aid office successfully moved the trial judge to stay the proceedings forever on the basis that the barrister and legal aid office were immune from suit. An appeal of the decision to stay before the Victorian Court of Appeal failed. The High Court heard the application for special leave to appeal at the same time as the substantive appeal.

The immediate issue in *D'Orta* was whether the High Court would reconsider its decision in *Giannarelli* in respect to two matters: the advocate's immunity in common law and whether, as at a particular date, an advocate was immune from suit under Victorian legislation. It is not proposed, for the purpose of this note, to analyse the High Court's construction of the Victorian legislation, though the interpretation of that legislation signified that the structure of the legal profession in that state differed substantially from the barristers' profession in England and Wales ([19]). Attention is focussed instead upon the High Court's treatment of the advocate's immunity in common law.

Photo: Rob Homer / Fairfaxphotos

Identifying the public policy justification for the immunity

The joint judgment (Gleeson CJ, Gummow, Hayne and Heydon JJ) structured their consideration of the immunity in common law, and the correctness of the decision in *Giannarelli*, with regard to two matters: (a) the place of the judicial system as part of the structure of government; and (b) the place that the common law immunity has in a series of rules designed to achieve finality in the quelling of disputes by the exercise of judicial power ([25]). The joint judgment regarded as peripheral other matters cited in *Giannarelli* as supporting the immunity: connection between the barrister's immunity and inability to sue for fees; potential competition between duty to the court and duty to the client; and the desirability of maintaining the cab rank rule (at [26]).

Instead the justification for the immunity is rooted squarely in the role of the advocate in facilitating, along with other participants in the exercise of judicial power (judge, witness,

juror), the administration of justice[1]. This was a fresh approach to the issue: the immunity had not previously been explicitly linked to Australia's constitutional structure. The majority determined that it is part and parcel to the judicial system that controversies, once resolved, are *finally* resolved, subject to certain narrowly defined circumstances, even if they are determined imperfectly ([31] – [42], [84], [380]). The majority found that to admit suits against advocates conducting litigation would inevitably and essentially involve the re-litigation of controversies ([43]), thereby colliding with the principle of finality. To take perhaps the most common example, in criminal proceedings, it might be claimed that the incompetence of counsel has led to a conviction[2]. To admit suits against advocates for work in court would require an exception to the tenet of finality.

There are two particular difficulties in carving such exception: first, there would be an imperfect, or peculiar type of re-litigation: one in which only the role of the advocate (not the judge, jurors or witness) was placed under the microscope of the events complained of ([45], [113], [164], [192] – [194])[3]. Thus, the barrister (and the legal aid office) in *D'Orta* could not, at the civil trial, have called any of the jurors to say what impact the trial judge's mistaken direction as to the use of a plea had on their decision. Secondly, in order to succeed with a suit, it would be necessary to impugn the final result of earlier litigation, since the 'harm' sustained by the client could not be corrected within the original litigation ([66] - [73], [165] – [168], [370]).

The joint judgment rejected the reasoning, approved by the House of Lords in *Hall v Simons*, that rules about of abuse of process (especially collateral challenges to criminal convictions in civil proceedings) could substitute for the function of advocate's immunity of avoiding the risks of re-litigation; and that distinction should be made between applying the principle in criminal and civil proceedings (at [74] – [79].

McHugh J and Callinan J delivered concurring judgments, emphasising, in particular, certain features of the profession of the Bar distinguishing it from other professionals. They cited important differences between advocates and other professionals including the occasions where advocates, as officers of the court, must occasionally subordinate the interests of the client ([113]) and the non – scientific, even intuitive, nature of the advocate's craft ([370]).

As he did in *Boland v Yates Property Corporation* (1999) 74 ALJR 209, Kirby J, in dissent, rejected public policy arguments, and all other considerations, favouring the immunity. His Honour did, however, confine his views favouring the abolition of the immunity to 'out of court' negligence, leaving *Giannarelli* to stand in respect to acts or omissions 'in court' to another day ([339] – [340], [346]).

Kirby J, in dissent, rejected public policy arguments, and all other considerations, favouring the immunity. His Honour did, however, confine his views favouring the abolition of the immunity to 'out of court' negligence, leaving *Giannarelli* to stand in respect to acts or omissions 'in court' to another day

Identifying the boundary of work in court

The joint judgment saw no reason to depart from the test in *Giannarelli* that the immunity extends to work done in court or to work done out of court that leads to a decision affecting the conduct of a case in court, as it is the conduct of the case that generates the result which should not be impugned ([85]). Advice about a plea given out of court led to a decision (to enter the guilty plea) affecting the conduct of the case at the subsequent trial (at [88]).

McHugh J considered the boundary at some length, giving examples of cases falling on both sides of the line (at [154] – [156]). His Honour noted that the question is whether the connection with the litigation exists; not the form of the negligence, a point that is important where claimants might seek to couch their cause of action in a way that seeks to distance the conduct from occurring in the courtroom (at [167])[4]. Thus actions are commonly framed with particulars alleging a failure to advise, being an omission that can more readily be attributable to conduct in the calm of a barrister's chambers. In line with the public policy considerations expressly identified in the joint judgment, McHugh J determined that the immunity should extend to any work that, if subject to a claim of negligence, would require the impugning of a final decision of a court, or the re-litigation of matters already finally determined by the court (at [168]).

Commentary

At the time of writing this note, the question of whether to abolish the immunity was on the agenda of state and territory attorneys-general. A view appears to have taken hold in sections of the public, in the aftermath to *D'Orta*, that it is wrong, or anomalous, for advocates not to be accountable for their acts and omissions, when other professionals whose profession requires them to make intuitive, instantaneous judgment calls do not enjoy an immunity. The argument that there are no other or adequate forms of accountability deserves close attention when that argument appears to be motivating legislators in considering whether to abrogate the immunity.

First, where advocates conduct themselves so flagrantly such that the conduct constitutes a form of unsatisfactory professional conduct or professional misconduct, they may be liable to pay compensation as a sanction in disciplinary

proceedings (Legal Profession Act, s171C). Whilst statutory caps exist for compensation orders (such as they exist, for example, in victims compensation statutes) and there may be an argument to increase those caps, clients who suffer loss as a result of such conduct do not also have to prove the difficult issue of causation that they would in a private suit against the advocate.

Secondly, where the advocate's conduct has arisen in the civil jurisdiction of superior courts, advocates may be amenable to costs orders under the court's inherent jurisdiction, as well as provisions such as Part 52A r 43A which permit the making of orders in respect of costs incurred improperly or without reasonable cause; or costs which are wasted by undue delay or by other misconduct or default[5]. A long time ago, the court had the power, in its disciplinary jurisdiction over officers of the court, to penalise advocates by way of fine, by 'mulcting' the court officer[6]. Such forms of accountability are apt to hit the hip pocket of advocates and may not necessarily be covered by professional indemnity policies.

Thirdly, unlike other professionals forced to make intuitive and instantaneous decisions, and quite apart from the multiple and sometimes conflicting duties owed by them, advocates make their decisions in the public gaze, with their conduct scrutinised by judges, jurors, court officials, solicitors, clients, the media and the general public. Conceivably, over time, there may be audio or television broadcasting of court proceedings, so that the advocate's conduct may be exposed to broader sections of the community. Further, it is not unknown for criticisms of the way parties (and implicitly, the advocates representing them) run their cases to emerge in judgments. These forms of public scrutiny keep advocates accountable in a competitive profession.

Moy v Pettmann

The context

Moy was a case about a client's decision to accept one of a number of settlement offers at an undervalue, and litigation brought against his solicitors and barrister to sue for the difference between what he received on settlement and what he would have received in the highest settlement offer made by his opponent. A barrister was briefed to appear for a claimant in a personal injuries case arising from surgical treatment received at a hospital. The claimant faced a number of evidentiary difficulties in his case against the hospital; which was partly the result of inadequate preparation by the claimant's solicitors. The hospital authority made several payments into court. As the trial approached, the defendant barrister was informed, contrary to her expectations, that the hospital would raise an issue of causation concerning the claimant's pain and disability and consequential future loss. She understood that she would need the court's leave to adduce evidence to close the evidentiary gap. She considered that she had a better than 50:50 chance of succeeding in getting that leave. The trial commenced. At the door of the court, the defendant barrister was told that the hospital authority's last offer was still open for acceptance before the judge came on the Bench.

The barrister advised the client essentially in the following terms: he could still accept the hospital's last offer, but she was hopeful that the evidence would be allowed in, and that it was better for him if the case went on, since he should beat the hospital's last offer, but it was a matter for him whether to accept the offer to avoid the risks. The claimant proceeded. The judge came on the Bench. Discussion between the Bench and the Bar made it apparent that the claimant was unlikely to get the new evidence in. The case was briefly adjourned, during which time the hospital withdrew its immediate past offer and substituted a previous lesser offer (which also deducted costs incurred from the date of payment into court of that lesser amount). In the interval, the barrister advised the client to accept the reduced offer and this advice was accepted.

It was claimed that the barrister negligently failed to advise the claimant to accept the hospital's highest offer before trial and but for that negligence, the claimant's losses would have been less. Eventually, there was no issue that the barrister's assessment of the prospects of persuading the trial judge to admit the necessary evidence was one that a reasonably competent barrister would make. The case turned upon the adequacy of her advice to the client. The English Court of Appeal found that notwithstanding the reasonableness of her assessment of getting the new evidence in, since the barrister did not actually tell the client that her *assessment* of the prospects of getting the evidence in was only 50:50, this was negligent advice. It then inferred that had the claimant been given this advice, he would have decided to accept the hospital's highest offer.

The reasoning

The House of Lords allowed the barrister's appeal. Lord Carswell delivered the leading opinion. At the outset, Lord Carswell emphasised (at [60]) that it was not intended that the abolition of the immunity in England and Wales should lead to barristers adopting 'defensive' advocacy, to abdicate responsibility for making hard decisions and a reluctance to give clients advice that they need. Turning to the question of breach, Lord Carswell accepted the barrister's counsel's submission that it followed, by clear implication from the finding that the barrister was not negligent in *assessing* the prospects of succeeding with her application to adduce the new evidence, that she was not negligent in *advising* the client to proceed with the action, rather than accepting the hospital's highest offer (at [61] – [63]). The other lords agreed with Lord Carswell ([1], [2], [21], [23], [71]). Lord Carswell also doubted (without deciding) the Court of Appeal's finding that the client would have accepted the hospital authority's highest

offer if given the more specific advice concerning the prospects ([64] – [65]). This was the causation issue.

What was the content of the advice that should have been given? On this the lords were unclear. Lord Carswell said that the barrister should give clear and readily understood advice and appeared to find that since her reasoning was reasonable, it was not incumbent upon her to spell out the reasoning ([65]). Lord Hope (with whose opinion Lords Nicholls, Baroness Hale and Lord Brown also agreed) said that the client would be entitled to know once the defendant had paid a sum into court: (a) whether s/he is likely to better the sum paid into court if the matter was left to the judge; and (b) any costs liability that the client may have if s/he fails to better that sum from the trial judge ([14]). Lord Hope also said that it is the substance of the advice that needs to be communicated ([21]). Baroness Hale described Lord Hope's analysis of the content of the advice to be given as the 'minimum' that a client should know when deciding whether to accept a payment into court, but distinguished that situation from where the offer is made at the court – door (at [28]). Baroness Hale frankly conceded that there were no clear principles governing the terms in which advice in this context could be given (whilst noting that there was no expert evidence to indicate that a reasonable barrister would have acted any differently to this barrister) (at [28]).

Photo: Tamara Voninski / Fairfaxphotos

Issues arising from Moy for Australian advocates

First, there is, as indicated, a real argument as to whether the advocate's immunity at common law might have been invoked by an Australian barrister in the same position as the barrister in Moy. In the pre – *Hall v Simons* decision of *Kelley v Corston* [1998] QB 686, the English Court of Appeal considered another case of alleged negligent advice on settlement offers at or close to the court door. In that case, an important factor that led to the immunity being invoked in *Kelly* was the fact that to fully test the reasonableness of the barrister's conduct, it was necessary to consider how a judge might have responded. The client's complaint in *Moy* arose because a judge indicated that, contrary to the expectation of his counsel, the court was not likely to admit the evidence. It is very likely that in *Moy* this judicial indication, which was thereafter exploited by the hospital, had some causative role to play in the client's loss and disappointment. The judge's comments doubtless contributed to the hospital's decision to withdraw its highest offer; which decision, in turn, contributed to the client's loss. Had the judge rejected (as was apparently likely) the application to admit the evidence, in Australia, conceivably the decision might potentially (depending upon the precise circumstances) have offended the principle from *Queensland v JL Holdings* (1997) 189 CLR 146. It would bring to bear the point made by Callinan J in *D'Orta* (at [369]) that sometimes it might be *judicial* error that has caused a client loss. Had another judge taken a more sympathetic view, and the evidence had gone in, the case would have been more likely presented in a way that reflected its true value and it is possible that no loss (or at least a lesser amount of loss) would have occurred.

For a barrister to defend a claim of negligent advice (and for a client to prove the issue of causation) would and did in this instance, require some other court to inquire into the actual or likely conduct of the judge. This was the sort of case where the barrister might, under the common law, have interposed the judge's conduct, in expressing the negative indications towards the application, between herself and the client's loss; but in circumstances where the judge was not only immune, but barrister could not ordinarily call the judge as a witness[7].

Secondly, how persuasive is the reasoning that because a barrister's assessment of the merits of a settlement offer is not negligent, then it followed that a failure to articulate the reasoning underlying such assessment could not be negligent? In *Moy* the lords appeared to be mindful of the analogy of doctors advising patients of the risks of surgical treatment (e.g. [28], [64]). In the Australian context, ever since *Rogers v Whitaker* (1992) 175 CLR 479 it has been the common law that there is a difference between a doctor's treatment and disclosure of advice and information (albeit that both are components of the single comprehensive duty): doctors have the duty to warn patients of material risks inherent in the proposed treatment[8], and it has been demonstrated that liability may result for failure to warn even if the treatment is carried out competently (*Chappel v Hart* (1998) 195 CLR 232). In this medical context, there are a range of factors that a practitioner would ordinarily be expected to consider in deciding whether to advise and what to advise the patient, including the nature of the risk (and the likelihood of its eventuating), the existence of reasonably available alternative treatments, the patient's desire for information, the characteristics of the patient and all surrounding circumstances (such as emergencies)[9]. Perhaps not all of these matters could readily be transposed to the context of a barrister's advice to the client about settlement offers at the door of court[10] . Nevertheless, as the High Court noted in *Rogers* (at 486), a

consequence of the application of the 'Bolam' principle, which gave the medical profession the right to determine for itself the standard of care, was that no matter whether a patient asks a direct question about possible risks or complications of treatment, no matter whether or not it was ultimately performed competently, the making of that inquiry would have no significance. It is suggested that the lords' reasoning does not admit of a proper role for the inquisitive client and the other factors of the kind considered in the medical advice cases.

In *D'Orta*, McHugh J (at [157]) and Callinan J (at [387]) rejected the application of the principle in the circumstances of the case. Nevertheless, it is submitted that merely because a barrister's assessment of the merits of accepting an offer of settlement against the alternative courses is reasonable does not, by itself, answer a complaint that the provision of information or advice was negligent. The causation issue is another matter. This is not to say that the lords' determination was wrong and it appears that the claimant's case was likely to have foundered on the causation ground that it would have made no difference to the client to receive the fully elaborated advice: what mattered to him was the substance of the advice. Further, the circumstance that an offer is put at the court door and thereby requires urgent consideration might be regarded as analogous to the circumstance that a surgeon might be required to advise a patient on treatment in an emergency. However, as the list of factors in *F v R* indicated, this is but one of many circumstances to be weighed in the balance.

Thirdly, there cannot be hard and fast rules as to the content of advice on settlement offers, whether at the court door – step or not. In *Studer v Boettcher* [2003] NSWCA 263, the client complained about the pressure brought to bear by his solicitor to settle a case at a mediation on the best terms. The court agreed that there are circumstances in which an advocate may bring legitimate pressure to bear upon a client to settle, but not to such extent so as to coerce the client. On the point of interest in this note, Fitzgerald JA (in obiter) indicated that the lawyer's advice on a settlement offer is not merely a matter of considering upon and advising how the client's rights and obligations are affected by the offer, but requires a consideration of other matters, including the 'value judgements, discretionary decisions and other subjective determinations' involved in continuing with the curial process, such as the delay, the stress associated with litigation for parties, potential costs liability of the client, and the diversion of the client away from other more productive activities (at [65]). More specifically, his Honour noted that the lawyer should advise of the advantages and disadvantages of the courses open to the client, the lawyer's opinion and the basis for it, in terms that the lawyer can understand (at [75]). As to this last matter, as some of the lords noted in *Moy*, lawyers in this context are paid for expressing their opinions; not their doubts ([28], [65])[11]. These are the sorts of matters capable of being reasonably adapted to the *F v R* criteria from the medical negligence cases.

Fourthly, the House of Lords emphasised the problematic requirement of causation for claimants that they prove, after the event, that after receiving proper advice, they would have declined the settlement offer that they actually accepted. This is akin to the medical negligence context of a patient having to prove that s/he would not have undergone the treatment if advised of its material risks. As indicated, the lords did not need to decide the causation point, but did emphasise that it was unlikely that the client would have acted any differently if given more detailed information to support the substance of the opinion expressed (at [64]). In the imperfect and artificial forum of the evidence given after the event, the High Court has noted that, under the common law, particular care needs to be given to accepting the subjective evidence of claimants and the court will pay close attention to the objective factors in assessing the credibility of such evidence[12]. For proceedings in New South Wales, the ability of claimants to give evidence as to what they would have done had they received proper advice is now also severely constrained by statute (s5D(3)(b) of the *Civil Liability Act 2002* (NSW).[13]

Fifthly, the lords' decision raises the question of the significance of expert opinion evidence and whether to call it in advice on settlement cases. As indicated, there was no dispute but that the barrister's assessment of the prospects of getting the evidence in set against the advisability of accepting the offer was reasonable and the only question was whether she was negligent for failing to give adequate advice. In this case, no expert evidence on reasonably competent practice in advising clients in the situation that this barrister was confronted was adduced. Instead the matter was left to the judge. That step is not unremarkable in barristers' negligence proceedings given the prevalence amongst the Bench of former experienced barristers (though, of course, appointments are increasingly being drawn from the solicitors' branch and the academy). A possible drawback of relying upon the judge alone is that unless s/he is forced to deal with expert evidence (especially that which has been contested), judges may have differing (and possibly unarticulated) standards upon which judicial minds may reasonably differ (at [19] and [26])[14]. The ultimate question is not what the judge would have advised, but whether the advocate's advice accorded with reasonable practice. Where there is an absence of authority or a commonly held view as to what constitutes reasonable practice, than the absence of expert evidence can be significant and, indeed, such omission may be relied upon to support a view that the barrister should receive the benefit of the doubt. This was an important point to Lord Hope (at [22]) and Baroness Hale ([28]) in *Moy*.

For proceedings in New South Wales, again, the position in the common law has, since late 2002, been affected by s5O (1) of

the *Civil Liability Act 2002* which provides a defence for a professional in negligence proceedings if s/he acted in a manner which (at the time of the act or omission) was widely accepted in Australia by peer professional opinion as competent professional practice. Section 5O(2) provides a qualification to this defence where the court considers that the peer opinion is 'irrational' and it is perhaps, here, that an adventurous judge might water down the application of the defence. Nevertheless, in most cases of barristers negligence involving alleged negligent advice this statutory defence makes it virtually irresistible for lawyers acting for barristers in professional negligence suits to serve before trial expert opinion evidence that the barrister acted in accordance with a competent professional practice widely accepted in Australia. This defence is not applicable to the *failure* to advise/warn cases[15]. In these types of cases lawyers for claimants can put on expert evidence on reasonable practice in the provision of advice about settlements in the knowledge that whatever the barrister might put on in response will not, under the statute, be determinative.

Conclusion

In these two decisions, the High Court and the House of Lords have shown their common concern to ensure that advocates are not diverted from performing their role of serving and facilitating the administration of justice. That common endeavour is, however, reflected by two very different standpoints when considering the 'in court' conduct of advocates.

The English and Welsh courts have, since *Hall v Simons*, been required to treat with complaints about the reasonableness of an advocate's conduct where the key issues will be breach and causation, as developed in the common law; with the courts also hoping that rules regarding abuse of process may deter vexatious claims. *Moy* demonstrates that in one area where an advocate's craft is brought to the fore – advices on settlement – and where there is no scientific or ritualistic formula for advocates to apply, expert opinion evidence of reasonable practice will be essential, for both claimant and the advocate.

Australian courts will not (under the common law) even consider the reasonableness of an advocate's conduct in court or intimately connected with it, no matter how egregious, when to do so would risk bringing into disrepute the administration of justice by re – litigating controversies that the judicial process is designed to quell. The majority in *D'Orta* has taken a strong stand, contrary to some sections of public opinion, but a stand that places advocates on no different footing than other participants in that process. For those complaints of advocates' conduct that are on the borderline of out of court acts intimately connected with the conduct of a case in court, recent statutory provisions brought into this and other states relating to breach and causation will present additional hurdles for complainants.

1 McHugh J also said that the independence of the Bar largely secured the independence of the judiciary, yielding an efficient and economical system of justice at [105] – [106].

2 *R v Birks* (1990) 19 NSWLR 677.

3 In his concurring judgment, McHugh J noted that as a consequence, a determination whether an advocate's negligence caused damage would in most cases be a matter of 'guesswork': [190]. Callinan J also instanced the *Boland v Yates Property Corporation* litigation as an occasion where the client's 'loss' (through the eventual costs of protracted legal proceedings) resulted from an error of the court: at [369].

4 Approving *Keefe v Marks* (1989) 16 NSWLR 713; and noting *Boland v Yates Property Corporation* (1999) 74 ALJR 209 at 228 – 29 [97]; and at 280 [361].

5 Eg *Hickey v Davistown RSL Club Ltd* [2003] NSWCA 110

6 JM Bennett, *A history of solicitors in New South Wales* (1984) p 209.

7 *D'Orta* at [43], [45]; *Giannarelli v Wraith* (1988) 165 CLR 543 at 569, 573 – 74, 595; *Boland v Yates* (1999) 74 ALJR 209 at 237

8 The position at common law in New South Wales is not affected by the revival of the 'Bolam' standard in the *Civil Liability Act 2002* (NSW), s5P. In *D'Orta* McHugh J noted the position in other states at [189] fn 229.

9 *F v R* (1983) 33 SASR 189 at 192 – 193, approved in *Rogers* at 490. In *Rosenberg v Percival* (2001) 205 CLR 434, Gummow J at 458 [76] equated this summary with the criteria for breach of duty under the principles of *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 – 8.

10 The *Rogers v Whitaker* principle was applied in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, a case concerning a barrister's advice regarding a transaction: at 53 [145] – [146]

11 Or, as Callinan J said in *D'Orta*, advice that is not clear is advice that may not be worth having ([386]).

12 *Rosenberg* at 442 [17]; 449 [44] – [45]; 463 [91]; 488 – 489 [164]

13 See the evidentiary and constitutional difficulties associated with this provision in Gleeson SC and Evans 'The question that plaintiff's counsel cannot ask' (Summer 2004/05) *Bar News* 36

14 As they differed in the *Heydon v NRMA* litigation.

15 Section 5P

Costs: personal liability of legal practitioners

By Arthur Moses

Of all the changes wrought by the *Civil Liability Act 2002* (NSW), perhaps that which caused the greatest consternation in the legal profession was the insertion of Division 5C into the *Legal Profession Act 1987* (NSW). Division 5C created a statutory power by which legal practitioners could be made personally liable for costs orders in failed litigation in circumstances where the legal practitioner acted without holding the belief that there were reasonable prospects of success in the proceedings.

On one view, the consternation was surprising, given that statutory powers to make such orders already existed in New South Wales (see s76C of the *Supreme Court Act 1970* (NSW) and Part 52A Rule 43 of the *Supreme Court Rules*), and that a non-statutory power to make such orders is of longer standing again (see, for example, the cases discussed by Goldberg J in *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169). On another view, the consternation was entirely understandable given the potential for the new statutory power to eviscerate the cab rank rule by requiring counsel to act as a pre-trial screen between the courts and parties with genuine but problematic cases. The position was not assisted by the fact that the new division was one of a raft of reforms for which very little cogent policy justification was advanced (and some would say, for which there was very little cogent policy justification capable of advancement).

Photo: Rob Homer / Fairfaxphotos

Readers seeking to allay this consternation now have a number of resources to assist them in this regard. The first is the very useful article on the subject by Beaumont ('What are reasonable prospects of success?' (2004) 78 ALJ 812). The second is the decision of Barrett J in *Degiorgio v Dunn (No. 2)* [2005] NSWSC 3 (unreported, NSWSC, 1 February 2005). And the third is the recent decision of the NSW Court of Appeal in *Lemoto v Able Technical Pty Limited* [2005] NSWCA 153 (unreported, Hodgson, Ipp and McColl JJA, 9 May 2005.) The judgment of McColl JA, with whom Hodgson and Ipp JJA join, is deserving of that most happy triumvirate of adjectives which can be applied to judicial decisions: clear, comprehensive and closely reasoned.

Degiorgio holds (at [44]) that the test to be applied in respect of Division 5C 'is more stringent, from the lawyer's perspective' than the pre-existing statutory and non-statutory powers referred to above. *Lemoto* describes the test as representing 'a substantial departure from the ambit of the power hitherto available to courts' [at 83].

However, it is also plain that the conduct of a legal practitioner in advancing a weak case (and even, a manifestly weak case) will not usually be sufficient of itself to expose that legal practitioner to personal liability for costs. It is worth noting that of the three cases discussed in this article (albeit, allowing for the effects of appellate correction) a set of circumstances in which it was appropriate to make an order under s198M has yet to arise.

The legislation

Division 5C contains five sections, ss198J – 198N. (It should be noted that these sections are replicated in ss344 – 349 of the yet to commence *Legal Profession Act 2004* (NSW)). The power to make costs orders is found in s198M, which is as follows:

> 198M Costs order against solicitor or barrister who acts without reasonable prospects of success
>
> (1) If it appears to a court in which proceedings are taken on a claim for damages that a solicitor or barrister has provided legal services to a party without reasonable prospects of success, the court may of its own motion or on the application of any party to the proceedings make either or both of the following orders in respect of the solicitor or barrister who provided the services:
>
> (a) an order directing the solicitor or barrister to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,
>
> (b) an order directing the solicitor or barrister to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified.
>
> (2) The Supreme Court may on the application of any party to proceedings on a claim for damages make any order that the court in which proceedings on the claim are taken could make under this section.
>
> (3) An application for an order under this section cannot be made after a final determination has been made under this Part by a costs assessor of the costs payable as a result of an order made by the court in which the proceedings on the claim concerned were taken.

(4) A solicitor or barrister is not entitled to demand, recover or accept from his or her client any part of the amount for which the solicitor or barrister is directed to indemnify a party pursuant to an order under this section.

To understand s198M, it is necessary to have regard to s198J, which is as follows:

198J Solicitor or barrister not to act unless there are reasonable prospects of success

(1) A solicitor or barrister must not provide legal services on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

(2) A fact is provable only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.

(3) This division applies despite any obligation that a solicitor or barrister may have to act in accordance with the instructions or wishes of his or her client.

(4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.

(5) Provision of legal services in contravention of this section constitutes for the purposes of this division the provision of legal services without reasonable prospects of success."

It can be seen that if s198J(1) is contravened, then s198J(5) makes operative s198M. For completeness, it should be noted that a contravention of s198J is capable of amounting to unsatisfactory professional conduct or professional misconduct (s198L(1)).

It will be noted that s198J(1) refers to 'a claim or defence of a claim for damages'. It is unnecessary here to enter into a discussion of the width of the expression 'a claim for damages'. It is sufficient to note that in *Degiorgio*, although the claims advanced in the statement of claim primarily sought relief of an equitable kind (see [30]), Barrett J held that the inclusion amongst those claims of a claim for damages meant that s198M was operative in that case (see [34]).

'Without reasonable prospects of success' – the *Momibo factors*

The question then becomes how to identify whether a practitioner has acted 'without reasonable prospects of success'. In *Degiorgio*, Barrett J adopted the five element test propounded by Neilson DCJ in *Momibo Pty Ltd v Adam* (2004) 1 DCLR (NSW) 316 (*'Momibo'*) as to what 'reasonable prospects of success' should entail. The relevant elements are as follows (see [17]):

a) The first is an overarching element that the practitioner subjectively held a reasonable belief about prospects which is based on propositions which can be regarded as logically arguable in an objective sense;

b) The second is that the reasonable belief must have its objective foundation in material available to the practitioner at the relevant time (which material need not be admissible evidence as such and can extend to material which is credible albeit not strictly admissible);

c) The third is that the material thus identified constitutes a proper basis for alleging each relevant fact;

d) The fourth is that the claim must proceed according to a reasonably arguable view of the law. This element is not to be approached narrowly and encompasses arguably available extensions and innovation; and

e) The fifth is that there must be reasonable prospects of damages being recovered in the action, even if those damages are modest or merely nominal or token.

Momibo concerned a claim for a breach of lease (and associated matters). The vast bulk of the damages claimed related to a claim for loss of profits based on the exercise of an option to renew. However, it was unarguable that the option had been validly exercised, and Neilson DCJ described this aspect of the claim as being 'totally unfounded'. However, there were other aspects of the claim which Neilson DCJ regarded as rasing triable issues. In this context, it was submitted to Neilson DCJ that the legislation was intended to capture cases where the damages claimed were exaggerated or 'ramped up.' However, Neilson DCJ rejected this submission and held that reasonable prospects of recovering damages meant reasonable prospects of recovering *some* damages, or *any* damages, rather than all damages.

What has happened in this case is a salutary warning to courts to ensure that Division 5C applications do not assume a costly life of their own McColl, JA in *Lemoto.*

Before turning to consider the way that this case was applied in *Degiorgio*, it is worth repeating a delightful passage from the reasons of Neilson DCJ which is deserving of a wider audience. After reciting his second reading speech on 28 May 2002, the premier had said, 'The government has changed the standard for assessing unmeritorious claims in the Bill', Neilson DCJ continued: 'I do not need to consider whether the use of the perfect tense in [the above sentence] reflects ignorance of the legislative process, arrogance, or merely poor speech writing.'

Further consideration of the *Momibo* factors in *Degiorgio*

In *Degiorgio*, after noting that the relevant provisions impose upon lawyers a standard that is more demanding than that imposed by the general law (see [19] and [26]), and considering material including the Beaumont article referred to above, Barrett J concluded by finding that, 'without reasonable prospects of success', equated in meaning to 'so lacking in merit or substance as to not be fairly arguable' (see [28]).

The finding that the standard imposed by the relevant legislation is more demanding than the general law is not, however, to be understood as requiring legal practitioners to eschew weak cases. That point is forcefully made by Barrett J at [27]. Of particular importance are the concluding words of that paragraph: 'The legislation is not meant to be an instrument of intimidation, as far as lawyers are concerned.'

After a consideration of all of the relevant facts, Barrett J held that the solicitor had discharged the responsibility to satisfy the five elements referred to above, and dismissed the application for a costs order.

The decision of the Court of Appeal in *Lemoto*

Lemoto was an appeal from a decision of Phegan DCJ to award costs against a solicitor acting for a plaintiff in a personal injury matter. The manner in which Phegan DCJ came to that decision was the subject of criticism by reason of the failure of Phegan DCJ to afford to the solicitor a proper hearing. It is unnecessary to deal with that aspect of the case at length, save to say that Phegan DCJ appears to have proceeded upon the misapprehension that an order under s198M was mandatory if a prima facie case, once raised, was not displaced by the solicitor. As Hodgson JA noted at [10], this cannot, with respect, be a correct construction of a provision which includes the word 'may.'

McColl JA, having noted at [83] that the enactment of Division 5C represented a substantial departure from the ambit of the inherent power to order costs, held that the making of a costs order under Division 5C involves 'either an exercise of disciplinary power or the exercise of a power ancillary to a disciplinary power, rather than merely the exercise of the court's costs jurisdiction.' This is supported by the fact that the provision is to be found in legislation dealing with the regulation of the professional conduct of legal practitioners and that a breach of s198J is, as has been noted above, capable of amounting to unsatisfactory professional conduct or professional misconduct. Before turning to consider the ambit of the new power, McColl JA considered the ambit of the inherent power, and derived from the authorities a series of principles which are set out at [92].

In construing the provisions of Division 5C, McColl JA (albeit without directly referring to the *Momibo* principles) endorsed the approach of Barrett J in *Degiorgio*. Indeed, a lengthy passage from *Degiorgio* is extracted at [131]. McColl JA also notes at [123] that the 'grave consequences' of making an order under s198M indicate that the application of the provision need be 'no wider than is clearly required by the statute', and this is consistent with the view expressed at a number of places throughout the judgment, that the jurisdiction ought be exercised sparingly and cautiously.

It would be a sad consequence of Division 5C if it influenced legal practitioners to become 'timorous souls' as opposed to 'bold spirits'. McColl, JA in *Lemoto*.

Procedure in respect of orders under section 198M

Having noted that there is no express procedure to be followed by a party who seeks an order under s198M, McColl JA then sets out at [149] a suggested procedure to be followed. The desirability of regulations being made to the Legal Profession Act is then noted. It is suggested that the drafter of the regulations would not have a particularly difficult task in so doing, in that the drafter need only express in legislative language what appears in paragraph [149]. However, any legislative response might also need to consider how to deal with the prospect of such applications being used a tool of oppression, which question has arisen as a subject of potential concern consistently through the cases.

Is it intimidatory to threaten to seek personal costs orders against one's opponents?

The concluding words of McColl, JA at [194] also shed light upon the question of whether it is inappropriate for a party to threaten (or, to use a more neutral expression, to give notice of or to intimate) an intention to seek personal costs orders against opposing legal practitioners. Such a practice has been deprecated under the general law in Australia (see *Re Benedeich (No. 2)* (1994) 53 FCR 422 at 426-7 and *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* [2004] FCA 1249 (unreported, Tamberlin J, FCA, 24 September 2004) and in the United Kingdom (see *Orchard v South Eastern Electricity Board* [1987] QB 565). Indeed, those cases use the decidedly non-neutral term 'browbeat' to describe such conduct, and suggest (as does Beaumont's article) that such conduct may, in serious cases, be capable of amounting to contempt of court.

In response to reports of threats being made by practitioners and against practitioners to engage s198M, the Council of the Law Society of New South Wales issued a president's message to its members on 7 August 2004 prescribing the limited basis on which such intimations can properly be made. That president's message, in summary:

a) Reminds practitioners of their duty to ensure that their

communications are courteous and that provocative or offensive conduct is avoided, and refers specifically to Rules 25 and 34 of the *Revised Professional Conduct and Practice Rules 1995;*

b) States that a threat to seek a personal costs order against a practitioner should not be made unless:

   a. There is material available which clearly suggests that the proceedings have little merit and are likely to fail; and

   b. The practitioner has specific instructions from the client to make the threat after the client has been made aware of its seriousness and the possible consequences for the client if the allegation is not made out; and

   c. The practitioner makes known to the opposing practitioner the evidentiary basis for the view referred to in (a.) above and that the warning is being given as a matter of professional courtesy;

c) Notes that interlocutory proceedings for dismissal or strike-out should be a more appropriate course; and

d) Reminds practitioners that they have an obligation to maintain professional independence and should not make an application for an order merely because a client has instructed them to do so.

Do *Degiorgio* and *Lemoto* alter this position?

However, the view that such intimations (or threats) are inappropriate in the context of the legislation is difficult to reconcile with the finding of Barrett J in *Degiorgio* that the standard imposed by the legislation is more demanding than that imposed by the general law. It should be noted that an order cannot be made under s198M without the precondition of a breach of s198J(1). To put it another way, a legal practitioner is under no danger of incurring personal liability if that legal practitioner has complied with the obligations which arise elsewhere in the Division.

In a circumstance where parliament has expressly armed litigants with a right of recourse against a legal practitioner who has breached s198J(1), it seems odd indeed that a party should be prevented from intimating an intention to rely upon the very right which parliament has made available. It would be a very curious result if applications for personal costs orders under s198M could be made only where no notice that such an application was to be made had been given to the legal practitioner against whom the order was sought.

It may be possible to resolve the general law approach with the entitlement to resort to the new right of recourse by ensuring that intimations are not made until judgment has been delivered, on the basis that argument as to costs is reserved to allow the court to consider the potential applicability of s198M.

The difficulty with this approach is that, as McColl JA in *Lemoto* notes at [193], it is the making of an application for an order under s198M after the delivery of judgment that does create a more serious risk of denying a party its right to approach the court (albeit, an appellate court) than does the intimation of such an approach prior to judgment. This is because of the fact that an application for such an order might permit the party seeking the order to drive the wedge of conflict of interest between the other party and its legal representatives. It is difficult to envisage a situation in which a practitioner would be able to act for a client when there is a contested application as to whether that client, or the legal practitioner, should bear the burden of the costs which are payable to the successful party. Thus, the legal practitioner would not be in a position to advise the client as to any prospects of success on appeal.

Of course, there will be many circumstances in which making an application for an order under s198M will not amount to a contempt, but if the application were made for the collateral or ulterior purpose of dividing a party and its legal representatives, the risk that it might amount to contempt is real.

Summary

Degiorgio and *Lemoto* provide very helpful guidance on a subject which has considerable implications for the professional conduct of solicitors and counsel alike. These decisions have identified the scope of the legislative provisions in a manner which, although confirming that the provisions impose a more demanding duty upon legal practitioners than that existing at general law, also provide considerable guidance as to what is necessary to meet that duty. Practitioners will have to turn to other aspects of the civil liability reforms if they are to maintain their recommended daily intake of consternation.

Reasonable prospects revisited

By D I Cassidy QC

Section 198J(1) of the *Legal Profession Act 1987* provides that a solicitor or barrister must not provide legal services on a claim for damages unless the solicitor or barrister reasonably believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim has reasonable prospect of success. Section 198L requires a barrister or solicitor filing process to certify that the claim has reasonable prospects of success. The sections apply to the representatives of both the plaintiff and the defendant and the latter to the initiating process, a defence and a cross claim. Breach of them may constitute professional misconduct or unsatisfactory professional conduct and the solicitor or barrister may be ordered to pay the costs of the client and/or the other party.[1]

Nicholas Beaumont presented the definitive paper on these provisions at a seminar of the Bar Association in March 2004. The paper was republished and updated in the December issue of the *Australian law journal*.[2] Since the paper was first written there have been several decisions on these provisions. It is not the purpose of this paper to regurgitate Beaumont's paper but to expand it in the light of these decisions and to deal with some other aspects of the problems which these sections raise.

The *Legal Profession Act 1987* is to be repealed and replaced by the *Legal Profession Act 2004*. That Act was assented to on 21 December 2004 but does not operate until it is proclaimed: s2. It has not yet been proclaimed but it is proposed that this will happen on 1 July 2005. Chapter 3, Division 10, containing ss344 to 349 replaces the equivalent sections in the 1987 Act. Though there are some differences, which I will deal with later, Beaumont's thesis remains valid.

The only assistance given by the Act to the meaning of the phrase 'reasonable prospects of success' is s198J(4) (s345(4)) which defines it as reasonable prospects of damages being recovered on the claim. Beaumont's view is that a case has reasonable prospects of success if it is not hopeless or entirely without merit.[3] He supports this view by a number of arguments - reference to the second reading speech, precedents on the award of costs against legal practitioners in other circumstances and overseas analogies.

I would respectfully agree with him but would add the analogy of statutory provisions which protect workers and workers' organisations from orders for costs. It appears that s 198J is derived from s90A of the *Industrial Relations Act 1996* (NSW), inserted in1998 but repealed in 2000. I have found no decided cases on the section. However s197A of the *Conciliation and Arbitration Act 1904* (Cth) provided that costs could only be ordered if the proceedings had been instituted without reasonable cause.[4] An order against the union was refused though the application was very weak.[5]

A stronger analogy may be provided by the tort of malicious prosecution one element of which is that the prosecutor lacked reasonable and probable cause. The classic definition of reasonable and probable cause for this purpose is:

> an honest belief founded upon reasonable grounds, of the existence of a state of circumstances which, *assuming them to be true*, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.[6]

The italicised words suggest that the prosecutor may accept facts at their face value. This is not so as later authorities have demonstrated:

> The defendant's subjective belief … must be based on evidence that persons of reasonably sound judgement would regard as sufficient for launching a prosecution. Only limited guidance can be furnished on this score, since we lack precise and universal criteria by which to measure the degree of caution and prudence that a reasonable man should observe in the evaluation of infinitely variable incriminating data. This much however is clear, that he should take reasonable steps to inform himself of the true state of the case instead acting upon mere imagination and surmise, and consider the matter in the light of such evidence alone as he reasonably believes to be sufficient to sustain a conviction. … He need not however, go to the length of verifying seemingly reliable information …[7]

Beaumont's interpretation is borne out by cases which have been decided since the sections came into force. Of particular importance is the decision in *Delgiorgio v Dunn (No 2)*[8] which will be referred to for other purposes later, in which Barrett J comes to this conclusion:

> The Legal Profession Act should not … be presumed to intend that lawyers practising in New South Wales courts must boycott every claimant with a weak case. A statutory provision denying to the community legal services in a particular class of litigation cannot be intended to stifle genuine but problematic cases. Nor do I see the statutory provisions as intended to expose a lawyer to the prospect of personal liability for costs in every case in which a court, having heard all the evidence and argument, comes to a conclusion showing that his or her client's case was not as strong as may have appeared at the outset to be. The legislation is not meant to be an instrument of intimidation, so far as lawyers are concerned. … (I would) adopt the construction of 'without reasonable prospects of success' that equates its meaning with 'so lacking in merit or substance as to be not fairly arguable'. The concept is one that falls appreciably short of 'likely to succeed'.

This and other cases have adopted a restrictive reading of the sections:

- The sections are not to stifle the development of the law.[9] Had the sections applied in Scotland in 1930, they would not have prevented Mr Morton KC from appearing for May M'Allister. The solicitor for General Jones could safely have filed a defence denying absolute liability for the escape of

the fire in the face of a host of High Court authority applying *Rylands v Fletcher*.[10]

- As long as there are reasonable prospects of establishing the cause of action it does not matter that the damages awarded are nominal.[11] However since nominal damages are not available in negligence actions this escape would be limited to breaches of contract, trespass and intellectual property.[12]
- A defence has reasonable prospects of success if it only goes to quantum: s198J(4); 345(4). Does this mean that the defendant's counsel is free to dispute liability if there are grounds for reducing the damages even though liability is a lay down *misere*? Clearly the defendant can file a defence denying liability in such a case as the form prescribed for the purposes of s198L does not distinguish between liability and quantum.
- However this approach sits uncomfortably with the view that the practitioner has to evaluate the prospects of bettering an offer of compromise from the other side – the effect of rejection of such an offer by a plaintiff is not judgment for the defendant.[13]
- The material on which the practitioner bases his view of the facts does not have to be admissible evidence.[14] Query whether this proposition is limited to s198L and the position up to the commencement of the hearing?

The provisions raise a number of other problems apart from the meaning of the phrase reasonable prospects of success:

1. What is a claim for damages? Barrett J has provided a non exhaustive list:

   'Damages may be claimed for tort, for breach of contract, for infringement of copyright, for breach of statutory duty, under statutory provisions such as s82 of the *Trade Practices Act 1974* (Cth) or under an undertaking as to damages given to the court. … In addition, equitable compensation is sometimes referred to as a species of 'damages'. … One thing may, however, be said with confidence. Although the relevant provisions were introduced into the Legal Profession Act by the *Civil Liability Act 2002* which is concerned overwhelmingly with claims in negligence for personal injuries, the parliamentary materials make it clear that the Legal Profession Act aspects are not so confined.'[15]

   Clearly a liquidated claim, for example for rent or on a quantum merruit would not constitute a claim for damages. Neither would a claim for partnership accounts.[16] But would it catch a claim for mesne profits

2. More controversial is Barrett J's suggestion, echoing that of David Cochran, that the sections apply to claims for an injunction because s68 of the Supreme Court Act empowers the court to grant damages in lieu of an injunction.[17] I would suggest that what the plaintiff seeks in the statement of claim or originating summons determines the nature of the claim – if all that is claimed is an injunction the fact that the court has power to give some other relief on its, or the defendant's, motion would be irrelevant. My submission would appear to be supported by Barrett J's view in *Delgiorgio* that the inclusion of a claim for damages in addition to one for partnership accounts was sufficient to attract the section.[18] But what if it is the defence which seeks damages in lieu of the injunction sought by the plaintiff?
3. This raises another question, perhaps theoretical. If a plaintiff in the originating process claims damages but the court gives some other relief, is the pleader at risk of an order for costs? I can only think of one example which arises in a case in which I am presently involved, a plaintiff mistakenly claiming damages for breach of contract pursuant to a default summons where the real cause of action is on a common money count for work done and materials provided.
4. Is there a territorial limit to either of the sections? Fairly clearly, s128L could not apply to proceedings commenced in the Federal Court even if they were cross-vested to a state court.[19] But would s198J apply to a NSW barrister appearing in the Supreme Court of Victoria. The 2004 Act makes it clear that the substantive provisions apply to an interstate barrister appearing before the Supreme Court of New South Wales: Section 4(1)- barrister.
5. Section 198J, unlike s198L, appears to be ambulatory, requiring a reassessment of the prospects as the particulars and evidence come to hand and as, during the trial, the evidence unfolds. Must counsel return the brief if, in the course of the trial, it becomes apparent that the claim, or the defence, as the case may be must fail? How does this fit in with counsel's obligation not to return the brief so late that alternative representation can be obtained and the solicitor's obligation to give written notice of ceasing to act. And what does he or she say to the judge once coming to the view that the prospects are no longer reasonable. The problem will be the same as that of the criminal advocate whose client admits guilt during the trial.
6. It has been proposed that expert witnesses should not be permitted to charge on a speculative basis and that only one expert should be allowed, either agreed to by the parties or appointed by the court. The latter proposal has been adopted in the Supreme Court.[20] Fortunately the practice note is so restricted that it will not have much effect - it applies only in personal injury cases but not in relation to liability, causation or the nature or extent of injury or disability.[21]
7. The first proposal is more dangerous – how is the solicitor for an impecunious plaintiff to give the certificate required by s198L if the expert must be paid up front? The view that the practitioner's belief does not have to be based on admissible evidence may not apply to inadmissible experts'

> reports if , at the time the proceedings are commenced, the practitioner knows that the client will not prior to the hearing be in a position to pay up front for another report.

I do not suggest that, interpreted in accordance with Beaumont's thesis, the legislation is a bad thing. If it focuses both branches of the profession on the need to evaluate and prepare their cases early, the solicitor to obtain reports and statements and counsel to think about the law, it is to be applauded.

I turn to another matter.

The Commonwealth attorney-general, on 15 March 2005, introduced in the House of Representatives the *Migration Litigation Reform Bill 2005*. It does other things, for example directing simple matters to the Federal Magistrates Court and giving power of summary dismissal to the courts and the Administrative Appeals Tribunal. But the provisions with which I am concerned today are in Part 8B containing sections 486E to 486K which the Bill would add to the *Migration Act 1958*.

The explanatory memorandum issued with the text of the Bill gives as the reason for the Bill:

> The government is very concerned about the large increase in the number of migration cases in the federal courts in recent years and the very low success rate of this litigation.

I doubt that that is true. I would wager that the attorney-general is overjoyed at the poor success rate of this litigation.

The memorandum draws attention to a constitutional problem:

> The proposal may raise constitutional issues, especially the possible intrusion of the legislature into the 'judicial power' of the Commonwealth, in contravention of Chapter III of the Constitution.

This is of course a reminder of *Kable v DPP* (1997) 189 CLR 51 and, more recently, *Baker v The Queen* (2004) 78 ALJR 1483.

The memorandum warned the parliament to consider a number of policy issues some of which could well apply to the New South Wales Act:

> Whether this would discourage lawyers and/or migration agents offering advice to potential applicants, leading to more unrepresented (and potentially less meritorious) applications.

And one might add applications which would take much longer to hear and would generate more appeals. The memorandum continued:

> A practical issue may be whether applicants with no ability to pay in any case if the decision goes against them would be discouraged by the threat of a personal costs order.

A copy of the Bill and the memorandum are available on the Commonwealth Parliament web site at www.aph.gov.au

To return to compare the main features of the Bill to those of the Legal Profession Acts.

There is of course a number of differences between s198J and s486E:

- In addition to the costs penalties the section presumably creates an offence. I have not looked at the offence provisions of the Act to see whether they cover this section but if they do not presumably there is a common law misdemeanour.
- Giving encouragement is very different from providing legal services. Would giving advice to commence proceedings be an offence.
- Sub section 2 would appear to be intended to spell out the Beaumont thesis. If so it contains a typographical error and is a nonsense.

Note that s486I, like s198L, only applies to lawyers. Neither prevents a litigant appearing in person from filing process.

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1 Sections 198L(1), 198M.

2 'What are ''reasonable prospects of success"? (2004) 78 ALJ 812.

3 78 ALJ at 814.

4 For analogous provisions see *Workplace Relations Act 1996* (Cth) s347(1); *Workers Compensation Act 1926* (NSW) s38(g).

5 *Re Commonwealth; ex parte Marks* (2000) 75 ALJR 470 per McHugh J at 477. See also *Westend Pallets Pty Ltd v Lally* (1996) 69 IR 1.

6 *Hicks v Falkner* (1878) 8 QBD 167 at 171.

7 *Fleming* on *torts*, 9th ed (1988) at 681.

8 [2005] NSWSC 3; BC200500375 at [27] & [28].

9 *Momibo v Adam* (2004) 1 DCLR (NSW) 316

10 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. For example *Hazlewood v Webber* (1934) 52 CLR

11 *Momibo v Adam*, above.

12 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286; *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 368.

13 *Bakarich v Commonwealth Bank of Australia* [2004] NSWSC 660; BC200404774 at [24]-[25].

14 *Momibo v Adam*, above.

15 *Delgiorgio v Dunn (No 2)* [2005] NSWSC 3; BC200500375 at [13] & [15].

16 *Delgiorgio v Dunn (No 2)*, above at [32]-[34].

17 Quadrature.

18 At [34].

19 *Pedersen v Young* (1964) 110 CLR 162.

20 Practice Note 128, operative from 1 January 2005.

21 Paragraph 6.

Dowling's select cases, 1828 to 1844

Edited by TD Castle and B Kercher

The Francis Forbes Society for Australian Legal History, 2005

Lord Esher MR said of the *Times Law Reports*, 'We have said that we will accept *The Times* law reports, because they are reports by barristers who put their names to their reports.'[1]

At least, the master of the rolls is reported to have said it, in a case with the citation '(1889) 6 TLR 5'. Perhaps unsurprisingly, the master of the rolls does not appear to have said it in a report of the same case, bearing the citation '(1889) 24 QBD 117'.[2]

To the modern litigator, with all the marvels of the web and, often, the judge's associate's certification of a report, concern over accuracy is hard to fathom. But, as Holt CJ put it in 1704, 'see the inconveniences of these scambling reports, they will make us appear to posterity for a parcel of blockheads.'[3]

In *Dowling's select cases*,[4] the citizens of New South Wales receive an anachronistic privilege; 160 years after the death of our second chief justice, we have a volume of reports not only written by the judge, but in large part headnoted by him, too.

Sir James Dowling was a puisne judge of the Supreme Court from 1828, and chief justice from 1837 until his death in 1844. During his tenure, he completed nine notebooks with a view to compiling the colony's first set of law books, and the 465 cases included in this work bring to fruition that ambition.[5]

Dowling knew the nature of the task, having worked as a law reporter. With Archer Ryland, he reported cases argued at *nisi prius*, in the Court of King's Bench and on the home circuit, reports which appear in the English reports from 171 ER 895.[6]

One wonders whether he was thinking of things to come, when he and his co-author wrote the headnote, 'To sell the dead body of a capital convict, for dissection, where dissection is no part of the sentence, is a misdemeanour indictable at common law.'[7]

But what was New South Wales like in 1828, when Dowling arrived? By 1826, Edward Smith Hall had commenced his newspaper, the Sydney *Monitor*. In his preface to a collection of essays by journalists on government dishonesty published last year,[8] John Pilger says:[9]

> The measure of Hall's principled audacity can be judged by the times. He started his newspaper not in some new Britannia flowering with Georgian liberalism, but in a brutal military dictatorship run with convict slave labour. The strong man was General Ralph Darling; and Hall's defiance of Darling's authority in the pages of his newspaper, his 'insurrection', brought down great wrath and suffering on him. His campaigns for the rights of convicts and freed prisoners and his exposure of the corruption of officials, magistrates and the governor's hangers-on made him a target of the draconian laws of criminal libel.

A different view is put by J M Bennett & N J Haxton:[10]

> Press law reporting was all very well if the integrity of the publisher could be relied upon. In the case of the (Sydney) *Monitor*, under the controversial editorship of Edward Smith Hall, no faith could be placed in the accuracy or objectivity of his reports. Hall constantly played politics and thought little of altering court reports to the prejudice of his opponents. So twisted was his account of a conspicuous case in 1832 that Mr Justice Dowling caused a corrected version to be published in the *Gazette*.

A beauty of *Dowling's select cases* is that one can go straight to the cases in which Hall was involved. And, merely by glancing at the 'Table of cases reported',[11] one could be excused for thinking that Hall was the colony's father of litigation.

In *In re Peter Tyler*,[12] Tyler was a convict assigned to Hall. He was taken forcibly by the superintendent of convicts, one Hely, and put on a road gang. Hall claimed property in the services of the man and prayed a habeas corpus. In April 1829, the court refused the writ. Were that all we knew – and taking into account Hall earlier having been charged with criminal libel, for imputing to Hely cruelty towards another prisoner[13] – we might have suspicions about Hall's treatment.

But in March 1830, on Hall's action for trespass, Dowling held that the governor had no authority to cancel the assignment of a convict servant except for the purpose of granting a remission of sentence, with the result that an action lay against Hely, who, it appears, was acting on Darling's order, to the tune of £25 damages.[14] And, in perhaps the clearest sign that Hall and Hely – or, perhaps, Darling – were not bosom buddies, there was litigation in respect of the taxation of Hall's costs.[15]

In *Dowling's select cases*, the citizens of New South Wales receive an anachronistic privilege; 160 years after the death of our second chief justice, we have a volume of reports not only written by the judge, but in large part headnoted by him, too.

Another of Darling's attempts to get Hall also foundered in Dowling's court. One way of controlling newspapers was to impose a huge penalty if the publisher failed to deliver to the colonial secretary at his office on the day of publication, a copy.[16] On 18 May 1827, Hall failed to deliver the goods, and was duly fined £100. Hall argued that his publication was a pamphlet, and not 'a newspaper or other such paper'.[17]

Dowling, for Forbes CJ, himself and Stephen J, and in an orthodox construction of a penal statute, gave judgment for Hall. It is interesting that judges use dictionaries as much then as now: Dowling had recourse to two, Mr Bailey's and Dr Johnson's.[18]

Apart from Hely, another *bête noire* of Hall's was the dextrously named Archdeacon Thomas Hobbes Scott, described by the historians of his own parish church as being 'of a somewhat overbearing disposition'.[19]

In litigation which makes any current controversies in the Sydney Anglican diocese tame, Hall and Scott jousted over the right of Scott to refuse a pew to Hall and his family at St James' Church, King Street. As our current chief justice tells the tale:[20]

> Hall, the editor of the *Monitor* was, at least on the surface, a religious man. He had come to Australia as a freelance lay missionary with a distinct evangelical bent. Hall rented a pew at St James Church for himself and his six daughters. Probably with the concurrence of Governor Darling, but in any event knowing precisely what the governor's wishes would be, Archdeacon Scott decided that Hall's pew was far too close to the governor for the latter's comfort.
>
> At first the archdeacon simply locked the pew. When Hall and his six daughters attended for Evensong, they climbed over the barrier and sat down. Next time the pew had been boarded up and was guarded by constables with staves. Hall and his daughters squatted on the step outside the altar rails, to the inconvenience, Scott would complain, of the children who were permitted to sit there.
>
> Taking up his pen, and dipping it in his usual vitriol, Hall wrote a *Monitor* editorial on 5 July 1828, attacking Scott. He proclaimed: 'This is the age of cant – cant political and cant religious. Thus we have Ministers of Jesus Christ thrusting their parishioners out of their pews, and then administering the sacrament'.

Among the litigation so spawned was, in December 1828, Hall's application for a writ of mandamus, refused.[21] More seriously, from the point of view of free speech, was Hall's conviction for criminal libel upon Dowling's address to the jury, discussed in more detail elsewhere by the current chief justice.[22] All that said, in April 1830, Hall had the last laugh, in the form of £100 damages upon his action in trespass and assault.[23]

A delightful footnote to the cascade of Hall-driven litigation came in 1830, when the sheriff called on the judge at home, to discuss whether all prisoners should be put in gaol clothing. There is revealed a grudging respect – mingled with mock horror – in the following exchange, reported in *In re Gaol Clothing*:[24]

> I asked the sheriff whether it was contemplated to put all descriptions of persons into gaol clothing? He said yes, with the exception of debtors. I said All! Do you mean to put Mr Hall (then in confinement for a libel) into party coloured clothing? He said in the exercise of his discretion he should not put Mr Hall into the clothing. I said that if this matter depended upon his discretion, it appeared to me that the order ought not to stand on that footing.

In any event, readers lay and legal have been blessed with a number of editorial extras which in no way impugn the text of the judgments, beginning with a lucid introduction which provides an overview of the New South Wales in which Dowling worked and died.

Whether the New South Wales Dowling arrived in was 'a brutal military dictatorship' is for others to debate. Certainly, when Darling left in 1831, Hall announced the event in the *Monitor* in large front-page capitals, 'He's off! The reign of terror ended', while Wentworth hosted a feast at Vaucluse House where an ox, half a dozen sheep and copious amounts of Coopers and Wrights beer was consumed, together with a thousand loaves of bread, and at which a band played 'Over the hills and far away'.[25] Wentworth, of course, had been Hall's counsel of choice through all this time. Whatever, it seems clear enough that Dowling was hardly Darling's man.

In any event, the changes over the following years were fundamental changes. Between Dowling's arrival and death, the population increased almost fivefold, while the percentage of convicts fell from about 50 per cent to 11 per cent.[26] During this time, and while the colony groped towards representative government, the court was a focal point of freedom and of democratic aspirations. That in turn is reflected in the nature and width of the decisions, and the range of subjects.

Indeed, the cases are arranged not chronologically but in topics, presumably in deference to a lay audience. Were there more than one volume, I think a practitioner might have found this frustrating, as the date of a judgment is often important. With one volume, the vitality of the arrangement outweighs this.

In any event, readers lay and legal have been blessed with a number of editorial extras which in no way impugn the text of the judgments, beginning with a lucid introduction which provides an overview of the New South Wales in which Dowling worked and died.

For those who wish to know what choices the editors made in their attempt 'to reproduce, as closely as possible, the handwritten cases as they appear in the notebooks, including headnotes written by Dowling, whilst producing coherent case reports that have legal utility',[27] reference should be had to the notes at pages xxix to xxxii.

I am not sure whether, prior to this work, there has been a volume of law reports up to but not beyond 1844, which includes the now-standard 'Cases judicially considered'. There is now. And, in a particular example of anachronistic value adding, the editors were able to cajole one volunteer or another into linking cases to their *English Reports* citation, those reports not being published prior to 1865.[28]

The 'Table of statutes considered' is divided into imperial and local statutes, and then by regnal year. The first statute was 13 Ed 1 c 11, from 1285, which dealt with 'The masters remedy against their servants, and other accomptants.' I was particularly glad to learn that the regnal years covering the years of Queen Mary's marriage to Philip are designated 'P&M'; I had thought the monarchy's only acknowledgement of things Roman Catholic was its ironic self-description, defender of the faith.[29] (The various forms that tables of statutes have taken in this state's reports, down to the present day, warrant an article in itself. And, as, perhaps, a curious indicator of antipodean morality, the regnal year appeared on the front page of the *Commonwealth Law Reports* for the last time in 1936-1937, the abdication year, 1 Edw VIII & 1 Geo VI.)

Our law is, by definition, a living law. The editors of this work, Tim Castle of the Sydney Bar and Bruce Kercher of Macquarie University's faculty of law, have performed a sterling job, at once isolating and contextualising something which lives but has been dormant for too many years.

There is also a glossary, said to contain 'a short description of a number of frequently appearing legal terms and Latin expressions… particularly for the assistance of general readers…';[30] I think the more modest practitioner will also find it valuable, *ex necessitate*.

Finally, there is the index. Indexing is an art, and all too often publishers in this cost-conscious world seem to think skimping on an index is a useful exercise. Fortunately, this accessible index will be useful to both laypersons and lawyers. There is a separate entry for witnesses, with each named. So too – perhaps a precedent with consequences too awful to contemplate – advocates, with Wardell and Wentworth among the main players. And the great litigator himself scores the delicious entry 'Hall, Edward Smith, newspaper editor and prisoner'.[31]

Dowling has hitherto been overshadowed by Sir Frances Forbes, the colony's first chief justice. Whether that continues to be justified [32] is not within the ambit of this article, for the historical value of the reports as a primary source of life in the colony is self-evident.

But what of their value as legal reports, in the narrow sense? This is a matter of no minor importance. The Supreme Court of Dowling, with its divisions and its appellate jurisdiction, is the Supreme Court of today. The magistracy then was, and is now, subject to the Supreme Court by such appeal provisions as might from time to time be enacted, and in any event subject to its supervision by, most usually, relief in the nature of certiorari. If these cases manifest an abiding theme, 'the omnipresence of continuity and change',[33] what of *stare decisis*, the base of the common law system? Is a single Supreme Court judge to follow a decision of Dowling on point, not subsequently dealt with, and in circumstances where it appears to the judge to be not clearly wrong? And, if the decision be one of the full court, or if the relevant judicial officer is a magistrate, the question is even more taut, for it is not a case of 'Do I follow?' but 'I must apply…'

The mere effluxion of time does not affect the doctrine. As the High Court rather archly reminded an intermediate court in recent years, it is not for a court lower in the appeal chain to ignore a precedent of a higher court in the chain, just because it is seen to be out of date.[34]

It appears that Dowling's notes were regarded as authority in their day. Barrister Thomas Callaghan, later a foundation judge of the District Court, records that Dowling had let him borrow notes so that he might transcribe a copy of a decision to use as a precedent in an argument he proposed to put to the court.[35]

And then there is a full court decision of 1844, *R v John Hodges and Thomas Lynch*.[36] This is one of the few of Dowling's reports which has been the subject of earlier publication, in this case in J Gordon Legge's two-volume series of decisions from 1830 to 1862,[37] itself published in 1896.[38]

In *R v Woolcott Forbes*,[39] a case decided one hundred years and two days later, Jordan CJ, Halse Rogers and Maxwell JJ were faced with a 'purely technical' point raised, it seems, by one Shand KC, where the only authority in the defence's favour was the earlier case.[40] And, having been faced with a purely technical point, the court rallied accordingly, Halse Rogers J saying:[41]

> The *dicta* in the passage [from the 1844 case] which I have quoted seem to show that the court was of opinion that the Act did not authorise concurrent commissions to different persons giving authority to prosecute. But the point now raised was not actually before the court, and we are not, in considering the question before us, bound by any authority on the matter. A hundred years have passed since the decision in *R v Hodges and Lynch*, and the point now relied upon has never in the meantime been raised.

Although Jordan CJ does not say so in as many words, it is a fair inference that he simply declines to follow the earlier decision.[42] Maxwell J does not deal with the issue.[43]

Be all that as it may, the point is that the full court, faced with a full court decision of (just) over one hundred years earlier, did not consider itself entitled simply to ignore that decision; the doctrine of stare decisis required otherwise.

As *R v Woolcott Forbes* illustrates, it is not for editors or commentators to validate or authenticate a set of reports; that is for the judges to whose attention they are brought. Perhaps

the Bar Association or the Law Society might assist by providing, say, the Thomas Callaghan Award for the first advocate to have a case from this volume applied or followed by a judge or magistrate. Not that I wish to be seen promoting maintenance.

A common lawyer cannot talk of 'old' law or 'early' law; the expressions are oxymoronic. Our law is, by definition, a living law. The editors of this work, Tim Castle of the Sydney Bar and Bruce Kercher of Macquarie University's faculty of law, have performed a sterling job, at once isolating and contextualising something which lives but has been dormant for too many years.

Anyone who thinks a project of this type is the scanning of a few diary pages, has never had a hand in publishing anything; it is hard, long work. And, as is clear from the Acknowledgments,[44] many people legal and lay gave of their time and expertise, including a number of Dowling J's successors, puisne and chief. One looks forward to the opportunity to take those successors to one of these reports.

Reviewed by David Ash

1 *West Derby Poor Law Guardians v Atcham Poor Law Guardians* (1889) 6 TLR5, 6.

2 As to reports generally, it is difficult to top the chapter 'These scambling reports' in Sir Robert Megarry's *Miscellany-at-law*, Stevens & Sons, 1955, and see particularly p 293.

3 *Slater v May* (1704) 92 ER 210.

4 *Dowling's select cases, 1828 to 1844: Decisions of the Supreme Court of New South Wales,* 2005, The Francis Forbes Society for Australian Legal History, cited as '(year) N.S.W. Sel. Cas. (Dowling)'.

5 N.S.W. Sel. Cas. (Dowling) vii.

6 And see also the editor's note, 171 ER 895.

7 *R v Cundick* 171 ER 900.

8 John Pilger (ed), *Tell me no lies*, Jonathan Cape, 2004.

9 Op cit, page xviii.

10 J M Bennett & N J Haxton, 'Law reporting and legal authoring', in *No mere mouthpiece: servants of all, yet of none*, Lexis Nexis Butterworths, 2002, 148.

11 N.S.W. Sel. Cas. (Dowling) xxxvii-liv.

12 N.S.W. Sel. Cas. (Dowling) 568.

13 See eg *Ex parte F A Hely; in re E S Hall* (1829) N.S.W. Sel. Cas. (Dowling) 788.

14 *Edward Smith Hall v Frederick Augustus Hely [No 1]* N.S.W. Sel. Cas. (Dowling) 570.

15 *Hall v Hely [No 3]* N.S.W. Sel. Cas. (Dowling) 857.

16 As to Governor Darling's success or lack of it, against the press generally, see pages 125-126 of Peter Coleman's *Obscenity, blasphemy, sedition*, 2000 (first published 1962), Duffy & Snellgrove.

17 *R v Edward Smith Hall [No 1]* (1828) N.S.W. Sel. Cas. (Dowling) 771.

18 *R v Edward Smith Hall* (1828) N.S.W. Sel. Cas. (Dowling) 771, 774.

19 *Historical sketch of* S. James' Sydney, 1919, W C Penfold, page 4.

20 'Foundations of the freedom of the press in Australia - The inaugural Australian Press Council address', 20 November 2002, at http://www.agd.nsw.gov.au/sc/sc.nsf/pages/spigelman_201102 .

21 *R v Hall* [No 3] N.S.W. Sel. Cas. (Dowling) 533. As to the Crown's action against Hall, see *R v Hall [No 2]* (1828) N.S.W. Sel. Cas. (Dowling) 661.

22 Foundations of the freedom of the press in Australia - The inaugural Australian Press Council address", 20 November 2002, at http://www.agd.nsw.gov.au/sc/sc.nsf/pages/spigelman_201102

23 *E S Hall v Scott* (1830) N.S.W. Sel. Cas. (Dowling) 437.

24 *In re Gaol Clothing* (1830) N.S.W. Sel. Cas. (Dowling) 211, 214.

25 'Foundations of the freedom of the press in Australia - The inaugural Australian Press Council address', 20 November 2002, at http://www.agd.nsw.gov.au/sc/sc.nsf/pages/spigelman_201102 .

26 N.S.W. Sel. Cas. (Dowling) xi.

27 N.S.W. Sel. Cas. (Dowling) xxix.

28 For a short history, see eg 'A finding guide to British legal sources in Firestone Library', Princeton University, Princeton, New Jersey, http://infoshare1.princeton.edu/online/guide/british.html .

29 In 1521, as a reward for attacking Lutheran ideas, Pope Leo X conferred the title of *fidei defensor* (defender of the faith) on Henry VIII. In the United Kingdom, the monarch retains the title, not so here: see the Schedule to the *Royal Style and Titles Act 1973 (Cth)*.

30 N.S.W. Sel. Cas. (Dowling) 991.

31 N.S.W. Sel. Cas. (Dowling) 1018.

32 J M Bennett's series, 'Lives of the Australian chief justices', includes both. The series is published by The Federation Press, for which see www.federationpress.com.au .

33 See Spigelman CJ's forward, N.S.W. Sel. Cas. (Dowling) v.

34 *Garcia v National Australian Bank Ltd* (1998) 194 CLR 395, [17].

35 Bennett & Haxton, op cit, page 149.

36 (1844) N.S.W. Sel. Cas. (Dowling) 273.

37 As *R v Hodges and Lynch* (1844) 1 Legge 201.

38 Legge's other contribution to Australia was as a soldier; he reached the rank of Lieutenant-General. See generally www.unsw.adfa.edu.au/~rmallett/Generals/legge.html.

39 (1944) 44 SR(NSW) 333.

40 At 343.

41 At 345.

42 See at 338-340.

43 Cf at 347.

44 N.S.W. Sel. Cas. (Dowling) xxxiii-xxxv.

Chairman's address to the 50th annual general meeting of Counsel's Chambers, 18 November 2003

By Steven Rares SC

When this company was founded 50 years ago its corporators, Sir Garfield Barwick QC, Ken Manning QC and Paul Toose had a vision. Their first directors' meeting was held on 17 April 1953. By the time of the first annual general meeting of the company on 26 August 1954 in Court No 1 of the Supreme Court Building in King Street, Sir Garfield Barwick reported:

> This is, in a very real sense, an historic occasion. It marks the completion of the first stage of the efforts which have been made for many years to secure for the Bar a permanent home. But it is really something much more significant and far-reaching. We have now laid the foundation stone, not merely of a building, but of an institution. The Bar of New South has suffered to an extent in the past from a lack of cohesion. It has been handicapped in its efforts to achieve that unity of purpose and spirit so desirable if it is to retain to the full its important and indeed essential role as a vital element in the administration of justice.

The vision included setting aside a substantial area in the basement for the communal use of the Bar. Sir Garfield referred to the then proposed restaurant facilities to be installed and mentioned that there would be a dining room, a lounge and library facilities which he said were to be 'combined on a liberal, if not lavish, scale'. I am not sure that the present members of the Bar would regard the facilities as 'lavish' although they are very substantial for the important work which the Bar Association performs for us all. That special relationship between the Bar Association and this company has been at the forefront of our company's history and is present today. The vision of which Sir Garfield spoke included a hope that there would be provided, through the Bar Association, practical and immediate assistance to new members of the Bar and that Bar Council would organise tuition and discussion groups, expand library facilities and make all such other provisions would enable the provision of facilities similar to those extended by the English Inns of Court.

The company has been conscious to provide assistance co-operatively with the Bar Association in the ongoing provision of those facilities. Over the most recent vacation we organised a refurbishment of the basement at the request of the Bar Association to permit more space to be devoted to those activities following Bar Council's decision to close, permanently, the dining room and takeaway facilities which it had operated there for many years. At the same time the Bar Association took a new lease for three years with a term which commenced in May 2003.

It is also timely to reflect upon the fragmentation which has subsequently occurred over the last 25 years of the life of the New South Wales Bar. The original vision of housing substantially all of the Bar in Wentworth and Selborne Chambers gave way, as the Bar grew, to sets of chambers developing in surrounding buildings. In 1962 there were 434 members of the Bar. By 1975 that had grown to 670 but the Bar today numbers over 2,000 and the facilities and buildings owned by Counsel's Chambers Limited can now no longer provide accommodation for them all.

The early years of Counsel's Chambers were occupied in constructing these buildings. They were solidly built, a matter which has occupied the Board for many years since including our current major project of upgrading the buildings to comply with the fire standards for the Building Code of Australia. We must also recognize that a past board made an investment in what is now the National Disputes Centre. That decision turned out to be financially very disadvantageous for it lumbered us with a huge debt. That debt has been reduced by about $1 million per annum for the past few years – but it is still a millstone round the company's neck. However, that building now houses a substantial number of barristers once again and provides services in the alternative dispute resolution sector.

The company has moved into the modern age, establishing a subsidiary which provides high speed and good quality internet services to almost all of our members.

We are also keeping under review the possibility of redeveloping our buildings, although this cannot be done without the participation of a substantial partner because of cost constraints.

None of what has been achieved over the years in the provision and maintenance of accommodation and services for the Bar, the Bar Association and the courts could have been achieved without the dedication of first, the Registrars of the Bar Association who were the executive officers of the company, and later the full time staff of the company after it separated, formally, its internal arrangements from the Bar Association in June 1980 under the chairmanship of Terry Cole QC.

I would like to thank the staff past and present including the general manager, Linda Bean, who has served with the company now for over 20 years.

Finally, I would like to pay tribute to the former members of the Board too many to name individually but a number of whom we are pleased could join us to celebrate today. Those members served the company in a voluntary capacity carrying large responsibilities and work loads for the only reward of a satisfaction that a job was being done competently and diligently by them. Without the dedication of the volunteers who serve in these offices in keeping with the tradition of voluntary service that is so much a part of the New South Wales Bar, the company could not function.

Your directors have not lost sight of the original vision and aspirations of the company's founders. However, with the changed circumstances generated by the passage of years we have sought to adapt while keeping our eyes on the future.

Bench & Bar Dinner 2005

The Bench and Bar Dinner was held at the Westin Hotel, Sydney on 6 May, 2005. The Guest of Honour was the Hon Diana Bryant, Chief Justice of the Family Court of Australia, Mr Senior was Robert Toner SC and Mr Junior was Paresh Khandhar.

L to R: Dominique Hogan-Doran, Sophie York, Kate Traill, Catherine Parry.

President Ian Harrison SC.

Robert Toner SC.

John McCarthy QC, Justice Annabelle Bennett AO.

Harrison SC looks at Toner SC.

Toner SC looks at Harrison SC.

L to R: Justice Peter Johnson, Solicitor-General David Bennett AO QC, John Sheahan SC.

Philip Durack SC, Stephen Gageler SC.

Simon Kerr, Peter Kulevski.

Steven Rares SC, Federal Magistrate Sylvia Emmett.

Angela Pearman & Ian Hemmings.

L to R: President Ian Harrison SC, Chief Justice Diana Bryant, Robert Toner SC, Paresh Khandhar.

Chief Justice Diana Bryant.

Paresh Khandhar.

The Hon Justice Peter Johnson

Peter Johnson SC was sworn in as a judge of the Supreme Court of New South Wales on Tuesday, 1 February 2005. The Hon RJ Debus MP addressed the court on behalf of the Bar.

The attorney detailed his Honour's long and assiduous apprenticeship in the law. After completing a Bachelor of Arts in 1972 at Sydney University he went on to receive a Bachelor of Laws in 1975 and a Master of Laws in 1981. In 1976 his Honour was admitted as a solicitor and worked in the then Public Solicitor's Office. During this time, his Honour was also the duty solicitor in courts of petty sessions, the solicitor in charge at Hurstville Legal Aid Office, and solicitor in charge in the Research and Advising Section. Admitted as a barrister in February 1982 His Honour read with Colin O'Connor, now his Honour Judge O'Connor QC of the District Court.

Whilst later refusing to shake the infamous Chopper Reid's hand - a slight he took poorly and referred to in his book, getting down and dirty with the criminal element is nothing new to his Honour. Indeed, his Honour's first year as a lawyer working in the Public Solicitor's Office - the precursor of the Legal Aid Commission of NSW – was spent as the duty solicitor at a variety of local courts. Finding himself accidentally incarcerated on the wrong side of the cell door during an interview with a client, while an inauspicious start to a career, such an event certainly failed to blight it. In fact, his Honour quickly moved on to run the Hurstville Legal Aid Office where one of his colleagues was a fellow called Rod Howie. He has now, of course, taken on the appellation of the Hon Justice Howie.

His Honour has specialised in the areas of administrative, criminal and appellate law and appeared before numerous inquiries, recently appearing as senior counsel at both the Special Commission of Inquiry into the Waterfall Rail Accident and for the Australian Capital Territory at the inquest and inquiry arising from the ACT fires of January 2003. His Honour has also appeared before the High Court on several occasions.

Appearing with Glen Bartley as junior counsel, his Honour appeared in the *Queen v Young*, a case concerning sexual assault communications privilege and although his Honour did not win the matter, it is a tribute to his legal expertise and skill that the parliament later introduced amending legislation which implemented his arguments.

When it comes to the printed word, his Honour is described as being a bower bird, putting things away in case they may be needed at a future date, and accumulating an eclectic collection - submissions, articles, transcripts, obscure documents, duplicates - all kept for future reference. His Honour's move to the Bench has been described by colleagues as 'the greatest cull in the history of chambers'.

At his Honour's swearing in ceremony, John McIntyre, President of the Law Society of New South Wales, addressed the court in the following way:

> The famous philosopher and lawyer, Cicero, once said, 'A room without books is like a body without a soul.'
>
> The sentiment of this quote is something that your Honour has taken to heart. It has been put to me that the written word is your life. I am told that you cannot pass a book store without purchasing volumes.

His Honour's written advices have been described as 'works of art'. Apparently, judges frequently ask for written submissions which, with the benefit of good cut and paste, seem to make an appearance in the final judgment. Justice Whitlam recently described one of his Honour's submissions as 'a model of clarity'.

His Honour's excellent legal knowledge, not only about the relevant areas of law, but also about practice and procedures has ensured that he is highly respected by present and former colleagues and the judiciary. An example of that high regard is evidenced in the words of Chester Porter QC, who, upon hearing of his Honour's appointment, wrote:

> You will be a modest judge, although you have much less to be modest about than most. You have a sense of justice which, combined with your learning, will ensure that people receive a fair trial.

The Hon Justice Megan Latham

On Tuesday, 12 April 2005, her Honour Judge Megan Fay Latham was sworn in as a judge of the Supreme Court of New South Wales.

With a significant reputation as an advocate for the rights of children and women, it has been apparent that her Honour has had a deep and abiding passion in the area of child welfare in the law.

Growing up in Cronulla, her Honour attended MLC Burwood and then the University of New South Wales, graduating in arts and law. Admitted as a solicitor in 1979, her Honour started at Maguire & Martin, solicitors in Leeton, and remained there until 1982. After a short time as a legal officer with the Lands Department, her Honour joined the office of the Clerk of the Peace that same year.

For five years her Honour worked as a solicitor with the Solicitor For Public Prosecution Office, including two years as the solicitor in charge of the Child Assault Protections Unit, and then on secondment to the Premier's Department as executive officer of the New South Wales Child Assault Task Force.

During this time her Honour was appointed to the Legal Committee of the New South Wales Child Protection Council and the New South Wales Sexual Assault Committee. After that, her Honour was successful in securing a travelling fellowship from the Law Foundation of New South Wales, enabling her to spend time in the United States looking at how child sexual assault cases were handled and identifying ways of ensuring their more effective conduct.

Her Honour came to the Bar in 1987 and was appointed as a crown prosecutor. Working in that capacity until 1994, her Honour became the director of the Criminal Law Division. In 1996 her Honour was the first and only appointed female crown advocate of New South Wales. In that position her Honour provided top level advice on high profile cases to the Attorney General's Department.

As the crown advocate, her Honour was appointed to the Model Criminal Code Officers Committee, which was responsible for the development of a uniform Criminal Code in Australia, and played a valuable role in producing a ground-breaking report in 1998 on offences against humanity involving sex slavery.

John McIntyre, President of the Law Society of New South Wales, commented on her Honour's renowned ability and human qualities, referring to a speech given by the Honourable Justice Michael Kirby to the Women's Lawyer Association, in which he was reflecting on eminent female lawyers in Australia, and said, 'You showed all the subtlety and forbearance expected of crown counsel.'

On 7 August 1998, her Honour was sworn in as a judge of the District Court of New South Wales at quite a young age, a fitting reward for her tireless hard work and commitment. Her progression from there to the Supreme Court is supported by admirable precedent.

Ian Harrison SC commented that her Honour was a student of his at the University of New South Wales, along with the late Judge Bob Bellear. He praised her Honour's sharp wit, recalling an occasion, when appearing in her court, he urged upon her Honour to consider a proposition. He remarked respectfully that her Honour's analysis did not appear, to him at least, to be entirely logical. He remembered that her Honour had no hesitation in dealing with his comment by saying very descriptively and very convincingly, 'Mr Harrison, if the world were a logical place, men would ride side-saddle.'

Her Honour has been the subject of much media comment concerning high profile cases of serious sexual assault, but the judicial case load has also thrown up other interesting matters, including the occasional speeding offence. In a recent matter, despite the Crown having irrefutable photographic evidence that the defendant's car was travelling at 56kph in a 40kph zone, the defendant still chose to appeal. The defendant, representing himself, presented to the court the National Measurement Act and Regulations to prove that the initials 'kph' did not mean what everyone thought they did. The defendant argued that under the Act, the 'K' stood for 'kelvin', a measure of thermodynamic temperature; 'P' for 'poise', a measure of viscosity, and 'H' for 'henry', which measures electricity inductance.

Although amused and entertained by the defendant's submission that the abbreviation might be illogical and incorrect, her Honour applied a large measure of commonsense in her ruling explaining to the hapless defendant that it had to be viewed in context and it clearly suggested that it related to vehicle speed. Using, however, considerable judicial wisdom her Honour then gave the defendant a bond to be of good behaviour.

Much is said these days about balancing career and family, particularly in the legal profession. Her Honour's husband and son are very supportive and very proud of her Honour's achievements.

Speaking from the heart, her Honour thanked the court on her appointment and commented on her great regret at leaving the camaraderie and support of so many friends in the District Court. Her Honour payed tribute to the chief judge of the District Court and Robert Fornito of the Criminal Listing Directorate of the District Court for their influence on her professional development and their support.

The Hon Justice Peter Hall

On 8 March 2005, Peter Hall QC was sworn in as a judge of the Supreme Court of New South Wales. His Honour was called to the Bar on 26 July 1974, having practised as a solicitor with Dawson Waldron. He took silk in 1991.

His Honour has had a varied and successful practice at the Bar, with a reputation for thorough preparation and fairness. His Honour has developed considerable expertise as an advocate appearing before royal commissions and other special commissions of inquiry, in particular, the royal commission into the events at Chelmsford hospital, the ICAC inquiry into the Walsh Bay redevelopment tender process and assisting the royal commission into the building industry before commissioners Gyles QC and Holland QC.

Serving as an assistant ICAC commissioner in 1995 and 1996, and more recently as an assistant ICAC commissioner until last month, his Honour was senior counsel assisting the special commission of inquiry into the Waterfall rail accident.

His Honour's dedication to hard work and the task at hand has often involved family sacrifices. During the Waterfall inquiry his Honour and his wife Trish moved out of the family home with their children to take up residence in the caretaker's flat at the Engadine signal box. The décor of the premises was apparently reminiscent of eighth floor of Selborne Chambers.

His Honour has written widely and published several texts, including *Unconscionable contracts and economic duress* in 1985 and most recently *Investigating corruption and misconduct in public office: Commissions of inquiry – powers and procedures* published in 2004.

His Honour's appointment to the Supreme Court has been universally acclaimed by the barristers of New South Wales, wishing him a satisfying and rewarding life as a judge.

Ian Harrison SC, speaking on behalf of the Bar, commented on the fashion in the 'so-called popular press publicly to assail judges in this state and throughout the country'. This fashion is urged by 'an unrepresentative coven of journalists with a wicked agenda'. Their scrutiny could be avoided, said Harrison SC, by 'working seven days a week, accepting no pay, taking no holidays and never making the slightest mistake whether on or off the bench. Overseas travel should be avoided, if at all possible'.

Fittingly, Harrison SC added in his speech before the court that: 'You join today a powerful bench of dedicated women and men whose own fearless reputation for hard work and independence you will continue to enhance.'

The Hon Justice John Basten

John Basten QC was sworn in as a judge of the Supreme Court and as a judge of appeal of that court on 2 May 2005. At the time of his appointment, his Honour had one of the largest practices, including appellate practices, in the country. His particular areas of practice included administrative and constitutional law, native title and Aboriginal land rights, discrimination, human rights, immigration and professional disciplinary matters. The Hon RJ Debus MP, Attorney General of New South Wales, addressing the court on behalf of the Bar, noted in his address that his Honour acted for:

> Aboriginal or Islander groups regarding every major or significant native title or land rights case during your career at the Bar, including the High Court cases of *Ward*, *Yanner*, *Yorta Yorta*, *Hayes*, *Risk*, and the Federal Court claims of *Yulara*, *Lardil*, *Goomana* and *Director of Fisheries*. Your contribution to the development of native title law and the construction of the Native Title Act is in fact unsurpassed. I understand that apart from representing several Aboriginal groups in relation to the 1993 legislation you were engaged by the National Indigenous Working Group to provide representation regarding the 1998 amendments to that Act. Your comprehensive contribution, through the provision of representation and the development of law to both Aboriginal interests and Australian society is, in short, remarkable and distinguished.

Although in practice at the Bar for almost 25 years and a silk since 1992, his Honour is also remembered for his distinguished academic background principally at the University of New South Wales but also at the University of Chicago prior to his coming to the Bar. Whilst at the Bar, his Honour continued to publish widely in academic and professional journals. Recent publications include 'Representative proceedings in New South Wales (1996) 34 LSJ 45; 'Should judges have performance standards?' (1996) 34 LSJ 46: 'Native Title: 'Sea- Country' (1997-98) 3 NTN 196; 'Judicial Review: Recent Trends' (2001) 29 FLRev 365; 'Ouster Clauses: Recent Developments' (2002) 22 Australian Bar Review 217; 'Revival of Procedural Fairness for Asylum Seekers' (2003) 28 AltLJ 114; 'Constitutional Elements of Judicial Review' (2004) 15 PLR 187.

His Honour also held, during his time at the Bar, a number of appointments and positions including, between 1981 and 1997, chair of the Prisoners' Legal Service Advisory Committee of the New South Wales Legal Aid Commission, part time member of the Australian Law Reform Commission (between 1986-1987) and of the Human Rights and Equal Opportunity Commission (1994-1997), advisory committee member in relation to the Australian Law Reform Commission's reference on genetic information and Commissioner of the New South Wales Law Reform Commission's reference on the state's Anti-Discrimination Act. More recently, between 2003-2004, he was the assistant commissioner of the Independent Commission against corruption. As is well known, his Honour was also instrumental in establishing the community legal centre movement in Australia, including as a member of the management committee of the Redfern Legal Centre from 1977 to 1983.

In reply, and with typical modesty, his Honour emphasised the role of others rather than himself in his several legal endeavours. His Honour said:

> Hearing of various aspects of my earlier activities immediately brings to my mind the contributions of the many others who participated. For example in the early days of the community legal centres there were dedicated individuals, not only lawyers, who were convinced that the rule of law could not be more than an abstract concept unless serious efforts were made to extend the availability of legal services to a broader section of the community. Many such people have been credited with involvement in the establishment of Redfern Legal Centre. Indeed, so many have been publicly credited with that involvement that we used to joke that anyone concerned about social justice expected to be granted that accolade, whether or not they had ever set foot on the premises. However, more seriously, there were many committed volunteers who provided thousands of hours to the establishment and operation of community legal centres before they became an accepted part of the delivery of legal aid in New South Wales and, indeed, across the country.
>
> Many of those early participants are with us and hold honourable positions in the community. So far as Redfern is concerned, they include Virginia Bell J and Terry Buddin J of this court and George Sdnkowski, now a magistrate. Some, however, are no longer with us. Among these are John Kirkwood and Phillip Molan. John devoted much of his time to maintaining almost single-handedly the high standards of practice at the Redfern Legal Centre; tragically John died from a brain tumour, still a young man. Phil Molan was a founder of Fitzroy Legal Service, Melbourne, before he came to the Public Interest Advocacy Centre here in Sydney. He spent several years as an honourable and humane magistrate before succumbing to cancer in 1997.
>
> Similarly, in relation to land rights and native title litigation, my contribution was entirely dependent on the dogged efficiency and legal creativity of practitioners working for various land councils around Australia, including the Northern and Central land councils in the Northern Territory; the Torres Strait Regional Authority; the Cape

continued on page 60

His Hon Judge Brian Donovan QC

Brian Donovan QC was sworn in as a judge of the District Court of New South Wales on 11 April 2005. His appointment was warmly welcomed. His Honour was admitted to the Bar on 8 November 1974 and took silk in 1988. In that period, he had made significant contributions to the Bar including service for a number of years on Bar Council including a period as the treasurer of the association. His Honour was also involved in numerous other committees of the Bar and led a delegation of the New South Wales Bar Association and Australian Bar Association in a series of advocacy workshops in Bangladesh in January 1996 (see (1997) 71 ALJ 70). Writing of that experience, his Honour said:

> The theme throughout was freedom and human rights. The experience created in me a sense of concern about our own relaxed attitude to democracy. Their history has involved a real struggle to achieve and maintain democracy.
> …
> The experiences of the election, the hartals, the rallies and the unrest all force a guest in this country to face the issues of freedom, human rights, rule of law and how we as disciples of the law and servants of our society can support these principles in both our own and other societies. It made me and our team understand something of the heated enthusiasm for us and support for our mission not just our teaching, but the fact that we were interested and involved in their country. Over and over again we were left emotionally exhausted by the way we were taken to the hearts of the advocates of Dhaka.

At the Bar, his Honour had a wide practice both at trial and appellate levels especially in the areas of medical negligence, family law, defamation and administrative law. Speaking on behalf of the Bar at his Honour's swearing in, Harrison SC described Judge Donovan as 'one of the most decent and fair minded opponents – not to say people – at the New South Wales Bar'.

The Hon Justice John Basten *(continued)*

> York Land Council; the Kimberley Land Council; the Aboriginal Legal Rights Movement in South Australia; and the Carpentaria Land Council through Chalk & Fitzgerald. As Andrew Chalk said on a recent occasion, none of us who knew him can forget the extraordinary contribution to this work made by the late Ron Castan, QC. In the 1970s Ron was led to wonder, while working on a case involving customary land law in Papua New Guinea, why the legal circumstances of Indigenous Australians were seen to be so different. The result, of course, was *Mabo*, which he argued for the claimants.

Turning to another topic, and perhaps giving a foretaste of things to come, his Honour drew attention to an increasingly prevalent theme, namely the importance of issues of statutory interpretation and, perhaps until very recently, the lack of recognition and of serious attention given to that subject matter. His Honour said, no doubt drawing on his extensive experience in the federal jurisdiction, that:

> It might surprise many, though perhaps not so many in this audience, to suggest that principles of statutory construction are of fundamental constitutional importance. In public law they define the proper boundaries between the parliament and the executive, and between both parliament and the executive on the one hand and the courts on the other. But how many legislators in conferring a statutory power on a government officer think about whether that power will be constrained by some implied principles of procedural fairness governing its execution and about what those principles may be? How clearly do we, when articulating a presumption that the parliament does not intend to interfere with fundamental human rights and freedoms, appreciate that we are formulating a principle with constitutional significance because it accords a certain level of power to the judiciary at the expense of the legislature?

When we are told that the state constitution embodies no principle of separation of powers, we should realise that such a statement cannot be taken too far. In a famous passage in *Quin's* case, Sir Gerard Brennan explained that to allow judicial review to question the merits of administrative action, as opposed to its legality, would be to permit the judiciary to impinge on the functions of the executive. That canonical statement, containing an inherent assumption about the separate spheres of the administration and the judiciary was made in relation to an exercise of state power.

The profession has little doubt that Justice Basten will, in his role on the New South Wales Court of Appeal, continue to make the same major and distinguished contribution to not only the legal profession but, more importantly, a civilised society governed by a rule of law that he has already made over the last 30 years.

The Hon Justice Stephen Rothman

Stephen Rothman SC was sworn in as a judge of the Supreme Court on 3 May 2005. He had come to the Bar in 1982 and took silk in 1995. He had a national practice and was an acknowledged leader of the industrial bar.

In his swearing-in speech, Harrison SC, on behalf of the Bar, noted that his Honour had been selected by the ILO to advise the Soviet Union on attempts it was undertaking to establish free trade unions and that 'for that purpose, together with advocates from Europe, you met and worked with former Soviet premier Mikhail Gorbachev and members of his government in 1987 and 1988.' Harrison continued by observing that his Honour:

> was involved in some seminal constitutional and human rights cases concerned with issues including the implied guarantees in the Australian Constitution involving the right to strike, the right to work and choose one's employer, anti-victimisation provisions and the status of trade unions. Most recently you have been involved in cases involving the protection of persons applying for refugee status under Australia's current immigration laws, including two significant cases dealing with racial vilification and freedom of speech. *Tobin v Jones* and *Jones v Scully*, both cases taken by you pro bono, clearly record your significant contribution to this area of the law.

Justice Rothman is also well-known for his service to, and as a leading member of the Australian Jewish community. In 1979, he was elected as a member of the Council of the New South Wales Board of Jewish Education and, in 1982, was elected to the executive of that body and served successively as its honorary secretary, vice-president and, from 1993-1995, as its president. In 1998, he became an executive member of the New South Wales Jewish Board of Deputies and a member of the Executive Council of Australian Jewry and was elected and served as president of the New South Wales Jewish Board of Deputies in 2000 for the maximum four-year term.

Swearing in of Justice Rothman.

In his remarks in reply, Justice Rothman referred to two mentors from whom he acknowledged having 'learnt the basic tenets which have guided my life, namely, to accord respect to all human kind; to understand that truly civilised society entitles each of us to our basic needs and an equal opportunity to reach our potential; and that, as part of human society, each of us has a duty to give back to society to the extent to which we are able.' His Honour said that 'It is that last duty which has always guided me to seek to empower the disempowered; to pursue justice; and to implement steps to ensure a fair society.'

His Honour continued:

> I have been blessed in that endeavour in coming from a community that has suffered over thousands of years the persecution that comes from being a minority and as a consequence I have been given an understanding of the suffering of others and the support and confidence to rail against it. The exploration of the proper construction and operation of the racial vilification laws was one example; the work in establishing scholarships for Indigenous students of law was another. I have had the opportunity to alter the operation of the law as it affects Australian society and it has been a labour of great love. Every case in which rights are enforced or denied defines the democracy in which we live. Every time a steer jumps a fence and a person is injured and is granted or denied rights, society is defined. Every balancing of defendants' and victims' rights is a defining of democracy.
>
> The autochthonous form of democracy which is Australia has largely been kind to my community; not so our Indigenous inhabitants whose traditional ownership of this land I acknowledge and who still suffer the effects of our actions. Ours is a society which does not seek to merge differences by creating one from many, but to encourage diversity within our values including a fundamental egalitarianism and respect.
>
> It is said that our values are under attack and that laws are necessary for the protection of our society. But the greater the attack, the more vigilant we must be to ensure the continuation of democratic precepts and the inculcation of fairness. Democracy is more than the rule of the majority; it is the equal treatment of all, including the minority. The rule of law is 'a great inheritance which has guaranteed the rights that, as individuals and as a nation, we have cherished'. Essential to the operation of the rule of law is the legitimacy of the institutions which administer it. The Supreme Court of New South Wales epitomises that legitimacy. Essential to that democracy and essential to that legitimacy is the independent unbiased application, equally amongst its citizens, of the law. Once we embark, as a society, upon a course which undermines the legitimacy of the institutions in our democracy or undermines the rule of law, we will begin to erode the very democracy that we seek to protect.

His Hon Judge Brian Knox SC

His Honour Judge Brian Knox SC was sworn in as a judge of the District Court of New South Wales on 14 February 2005 and brings to that court not only many years at the Bar which culminated in his appointment as a silk in 2002 and as deputy senior crown prosecutor in 2004 but also an extensive and varied career prior to coming to the Bar in 1989. That career included time spent as editor of the *Commonwealth Parliamentary Handbook*, as assistant secretary and research officer to the Senate Select Committee on Securities and Exchange, as a Principal legal officer in the Commonwealth Attorney General's Department, as the principal registrar of the Family Court of Australia (between 1983 and 1986) and, immediately prior to coming to the Bar, as the Commonwealth's director of legal services within the New South Wales Office of the Australian Government Solicitor.

Speaking on behalf of the Bar at his Honour's swearing in, Harrison SC said:

> It's well known that you have a golden retriever called 'Judge'. This says a lot about you and the view that you have of yourself. For example, I also have a dog, but being fairly modest, I call him 'deputy registrar'. Self-confidence is an essential attribute for a judicial officer in the third millennium.

Harrison continued:

> I have it on good authority that you consistently refer to yourself as a middle aged man. This has to cease immediately. This is precisely what the Murdoch press wants to hear. From now on, in all press releases accompanying any of your judgments, you are 'new age' not 'middle aged', 'thirty something', or at least 'no more than early 40s', you know that Powderfinger is not what a baker has and a Silverchair is not some form of motorised transport in a nursing home. The fact is, judges of this court today represent the community in terms of age, gender, attitude and life experiences and they serve the community well for that reason. You will fit in well here.

The Hon Justice Bryan Beaumont AO

On 10 February 2005, Court 21A overflowed with dignitaries, judges from other jurisdictions, practitioners and well-wishers to mark the retirement of Justice Bryan Beaumont AO. Amongst those present were Sir William Deane AC KBE, with whom Justice Beaumont had read on coming to the Bar, Sir Anthony Mason AC KBE, Sir Gerard Brennan AC KBE and the Hon JJ Spigelman AC, Chief Justice of New South Wales. The Bar was represented in very high numbers and the occasion was one of immense goodwill, marking the retirement of the longest serving judge of the Federal Court and a highly popular and personable man.

Speaking on behalf of the Commonwealth Government, Attorney-General Philip Ruddock acknowledged Justice Beaumont's 22 years of distinguished service on the Federal Court Bench, noted his recent appointment as an Officer of the Order of Australia and highlighted, in particular, Justice Beaumont's extensive involvement in the propagation of the rule of law in the Pacific region through his several appointments as chief justice of the Supreme Court of Norfolk Island, and an ad hoc judge of the Tongan Court of Appeal, the Fijian Supreme Court and the Supreme Court of Vanuatu. The attorney also made reference to Justice Beaumont's role in the establishment of the South Pacific Centre for Judicial Training and the key role he had played in improving legal education facilities and judicial infrastructure in the Pacific. His Honour had also been an early and dynamic president of the Australian Institute of Judicial Administration and was a 'distinguished foreign member' of the prestigious American Law Institute and one of its international advisers on its important project concerning the harmonisation of transnational rules of civil procedure.

The attorney concluded:

> as a judge you have displayed the highest degree of skill and professionalism. We have valued greatly your talents and your contribution and, knowing you as I have, I very much wanted to be here today to acknowledge your career, the immense benefit to both Australia and the Pacific that you have offered. You are known by your colleagues as a conscientious judge who has displayed patience and courtesy at all times.

Ian Harrison SC, speaking on behalf of both the Australian Bar Association and the New South Wales Bar captured the sentiments of many, saying:

> Members of the Australian legal profession and more importantly, those who they represent, can look back at your Honour's career with justifiable satisfaction at the way you were able to dispense justice to people whose lives had entered a state of painful turmoil often and whose ability to discriminate between their own understandable prejudices and a wise judgment was often significantly impaired. Too often judges are made the subject of ill-informed criticism by commentators who were neither present in court during the whole of a trial or who make assumptions about the background of judges which are both inaccurate and unfair.
>
> Nobody analysing your Honour's credentials before you became a judge of the Federal Court or with the benefit of reviewing your years of contribution to it, could have formed any view other than that you were eminently qualified for the task, you managed to achieve that elusive mix of judgment and grace. You might well have been the first graduate of the John Kearney School of judicial style and temperament. It is very pleasing to see that your old headmaster is behind me today.
>
> Your contribution to Australian native title jurisprudence stands like a beacon. You sat on *Peko-Wallsend v The Minister, Commonwealth of Australia v Yamir* and *State of Western Australian v Ward*. You also sat on *Arnotts v Trade Practices Commission*, *Amman Aviation v The Commonwealth*, *PetroTimor v The Commonwealth*. The attorney was even a litigant before you in *Ruddock v Vadarlis*.
>
> I challenge today the Murdoch Press to suggest that the work you performed as chief justice of Norfolk Island since 1992 as an acting judge of the Supreme Court of Vanuatu, as we've heard, as a judge of the Court of Appeal in Tonga and as a non resident judge of the Supreme Court of Fiji were no more than pleasant overseas excursions. Being a judge of the Federal Court or indeed, any court is a difficult job at the best of times. Your contribution to the administration of justice in the South Pacific and to the rule of law in these small nations and territories is your enduring legacy.

Justice Beaumont, in a typically modest and dignified address, concluded his remarks by saying:

> If I have made any contribution to the law, it is as part of the judicial system. Most people appearing in a court have their shirt riding on the outcome. The system must somehow ensure that their expenses are not overwhelming and that courts deal with their lists with appropriate expedition. Only within a just and fair system do judges make a worthwhile contribution to society.

The Hon. John Kearney QC and Justice Bryan Beaumont.

The Hon Justice Simon Sheller AO

The following address was delivered by the Hon JJ Spigelman AC, Chief Justice of New South Wales on the retirement of Justice Sheller, in the Banco Court, Sydney, on 29 April 2005

In the 180 year history of this court there have been numerous judges who have displayed many of the judicial virtues: learning, wisdom, compassion, eloquence, robust independence, impartiality, attentiveness, diligence, common sense, clarity of thought and of expression, administrative skills and strength of character. Few have had all of these qualities and to the high level, that has been manifest by the Hon Justice Simon Sheller for the entire period of over thirteen years that you have served as a judge and judge of appeal of this court.

Regrettably the time has come to pass on the responsibilities of office to others. In the words of Lucretius - *et quasi cursores vitai lampada tradunt:* 'like runners they pass on the torch of life'. This state is losing a great judge. It is fitting that so many of us have gathered here today to mark your retirement.

From your Honour's first day in this court to your last day, not one of the many hundreds of litigants, whose affairs it fell to you to determine, had any doubt that they were treated with the utmost courtesy; that the assessment of the case for and against their interests was conducted with care and rigour; by a person of great dignity who also had an enormous store of legal knowledge and a compassionate understanding of their difficulties and wishes. No one left your Honour's court, whether during the course of a hearing or after judgment was delivered, with any doubt that they had received substantial justice according to law.

L to R: the Hon CSC Sheller AO QC, as he is now, and Chief Justice Spigelman.

Your Honour's contribution was not limited to sitting as a judge. It extended to the detailed administration of the court and more broadly to the service of the Australian judiciary. Your Honour made a contribution that is unlikely to be surpassed and which has justifiably been recognised at the highest levels by the award of an Order of Australia.

Between 2000 and 2004 your Honour served as the president of the Judicial Conference of Australia where you represented the whole of the Australia judiciary at a time of considerable challenge, particularly in the context of the imposition of a taxation surcharge on judicial pension entitlements.

In this court your Honour served as the chairman of the Building Committee from its establishment in 1993 ensuring that the practical accommodation needs of the court were met and, perhaps most notably, supervising the transformation of the original Francis Greenway designed Supreme Court building in an award winning heritage project which, unusually for a heritage building, recycled an old building for its original use, whilst providing contemporary accommodation standards.

Your Honour also chaired the Alternative Dispute Resolutions Committee of the court since 1997. Your enthusiasm for mediation has led directly to changes in the court's Rules and in its practice with respect to mediation, which changes have considerably enhanced the dispute resolution process in this state.

Your Honour has served on the Law Court's Library Management Committee since 1995 and as chair from 2002 to 2004, maintaining the high level of quality of the service provided by the library, which is much appreciated by all judges. This service has been considerably enhanced by the resolution under your guidelines of longstanding budgetary difficulties with those who fund the courts and the reconstruction of the library itself.

Your Honour also chaired the 175th Anniversary Committee in 1999, organising a series of events including a ceremonial sitting, lectures, an exhibition and a dinner, by which the legal profession and, to some degree, the broader community came to better recognise the contribution that is made to this nation by the longevity of our institutions of the rule of law.

In all of these respects your Honour's past activities will continue to have effect to the great advantage of the administration of justice for many years to come.

Like any judge, your major contribution is the judgments you have delivered. Over 200 are published in the *New South Wales Law Reports* which, of course, represent only a fraction of your Honour's entire throughput in what was once called, when there was such a thing, unreported judgments.

I have, over recent years, on these occasions of the retirement of a judge of appeal noted a number of that judge's judgments which will clearly stand the test of time. On this occasion I

L to R: John West QC (back row), John McIntyre, President of the NSW Law Society, Ian Harrison SC, the Hon TEF Hughes AO QC and the Hon RP Meagher AO QC.

stand defeated. There are simply too many. It would be invidious to select some rather than others. There is no area of this court's jurisdiction that your Honour did not touch. There is no area that you touched that you do not adorn.

You have delivered leading judgments on the duties of company directors, on the law of options, on takeovers and winding ups, on the lifting of the corporate veil, on equitable setoffs and constructive trusts, on fatal accident claims, on the duty of care of local authorities and hospitals, on the effect of fraudulent conduct on insurance policies, on the requirements of procedural fairness in various statutory bodies, on the duties of executors, on the disbarment of legal practitioners, on the law of declarations, on the standing to obtain injunctions, on the rights of beneficiaries to have access to trust documents, on sentencing for sexual offences, on identification evidence based on photographs, on the withdrawal of a guilty plea, on the 'perils of the sea' exception to carriers liability and on the valuation of a dredge. There is no point in singling out any one of these judgments, nor in extending the list further.

Each of these judgments manifest your Honour's judicial style of comprehensive attention to all of the relevant facts, to the issues arising in the proceedings and to the arguments submitted by the parties. Notwithstanding the complexity or the size of the task, every one of your Honour's judgments deals with each of the requirements of the case at hand in a manner that is uncluttered by anecdote, literary reference or any other form of self indulgence, to which so many of us, including myself, sometimes succumb. Your command of the language allows all of this to be expressed with force and clarity and in a tone of high sobriety.

However, there is a side of you that is not manifest in your judgments and which is only available to those with the privilege of direct personal contact. Your Honour is a man of great wit, frequently of a kind that borders on the impish. Interacting with you, as your fellow judges have had the privilege to do on a regular basis, has always been a delight. That delight has been considerably enhanced by the contribution that your wife, Jan, to whom you are devoted, has made to the collegial life of the court. I wish to acknowledge that contribution here this morning. I know how much you value her support. We are particularly grateful that she permitted you to stay until you were required to retire by statute.

Your Honour leaves us with many memories and with many contributions and insights, on which we will draw for some considerable time. There is one, however, that will abide for all of my time as a judge and I am sure, in this respect, I speak for all of those who have been your colleagues. Thank you for many things, but thank you most of all for providing all of us a role model as to how a judge should behave.

Tom Hughes AO QC[1]

On Friday, 18 March 2005 the Bar Association was presented with a portrait of the Hon Tom Hughes AO QC, by artist Jiawei Shen, a 2004 Archibald Prize finalist. It was presented to the Bar Association on behalf of a number of senior members of the New South Wales Bar. The Hon Justice Michael McHugh AC spoke about Hughes QC and his career, while Edmund Capon AM OBE, Director of the Art Gallery of NSW, spoke about the work and the artist. The following speech was delivered by Justice McHugh.

Thank you for inviting me to speak about Tom Hughes and his career. It gives me great pleasure to do so because Tom and I have stood in this room together on many occasions for over 40 years and, in the 23 years I was at the Bar, we had many hard-fought cases against each other. I am not sure I am happy to be described as one of his contemporaries, but we do go back a long way.

In many respects, the general public knows much less about barristers today than it once did. No doubt, as the result of adverse publicity by journalists who do not appear to understand what would be involved in a negligence action against advocates[2], however, even the casual reader of this week's newspapers would know that barristers still have their ancient immunity from being sued for negligence. According to one newspaper correspondent, that was only because last week's High Court decision to that effect was given by six aged men, out of touch with the community. I suppose it follows that Justice Kirby, who dissented, must neither be aged nor out of touch with the community, despite the fact that he turned 66 today.

For better or worse, barristers as a class are no longer the recognisable, public personalities, they once were. Television and the growth of the local film industry put an end to the barrister as a public personality. The barrister cannot compete with the publicity machines that surround Nicole, Cate and Kylie or Geoffrey, Mel and Eric, the chief justice's son-in-law. And the demise of the afternoon newspapers with their six editions, reporting verbatim the evidence in every significant civil and criminal trial, took away a major source of free publicity for the barrister. Gone are the days when members of the public would buy two or three editions of the afternoon papers to find out the latest details of an interesting civil or criminal trial.

But there is one barrister today who is, and has been for 40 years, a public personality. That is the Honourable Thomas Eyre Forrest Hughes AO QC. There cannot be any intelligent person in this country over the age of 25 who takes an interest in public affairs who does not know who Tom Hughes is. He is a legendary figure who embodies the public's perception of the great advocate: dashing, dominating, charismatic, patrician and handsome - equally at home cross-examining a cowering witness or addressing a jury or the Judicial Committee of the Privy Council. By any reckoning, he ranks as one of the greatest barristers the Australian legal profession has produced.

Not least among the many astonishing aspects of his career has been the longevity of his fame and success. The demand for the services of barristers, like the demand for the services of actors, begins to decline after they pass middle age. Only the exceptionally able can overcome this iron law of professional life. That Tom Hughes was still the one that solicitors wanted to brief even when he was in his seventies and early eighties is the most convincing evidence of his greatness as an advocate.

So what do we know about this remarkable man?

We know that he was born in Sydney on 26 November 1923, that he was educated at Riverview and that he graduated with a law degree from the University of Sydney.

What is less well known are the details of his war service. In May 1942, at the age of 18, he showed the courage that has marked his career as an advocate and joined the Royal Australian Air Force. He was posted to Britain in April 1943 and to the RAAF's 10th Squadron at Plymouth in December of that year, where he flew Short Sunderland flying boats. During his service with the 10th Squadron he achieved the rank of flight lieutenant. At the age of 20, he was with the 10th Squadron during the D-Day invasion of Normandy, flying over the English Channel looking for German U-boats[3]. For his service in World War II and in recognition of the role Australia played in the liberation of France, earlier this year the French minister for veterans' affairs awarded Tom the Legion of Honour, France's highest decoration.

Following his war service Tom returned to Australia and was called to the New South Wales Bar in February 1949. Initially, he practised from the old Selborne Chambers, a three storey building whose site was the bottom half of this room. According to Derek Cassidy in the *Sydney Morning Herald*, last Monday, when he practised from Selborne it had two floors of barristers and a top floor that was a brothel. Derek must be much older than I thought because my understanding was that the prostitutes were cleared out of Selborne Chambers by the 1930s.

Tom was appointed queen's counsel in 1962. In his first year as a silk, he had a notable victory when he persuaded the Privy Council to reverse the decision of the full court of this State in *Jones v Skelton*[4] , which quickly became and remains one of the leading cases in the law of defamation.

In the same year as his great victory in *Jones v Skelton*, he entered federal parliament as the member for Parkes. Later he became the member for Berowra and remained there until he retired from federal parliament in December 1972. His successful campaign for the Parkes seat was run by a young member of the Liberal Party, none other than John Winston Howard, who no doubt acquired much of his own formidable campaigning skills by watching Tom in action. From November 1969 until March 1971, Tom served as the federal attorney-general in the government of his great friend, John Gorton.

His time as attorney-general was not without controversy. He was required to deal with many issues arising from Australia's involvement in the Vietnam War, such as prosecutions for breaches of the *National Service Act 1951-1964*. On one famous occasion, he had to make use of a cricket bat to defend his home against a group demonstrating against the war.

In my view, his greatest achievement as attorney-general was the *Concrete Pipes case*[5] when he persuaded the High Court to overrule the 60 year old decision in *Huddart Parker* and give a far reaching interpretation to the corporations power in the Constitution. That interpretation has permitted the Commonwealth to control and regulate most of the business and economic life and much of the social life of Australia. Its effect continues and will be the mainstay of the Commonwealth's intention to reform the law of defamation and take over the whole area of industrial relations later this year. Those who think that barristers leave no legal legacy should remember that case.

After leaving politics, Tom Hughes returned to the Bar, which is his natural home. He was president of the New South Wales Bar Association between 1973 and 1975 and was appointed a life member in 1996. Over the years, I had many cases against him and three with him. Appearing against him was a continuing forensic education. Whatever the cause of action and whoever heard it, Tom Hughes was always in complete control of his case and well aware of the weaknesses in your case. He gave no quarter and asked for none. But never in all the cases I had against him did he ever engage in any snide or underhand conduct. He knew the rules that governed the behaviour of counsel and never infringed them.

As an advocate, he has always been recognised as a leader in the areas of constitutional, commercial and defamation law, but, in the modern age of specialisation, he is set apart by the breadth of his practice. This is demonstrated by his entry in the *NSW barristers directory* under areas of practice: 'common law – general; equity – general; appellate – general'[6]. He has appeared as counsel in many significant and famous cases. They include the *Concrete Pipes case*[7], *Nationwide News Pty Ltd v Wills*[8], one of the seminal cases in establishing a right to freedom of communication on government and political matters under the Constitution and the *Super League* case[9]. He has become widely known to the general public from his appearances in many high-profile cases through his representation of clients such as the South Sydney Rabbitohs, Andrew Ettinghausen, Clive Lloyd, Jeff Thompson, Rene Rivkin, and various media organisations.

Throughout his career, Tom Hughes has held numerous other positions, including being a member of the Council of the Australian National University (1972-1975) and the principal member of the NSW Thoroughbred Racing Board Appeal Panel (1998-2003).

For his services to Australian society as a parliamentarian and barrister, Tom has been awarded numerous accolades. They include being made an Officer of the Order of Australia in 1988 and being a recipient of the Centenary Medal in 2003.

For more than 20 years, his wife, Chrissie, has supported his remarkable career He has two sons, one of whom is at this Bar and one daughter, Lucy, who is arguably even more famous than her father. They are here tonight, as are his brother Geoffrey and other relatives.

All of us are grateful to the 46 silks who contributed to the purchase of this painting of Tom. I will leave it to Edmund Capon to extol its virtues. If the gift of the silks had been a racehorse, I would not have hesitated to express an opinion on its qualities. But expert fields are generally best left to experts. So I will leave it to Edmund, a recognised expert in the world of art, to extol the aesthetic and other virtues of this painting.

1 For further details on the career of Tom Hughes, see:

1. Attorney-General's Department, *100 years: achieving a just and secure society* (2001).

2. I. Barker, '150 not out: speeches from the tribute dinner for Chester Porter QC, Frank McAlary QC and Tom Hughes QC' (Spring 1999) *Bar News* at 15-27.

3. Department of Veterans Affairs, Legion of Honour 2005: The Hon TEF Hughes AO QC (accessed at http://www.dva.gov.au/commem/loh2005/bio/tef_hughes.htm).

4. S. Hall, 'Master class: the law and life of Tom Hughes', *The Australian magazine*, 10-11 July 1993: 8-12, 14.

5. M. McKew, 'Tom Hughes, Queen's Counsel', *The Bulletin*, 22 August 2000: 40-49.

2 They do not appear to appreciate, for example, that in a civil action against the barrister all issues would have to be re-litigated whether or not the plaintiff had succeeded in an appeal. Imagine the outcry if a person convicted of rape sued his barrister claiming that he was convicted only because of the barrister's negligence and the complainant in the rape case had to go through the ordeal once again of giving evidence against the plaintiff. They do not appear to appreciate the incongruity of the barrister who had a duty to argue that his client was not guilty of the crime being forced to argue that on the balance of probabilities his or her client was guilty and therefore suffered no damage for the purpose of negligence law.

3 ABC Online. PM – *Australian vets honoured with French Legion of Honour* (Reporter: Kim Landers; 22 February 2005; Accessed at: www.abc.net.au).

4 (1963) 63 SR (NSW) 644.

5 *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468

6 Justin Gleeson SC, 'The role of the Bar Association' (Summer 2002/03) *Bar News* at 1.

7 *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468

8 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

9 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

Tom Hughes: Legion D'Honneur

In this article, Bar News records a little known dimension of the very full life of Hughes QC, recently recognised by his award of the French Republic's highest honour.

Sixty years ago this year Flight Lieutenant Tom Hughes commanded a Sunderland flying boat hunting German submarines. Tom's service in the Second World War helped form the courageous advocate who commanded every post war courtroom in which he appeared. Early this year the president of the Republic of France recognised Tom's war service with France's highest military decoration, the Legion of Honour.

With the modesty of those who have truly seen active service, Tom claims to have had but 'a quiet war'. Perhaps contrasted with the carnage suffered within Bomber Command is his argument may persuade. The war conducted by Sunderland flying boats was anything but quiet.

Much of Tom's style is explained by his war service: his ramrod-straight bearing; his courtesy to fellow combatants; his resolute determination to pursue a cause; his instinctive grasp of the tipping point which leads to victory; his courtroom presence; but above all his sense of humanity and justice.

Until France conferred its highest honour upon Tom earlier this year few at the Bar knew of his war record. With this account the Bar recognises and celebrates his service.

Tom's entry into the Royal Australian Air Force in 1942 was no accident. Tom was only sixteen when he completed the leaving certificate at St Ignatius College, Riverview in 1940. Tom keenly wanted to join the air force. His father had joined the Royal Flying Corps during World War I but in 1940 Tom was still too young for entry. Instead in 1941 he launched into first year law at Sydney University. At the law school in that year Tom encountered former High Court judge, Bert Evatt lecturing in constitutional law. In this less acclaimed part of his career, HV Evatt was still five years away from becoming the foundation secretary-general of the United Nations. Tom recalls that being lectured by this former member of the High Court was not particularly inspirational.

Finishing first year law in 1941 Tom entered the RAAF early in 1942 during the darkest phase of the war. He was attested and took his oath of loyalty as a member of the services at the Sydney Recruiting Centre at Wolloomooloo.

Tom's early recruit training was undertaken in suburban simplicity at Bradfield Park under Nissen huts located at the end of Fidden's Wharf Road, Killara. At war's onset these structures sprouted like incongruous galvanised mushrooms throughout Sydney's parks and open spaces. They housed all manner of defence related activity, including the elementary training involved in Tom's Recruit Course 28 in Killara.

The demands of war meant that young pilots needed to quickly earn their wings after basic recruit training. In Tom's case that meant a posting to No. 8 Elementary Flying Training School at Bundaberg. The RAAF's slow and safe single-engined bi-plane, the Tiger Moth, was the standard initial training aircraft. Tom graduated and was awarded his wings in April 1942 at about the same time that the Battle of the Coral Sea was taking place.

In one of those curiosities of military posting which probably helped to save Tom's life he was not sent directly overseas but to 1 Air Navigation School at Cootamundra for what was initially thought to be for a few months. There for the first time he flew the twin-engine Avro-Ansen. Hardly a leading edge war plane of its day, this aircraft required the navigator to manually unlock and wind the under carriage up after take off. Landing was equally a test of the aircrew's teamwork in cranking the landing gear into a safe position. At barely 19 Tom was training pupil navigators at Cootamundra. His posting at Cootamundra lasted for 13 months. Strange as it may seem to us now more pilots were lost in training than in operations during World War II. The danger of Tom's early training work should never be overlooked.

Tom finally received his overseas orders and crossed the Pacific in the troopship the USS *Mount Vernon* in August 1943. Tom and 150 Australian aircrew arrived in San Francisco in September and set out across the United States by train.

Many RAAF personnel at Brighton were sent to operational training units for RAF Bomber Command. A chance contact led to a rare opportunity to serve with a RAAF Squadron.

...

A RAAF squadron based in England was an anomaly to be explained.

In the course of this train journey something happened which marked out Tom as a leader among his contemporaries. Somewhere in the middle of the United States the officer commanding his cohort of aircrew had a breakdown and could not continue. In accordance with a tradition which spontaneously broke through in Second World War among Australian troops in places as diverse as the Kokoda Trail and the Burma Railway – in the absence of external orders Tom's peers took the initiative and by democratic ballot elected him to command them. Such ceremonies of military democracy have roots in classical times, when as Xenophon records in the *Anabasis*, 10,000 Greeks finding themselves in hostile Persian territory elected the generals to command their retreat to safety.

Tom soon faced the problems of command. His aircrew were billeted at Camp Miles Standish outside Boston. Their close confinement in barracks led to an outbreak of scarlet fever. He managed his men through this crisis, and then in the first week of October 1943 Tom and his aircrew were sent to New York, where they embarked on the *Queen Mary*.

The *Queen Mary* was fast enough to out pace the German U-boats still infesting the Atlantic but she was vulnerable nevertheless. As an officer, Tom was lucky enough to have a cabin with a porthole. His principal duties on board were to

see to the morale and welfare of the Australian NCOs. This was quite a challenge. For the trans-Atlantic passage sixteen NCOs were shoehorned into the cabins below the water line.

Landfall for the *Queen Mary* was at Grenoch in the Firth of Clyde. From there Tom entrained with fellow aircrew to Brighton, where a holding depot for RAAF air crew was maintained throughout the war. Tom remembers his period here as one of suffocating boredom. Young pilots objected to being marched up and down the Brighton seafront whilst disciplinary warrant officers shouted at them.

It is difficult to imagine a universe in which Tom Hughes was not a barrister. Yet after one year's law, Tom was genuinely uncertain about the form of his future career in the law. His father was a solicitor. To relieve the tedium of Brighton Tom travelled up to London to see the Royal Courts of Justice. There the rule of law was being administered whilst it was being defended in the skies above. These trips to court were Tom's first serious encounter with practice at the Bar. The experience formed Tom's future choice. Somewhere on the train to Brighton or sitting in the Royal Courts of Justice Tom decided upon a career at the Bar.

It was an exciting time to be in legal London. In the darkness of war, *Liversidge v Anderson* had just been decided and executive power was in the ascendant.

RAAF Brighton was a manpower pool from which Australian aircrew were drawn to replace the constant casualties in RAF squadrons.

Many RAAF personnel at Brighton were sent to operational training units for RAF Bomber Command. A chance contact led to a rare opportunity to serve with a RAAF Squadron. 10 Squadron RAAF at Plymouth was the only wholly RAAF staffed squadron in England. It needed volunteers. Tom jumped at the chance to escape from Brighton and see some action.

10 Squadron flew Sunderland flying boats. The Sunderland design had been developed pre-war to compete in the growing market for trans-Atlantic air travel. A RAF version was developed at the outbreak of the war. These massive aircraft were used for long range reconnaissance, maritime patrol, anti-submarine operations and sea rescue. With a cruising speed of 110 knots (about 115 mph) the Sunderland had a lugubrious personality when compared with the nimbler Spitfire. However the Luftwaffe had found them very hard to destroy. As early as April 1940 a Sunderland operating off Norway was attacked by six German Junkers-88 fighters. It shot one down, damaged another and drove off the rest. The Germans had their own nickname for the Sunderland, 'Fliegende Stachelsweine' or 'the flying porcupine'. Defensive armaments were machine guns in forward, upper and tail turrets. In attack depth charges were cranked out under the wings before being deployed against submarines.

The Hon Tom Hughes AO QC talks to artist Jaiwei Shen.
Photo: David Moir / Fairfaxphotos

Tom arrived at Mountbatten Airbase on Plymouth Sound late on Christmas Eve 1943. 10 Squadron's newest member walked into its Christmas party celebrations.

For the next 18 months Tom lived with a ghost whose genius may also help to explain just a little of Tom's independence of mind. Aircraft Sergeant Thomas Edward Lawrence had been based at RAF Plymouth until he was killed on his motorcycle near the airbase in 1935. Disillusioned with military hierarchies Lawrence of Arabia left the British army at the end of the First World War. He later enlisted in the RAF. He refused an officer's commission being content instead to serve in the supportive non-commissioned environment of RAF Plymouth.

A RAAF squadron based in England was an anomaly to be explained. In 1939 the Australian Government sent 10 Squadron to England to collect and fly back a number of Sunderland flying boats to Australia to assist Australia's defence effort. The squadron took possession of the Sunderlands but then war broke out. The mission to repatriate the Sunderlands to Australia was abandoned. The result was that 10 Squadron became the only RAAF squadron based in the UK during the Second World War.

Plymouth Sound faced a fair share of punishment during the Second World War. It was heavily bombed by the Luftwaffe several times during 1941.

A Sunderland's aircrew on operations were an extended family of twelve or thirteen. The crew consisted of three pilots, a captain, a first pilot and a second pilot. They were supported by two navigators, two flight engineers, plus up to six wireless operator / air gunners.

Sunderlands patrolled for up to 13 hours. Crew members used binoculars to look for the enemy below, day and night. Pilot

alertness was maintained by rotation of duties. A pilot could expect two hours on in every three flown, with one hour's rest.

Flying at 1000 feet with six depth changes slung under its wings, the Sunderland was a capable submarine hunter. Once contact with a submarine was made, a depth charge bombing run would be initiated along the submarine's course, usually with terminal consequences for the submarine. The Sunderland's hunting became much more difficult once the Germans developed snorkels so U-boats could run diesel engines and recharge batteries just below the surface.

Tom started as a second pilot on his first Sunderland in the last week of 1943. Somewhat like the junior articled clerk the second pilot officer's tasks included supervising the aircraft's refuelling, clearing the cockpit window with a chamois before takeoff and executing various dogsbody jobs. The line of promotion was to first pilot and then to captain.

Just prior to D-Day Tom became a first pilot in his crew. During D-Day operations Tom was on patrol guarding the invasion fleet against enemy submarines in the English Channel and the Bay of Biscay.

In an age before the satellite and with only elementary radar capacity, maritime patrol to find the enemy was an essential part of the war effort. Like the albatross, the Sunderland's flight path tracked invisible lines of longitude up and down the Bay of Biscay or over to northwestern Ireland hunting the declining but dangerous species of German U-boat. A typical flight path took a Sunderland down to Cape Finistere, at the north western end of the Spanish coast. During the summer of 1943 Junkers 88 fighters had been very busy intercepting Sunderlands in the bay but this threat was reducing by late 1943. When Tom arrived six months before D-Day a central Allied focus was ridding the area of German U-boats before the summer of 1944. A few Sunderlands were lost in battle well after D-Day. German fighters were active until after mid-1944. Junkers 88s shot up many RAAF Sunderlands during this period leaving their aircrew to limp home into Plymouth Sound. Every Sunderland flight was a crossing into danger.

Especially in the six months prior to D-Day U-boats were active and were equally actively being hunted by 10 Squadron. In January 1944 Flight Lieutenant Roberts and the crew of a Sunderland found and sunk a U-boat without Allied casualties. Another famous member of 10 Squadron, Flight Lieutenant Bill Tilley DFC did a little more only a few months later. Strict orders prohibited Sunderlands landing on the Bay of Biscay for fear that the large swells in the area would destabilise the aircraft or cause it to lose a float. Intelligently disobeying orders Bill Tilley successfully landed in the Bay and rescued stranded Allied aircrew. Tom is readier to speak of the achievements of these adventures than his own.

Just prior to D-Day Tom became a first pilot in his crew. During D-Day operations Tom was on patrol guarding the invasion fleet against enemy submarines in the English Channel and the Bay of Biscay. Tom was often first officer to Captain Jack Mabbett, who after the war became head of Repco Australia. During this phase of his war service, Jack's Sunderland encountered a German ship *Rostok* disguised as a hospital ship. This action presented the first concrete problem of Tom's legal career. Misrepresenting itself in the colours of a hospital ship the Rostok was bound for a Spanish port. Jack Mabbett discerned the German ruse: he broke radio silence to guide a Royal Navy strike force towards the ship, which was captured and taken to Plymouth under escort.

Maritime law gave Royal Navy participants in the capture an entitlement to prize money. Jack Mabbett, Tom's captain, thought that justice demanded the RAAF Sunderland, which initiated the capture, should share in the prize. The Australians all missed out. It's a point Tom would still like to rerun some day.

In January 1945 Tom was promoted to captain commanding his own Sunderland and crew of 12. Thus by the age of 21, a young man who had not yet commenced second year law assumed heavy responsibilities. He had final responsibility for the safety and security of eleven fellow air crew in time of war. No life was lost under Tom's command. This was not for want of dangerous encounters with the enemy.

By late 1944 Sunderlands began to undertake close in coastal and photographic reconnaissance as German forces withdrew from southwestern France. By early 1945 it was widely assumed by Allied intelligence that all pockets of German resistance in France had been eliminated. Under Tom's command a Sunderland flying boat proved that intelligence wrong not just once, but twice. The story of just what happened on the first occasion is perhaps no better told than in the words of fellow crew member Noel Haggett who wrote to Tom upon his recent award:

> It is now 60 years ago that we were shot at by both light and heavy flak between Belle Isle and St Nazaire and later on at Lorient. You will remember that we were on a photo reconnaissance mission and were briefed that all that area was in Allied hands. How we were not shot down I will never know. I was in the nose turret at the time and well remember the puffs of black smoke all around us and the sound of the rattle of hail on the tin roof. From memory, you did a couple of low level corkscrew rolls that got us out of serious trouble. Thank God we are still here to tell the tale.

Tom was fired upon in a second similar incident near the French coast. Even today, on tours of St Nazaire the anti-

aircraft gun emplacements which shot at Noel and Tom's Sunderland in April 1945 can still be seen.

On VE Day Tom's aircraft was patrolling the Channel Islands providing support for the RN ships rounding up German vessels caught off shore at the surrender.

After VE Day the short term plan was to fly 10 Squadron back to Australia. This plan was aborted at the end of the Pacific war. Tom was shipped back to Australia in November 1945 but not before using his time in England to apply for and be interviewed for a Rhodes scholarship. Like many returned servicemen of the day he resumed his study of the law in 1946.

The Legion of Honour is the French Republic's highest award. Created by Napoleon Bonaparte in 1802 he first bestowed it just over 200 years ago in July 1804 in the chapel of Les Invalides. As the republic's first consul, Napoleon instituted the order to found a single elite corps associating military bravery and civil talent. A handful of non-French citizens receive the honour annually. Tom Hughes is one of them. With stylish Gallic understatement, the medal's miniature is a tiny centimetre long slash of crimson. Tom now justly wars it with pride.

Indigenous Barristers' Trust Fund cocktail party

By Keith Chapple SC

On Wednesday evening 13 April 2005 the Indigenous Barristers' Strategy Working Party held a cocktail party in the Sky Phoenix Restaurant as a fundraiser to encourage and assist Indigenous law students and barristers.

The event was hosted by the patron of the Indigenous Barristers' Trust, the Hon Sir Gerard Brennan AC KBE.

Sir Gerard spoke about the work of the trust and the need for support for indigenous barristers coming to and already at the Bar. His sentiments were echoed by the president of the New South Wales Bar Association, Ian Harrison SC.

The main speaker for the evening was the high profile indigenous leader and adviser to the federal government on Indigenous welfare issues, Noel Pearson. In a well-received speech Mr Pearson spoke about Indigenous lawyers and also provided some careful analysis of High Court land rights cases. His comments were perfectly weighted for his largely legal audience.

The evening was a great triumph of organisation by Chris Ronalds SC and her colleagues.

The trust deserves a great deal of support. It has taken over and expanded the work begun by Mum Shirl many decades ago. Anyone who saw her efforts in the prisons and on the streets of Redfern could not fail to be impressed.

The trust is a highly organised and far reaching organisation that needs funds. The silks of 2004 made it the major beneficiary of their donations. More is needed.

Noel Pearson talks to the media following his speech at the fundraiser.
Photo: Bob Finlayson / News Image Library

His Honour Judge Bob Bellear (1944 – 2005)

Earlier this year, the Australian legal community lost one of its finest heroes with the tragic and untimely death of his Honour Judge Bob Bellear of the District Court of New South Wales who, in 1996, was the first Indigenous Australian to be appointed a judge.

As Mr Peter Manning wrote in his obituary published in the *Sydney Morning Herald* on 17 March 2005:

> Raised in the far north coast town of Billinudgel, near Mullumbimby, he was the grandson of a Vanuatu sugar-cutting slave and an Aboriginal woman from the Noonuccal People of Stradbroke Island. One of nine children, he knew poverty, hunger and widespread culture of alcoholism as he grew to manhood. He told an interviewer in 1978 'Drunkenness was our only refuge. But when you emerged from the haze of drunkenness, there was always the harsh reality of racism to face.'

Before his career in the law, Bob Bellear had served in the Royal Australian Navy, becoming the first Aboriginal to rise to the level of petty officer. In 1972, moved by events in Redfern, he resolved to study law and, to do so, returned to Sydney Technical College to finish high school studies. He graduated from the University of New South Wales in 1978 and was admitted to the Bar in 1979. As Peter Manning wrote in his obituary:

> He represented Aboriginal people (and whites) in a wide range of courts. The main emphasis of his practice, however, was criminal trials, instructed by the Aboriginal Legal Service, Legal Aid Commission or private practitioners. He was constantly working on the side of the poor. He also successfully represented traditional owners in three important land claims, and was appointed as counsel assisting to the Royal Commission into Aboriginal Deaths in Custody in 1987.

He was awarded an honorary doctorate of laws by Macquarie University in 1993 in recognition of his services to the law, community and the Aboriginal people. Earlier, in 1990, he was awarded the University of New South Wales Alumni Award. He was appointed to the District Court of New South Wales in 1996 where he served for eight years before his untimely death. At his state funeral, Terry Tobin QC delivered the following moving address:

> The last time Bob Bellear sat as a judge, he adjourned the court and found that he could not walk unaided. In the coming days he learned that it was because of lung cancer which was inoperable. His wife Kaye said that she would nurse him at home through his final illness and she did, to the very end, a gift to Bob and the children, and to all of us, one of great bravery and great endurance.
>
> During the months ahead - chair-bound all the time - he visited Vanuatu and the Tweed, went to the coffee shop and the club, celebrated 38 years of marriage and the first birthday of his grandson Tanna. He saw his friends, followed the horses and, as a man who loved the coast and the sea, enjoyed oysters and lobsters and crabs which we dropped in for him, chemotherapy permitting.
>
> In January he learned he was suffering from asbestosis from his years of naval service. 'Haven't I fought enough battles?' he asked before girding up one more time for his family and settling accounts with the Commonwealth.
>
> There were earlier battles, which in recent days Peter Manning has written of so movingly, the fights for justice in Redfern, which Bob and Kaye recalled on their wedding anniversary. Because of those experiences, in 1972 he decided to give up his job and study to become a lawyer. 'You do the study and I'll earn the money,' Kaye said, which he did, and she did.

Bob Bellear is farewelled at Sydney's Town Hall. His wife Kaye Bellear [centre] gave a speech during the service. Photo: Brett Faulkner / News Image Library

A decision which may seem a natural one now, looking back, but at the time must have been complex: to take up the law to undo the acts of those who administer and enforce it. Why not take against the law?

In his work as a barrister Bob many times defended those who knew what he had known at Redfern. After a trial that went several weeks he had the Mooree Boomers football team (along with a few just off the bench) acquitted of affray and began a close link with the people at Mooree - none closer.

He worked with Father Ted Kennedy at St Vincent's in Redfern. When sixteen homeless were evicted from squats, Ted undertook to house them; like the miracle of the loaves and fishes, they became a hundred: and Bob provided Ted with the counsel and the brawn needed to quell the tumult and begin a housing project.

In 1983 he appeared for many months in the Supreme Court in Canberra where more than twenty people from Cape York came to give evidence of how their lives at Weipa, Marpoon and Arakoon had been devastated by mining.

Judge Bellear presiding at the swearing-in of Police Commissioner Maroney.

Of a Thursday night over dinner (before the mobile became king) they would fetch a phone to the table and he would call home and talk to Kaye and Joanne and Marlu and Karli. He did that week after week and you knew that they were his raison d'etre, the pulse and heart beat of his life.

But these cases and many more you have heard of today cannot prescribe his legacy.

He had seen the canvas and the rigging of the law at Redfern but was not deterred by it. It is easy to think that, in becoming a petty officer in the navy, and a lawyer and a judge, he was being rescued from his lot. But in seeing his future in the law that day in Redfern, it was not Bob who was being rescued... but ourselves.

The Nobel laureate Seamus Heaney in 'Seeing things' spoke of such a vision.

> The annals say: when the monks of Clonmacnoise
> Were all at prayers inside the oratory
> A ship appeared above them in the air.
>
> The anchor dragged along behind so deep
> It hooked itself into the altar rails
> And then, as the big hull rocked to a standstill,
>
> A crewman shinned and grappled down the rope
> And struggled to release it. But in vain.
> "This man can't bear our life here and will drown,"
>
> The abbot said, "unless we help him." So
> They did, the freed ship sailed, and the man climbed back
> Out of the marvelous as he had known it.

Bob's decision to face the conflicts he saw through the law speaks to the policeman making arbitrary arrests at Redfern, the gaoler locking away a distressed man in a dark cell, the bailiff evicting the homeless, the lawyer who fails to front. He was saying not of the victims but of them and of us: 'This man cannot bear our life here and will drown unless we help him.' And Bob did.

So my friend we have come today to sing your soul, to wonder whether all that remains to do mocks what you did do, and when we are told by many voices that we are not just, to hear your voice among them, and listen.

Only then can we say goodbye to you and depart, climbing out of the marvelous as we have known it.

Bob Bellear is survived by his wife Kaye, the children, Joanne and Kali, and four grandchildren. He had a special place in his heart for his son Marlu, who died young.

Vale Bob Bellear

Sir William Stawell: second chief justice of Victoria 1857-1886

By J M Bennett

The Federation Press, 2004

In June 1858 the township of Stawell at Pleasant Creek in Victoria, was named in honour of that colony's second chief justice. It was so named by Charles Gavan Duffy, then minister of lands, and also by then father of a future Australian chief justice.

As Stawell was in the second year of his commission, it is safe to infer that the honour was a recognition only of his political achievements and of his instrumental role in drafting the colony's constitution. Indeed, when Stawell – pronounced to rhyme with 'stall' – held its first Gift foot race in 1878, the chief justice had eight years of office to go. His pronunciation rhymed with 'stole'.

This is another installment in Dr Bennett's series *Lives of the Australian chief justices*, published by The Federation Press, and dealing at least to date with early colonial, rather than later national, appointments. At first glance, the stories of the later have a more immediate appeal, touching as they must on more recent legal and political controversies, and each of David Marr and Professor Ayres have enjoyed justifiable success on their quite different studies of, respectively, Sir Garfield Barwick and Sir Owen Dixon.

Yet, as Dr Bennett and an increasing number of other scholars are demonstrating, there is as much to be learnt about our colonial forbears through the law and its personalities as through other more moulded prisms. And to be learnt about the present: the more one delves into nineteenth century tensions between law, politics and the press, the more one feels that the only thing making it different from today is the absence of talkback radio.

Of course, things were not entirely the same, back then. As attorney-general, it was Stawell's custom to prosecute personally in all criminal cases. Even if something like that were vaguely feasible today, our system of government, with its heightened sensitivity as to the isolation of matters judicial, for the most part reserves the machination of prosecution to an independent statutory body.

There are also more mundane differences. When a trial of bushrangers broke down upon a crown witness's recanting, Stawell initiated another charge and set off with five constables to get further witnesses. It is no discourtesy to Attorney General Debus or to Director of Public Prosecutions Cowdery, but a tribute to our modern highway system, to note that Stawell had to gallop cross-country, swim through a rain-swollen river, and travel all night and all the following day, to ensure success.

Although Stawell's family motto was *'en parole je vis'* – 'by the word I live' – he didn't, at least not as a barrister in Ireland. Born in 1815, he is reputed to have said in 1842 that, as there were 40 hats on the Munster circuit and not enough work for 20, it was time to go. In Melbourne, he quickly established himself at the bar and in politics, becoming attorney-general within a decade.

This was a time of great change on the political front, in particular with the move to responsible government, and of great turmoil, in particular with the discovery of gold. Stawell's role in the Eureka trials is discussed at length; that his political and judicial ambitions were not derailed by the debacle was a testament to good fortune and strong character.

Victoria's first chief justice was William á Beckett. His health and constitution had never been good: his career at the New South Wales Bar had been hampered by spinal damage upon a youthful cricket injury. He had accepted the more sedentary – if not more arduous – task of holding office as last resident judge of Port Phillip, becoming chief justice of the new colony in 1852.

Despite being given two years' leave on full pay, by 1856 it was apparent that á Beckett's health meant that he was no longer equal to the task. One wonders, too, at the effect in 1855 on this austere man with a distaste for the liquor trade, of his daughter's marriage to an ex-convict and brewer, a relationship which was to spawn the Boyd dynasty, Martin, Robin, Arthur, et al.

Into the breach rode Stawell, and while some controversy surrounds the circumstances of the appointment, Bennett concludes that the new chief justice had done no wrong 'in succeeding in advancing himself as he did'.

And what of Stawell the judge? In his foreword, John Phillips, himself chief justice from 1991 to 2003, suggests that he was ideal for the times. 'In the latter half of the nineteenth century Victoria had no need of a Lord Denning or a Sir Owen Dixon. What it needed, and got in Stawell, were judges who were able to dispense justice speedily and without elaboration – men who were also well known public figures prepared to lead the community by speaking out, in a variety of venues, on the necessity of the rule of law as the most vital plank in an ordered society.'

Certainly, while Stawell seems to have had a very happy home life, he seems to have preferred for his family a crisp Socratic method which may have found favour in courts other than Sir Owen's. Bennett recounts that while on leave in Europe, Stawell and his family holidayed in Europe. One of his boys fell ill, and was unable to return to school in London with his siblings. When better, he worried at travelling alone. 'Do you know a train when you see it?' his father asked. 'Yes', was the answer. 'Can you get into it when you see it?' 'Yes.' 'Then where is the difficulty?'

In the 1920s, an attorney-general claimed the office of lord chief justice, as of right. According to the author of *The Oxford*

companion to law (1980, Clarendon Press, at page 565), the successful claimant was 'characterised as perhaps the worst chief justice since the seventeenth century, not as being dishonest but as lacking in dignity, fairness, and sense of justice.' Stawell was an attorney-general happy to reward his own ambition, but the result is a chief justice of vitality and probity, vain perhaps, but not lacking in those three qualities of the ideal judge.

Reviewed by David Ash

To have but not to hold: a history of attitudes to marriage and divorce in Australia 1858-1975

By Henry Finlay

The Federation Press, 2005

The institution of marriage, in all facets including its breakdown, has been central in the development and evolution of Australian society. The study of the manner in which the colonies, states and Commonwealth imported and developed principles dealing with the breakdown of relationships and the attitudes evinced in the process is the focus of this work.

The author prefaces the work with a quote from G M Young, *Portrait of an age* which reads '[f]or that matter, what is history about? And the conclusion I reached was that the real, central theme of history is not what happened, but what people felt about it when it was happening.' The scene is set for a glimpse into the attitudes of Australian society during the period from the introduction of divorce in South Australia in 1858 to the sweeping reforms of the *Family Law Act 1975*.

The book commences with a promising introduction which outlines the emergence of divorce in England and outlines various models of marriage and separation. What then follows is a detailed account of the adoption and amendment within Australia of the English legislation. Unfortunately for those seeking a broader societal analysis of the development of the various principles and their emergence in Australia, this work disappoints.

The introduction and conclusion are of considerable insight, interest and substance. The freely dissoluble marriage prior to the Council of Trent to the declining relevance today of the formal marriage itself mark the two historical extremes of the analysis and reflect a curious evolution of attitudes in the light of the increasing regulation of, and consequences attaching to, marriage.

The balance of the work records in considerable detail the commissions of inquiry and debates in each of the colonial legislatures and their successors surrounding the introduction and development of the various pieces of state and ultimately Commonwealth legislation. The research into these processes is meticulous and the result a comprehensive overview of the lengthy gestation that divorce legislation endured in the parliamentary arena.

Complete as such analysis is, it represents a largely arid survey of the utterances of members of the various legislatures without providing a broader view of societal attitudes save to the extent that parliamentary committees recorded the same. The result is an exploration of the legislative development of divorce without providing the reader with a broader social context within which to appreciate the attitudes of members of the community at large.

Reviewed by Michael Kearney

Mareva and Anton Piller Orders: freezing and search orders

By Peter M Biscoe

Butterworths, 2005

Anyone who has encountered Biscoe QC in practice would be well aware that he is at once articulate, thorough and meticulous. These three characteristics are also evident in his recently published book on Mareva and Anton Piller orders, remedies which Sir John Donaldson once described as 'the law's two nuclear weapons'. This is a book which will be indispensable for the profession.

As is observed in the preface, 30 years have passed since the English courts created Mareva and Anton Piller orders. A number of monographs on the subject were published relatively early in that period, both in England and Australia, notably Augh & Flenley *The Mareva injunction and Anton Piller order* (2nd ed. 1993) and Hetherington (ed) *Mareva injunctions*, Law Book Company, 1983. The subject matter is, of course, treated in more general equity texts including *Meagher, Gummow and Lehane, Spry, Parkinson* and *dal Pont & Chalmers*. In none of those texts, however, will one find the detail and explication evident in Biscoe's new work. Nor will one necessarily find the strong practitioner-orientated perspective which Biscoe brings to the subject.

Following an excellent introduction and overview of the development of these two forms of relief, the next four chapters are devoted to what have traditionally be known as Mareva injunctions however, following *Cardile v LED Buildings Pty Ltd* (1999) 199 CLR 380, Biscoe in general opts for the description 'freezing order'. These chapters are respectively entitled 'Ancillary orders' (which deals, inter alia, with orders for the disclosure of assets, cross-examination, delivery up, bank direction, restoration or payment of monies into a designated account, orders restraining departure from the jurisdiction and the Norwich order); 'Third parties'; 'Transnational freezing orders' and a chapter entitled 'The conduct of freezing order proceedings'.

The chapter on 'transnational freezing orders' is particularly illuminating. Difficult questions of jurisdiction will often arise in this area and, with an increasing global economy and the ease of international funds' transfer, such relief will often be a necessary adjunct to transnational commercial litigation, especially in fraud cases. The chapter concerned with 'The conduct of freezing order proceedings' which runs to almost 60 pages reviews not only the mechanics of an application for Mareva relief but deals in a thorough manner with such important topics as the undertaking as to damages, other undertakings and the obligation of full disclosure of all material facts on an *ex parte* application.

There is also a lengthy and systematic discussion in chapter seven on the subject of Anton Piller orders. The text is rounded out by chapters on the privilege against self-incrimination and sanctions for disobedience including the possibility of being debarred from defending proceedings or not being heard through to the traditional sanction of contempt of court.

The focus is principally upon Australian and English decisions but there is also regular reference to Australian and English statutory material and practice directions which have been evolved by the courts over time in relation to both Mareva and Anton Piller orders. This material is usefully reproduced in appendices to the book which also include precedent orders.

Peter Biscoe is to be congratulated on his achievement. To publish any book, let alone one of this quality, is a fine achievement. To do so whilst simultaneously conducting a busy silk's practice is even more impressive. The book will become the standard specialist text in the area in Australia. It has already been cited in a number of decisions in the Supreme and Federal courts.

Reviewed by Andrew Bell

Company directors, principles of law and corporate governance

By Austin, Ford and Ramsay

LexisNexis, 2004

In the wake of recent corporate collapses and the prosecution of their high profile directors, the role and responsibilities of directors of corporations has been brought more sharply into focus. These recent events highlight the importance of directors of public corporations being aware of, and abiding by, their legal responsibilities. A failure to do so can cause widespread loss amongst the general public.

The recent release of *Company directors, principles of law and corporate governance* is therefore a timely one. The book, by the authors of *Ford's principles of corporations law*, Justice Robert Austin of the Supreme Court of New South Wales, and Professors Ford and Ramsay of the University of Melbourne, deals comprehensively with a broad range of legal issues affecting company directors. The book is divided into three broad parts:-

- structure and powers of the board of directors;
- the duties of directors;
- remedies for breach of duty and enforcement;

with each part having a number of sub-topics.

The treatment of directors' duties is extremely detailed, exceeding 450 pages. In addition to the better known directors' duties, the book deals separately with their duties in relation to meetings of members, and the duties and liabilities of directors in the context of capital raisings.

In addition to the comprehensive manner in which each of the topics are dealt with, the principal advantage of the book is that it gathers together in one place a broad range of topics which were previously dealt with either at a general level in more general corporations law textbooks, or in specialised publications dealing with, for example, meetings.

The book is a must-have for corporate lawyers.

Practitioners should note the disclaimer given by Justice Austin in the preface where it is clearly pointed out that Justice Austin only takes responsibility for the chapters allocated to him. No doubt this is intended to be a warning to any practitioner appearing before his Honour where it cannot be presumed that any submission based on a chapter in the book not written by his Honour, will be accepted.

Reviewed by Ian Pike

Cassidy QC, 50 years at the Bar.

Derek Cassidy in chambers. Photo: Lisa Wiltse / Fairfaxphotos

Photo: Lisa Wiltse / Fairfaxphotos

Verbatim

***Babak Haghighat v Local Spiritual Assembly of the Bahais of Parramatta Limited [2005]* HCATrans 025**

Mr Rofe: If your Honours please, I appear with my learned friend, Mr DM Wilson, for the respondent (instructed by Henry Davis York).

McHugh J: Yes, Mr Rofe. It is good to see you again. We have not seen you up here for a long while.

Mr Rofe: I either win or lose cases decisively.

Mr Hennessy: I hope that happens here.

* * * *

***Air Link Pty Limited v Paterson; Agtrack (NT) Pty Limited v Hatfield* [2005] HCATrans 119**

Gummow J: Your state is usually in favour of extinguishing people's common law rights, is not it? You seem to be standing in two canoes, as we said last week.

Mr Sexton: It is a different river today. Now, your Honours, can I just go back for one moment to the District Court Rule.

* * * *

A number of Australian barristers have been briefed in homicide matters in the Solomon Islands. A source in the Solomon Islands sent *Bar News* this transcript, warning us of appropriate court dress codes.

Barry: Thank you my Lord. The next witness I call is Philip Magnes, please.…

Court: Mr Barry you are not properly robed.

Barry: I'm sorry my Lord?

Court: You are not properly robed Mr Barry

Barry: Not properly robed?

Court: Are you aware of Regulation 16 of the Legal Practitioners Act of 1987. Legal Practitioner's Professional Conduct Rules 1995. Regulation 16

Barry: No, I'm not

Court: '4 G. A legal practitioner shall: G. appear in court wearing a long sleeved, cleaned ironed opaque white shirt or blouse with collar closed at the throat and dark trousers or a skirt and business shoes etc and if appearing as counsel properly gowned with bib that is tabs and wigs. If appearing as instructing legal practitioner, a tie in the case of a male and if appearing as queen's counsel with a legal practitioner as a junior.'

Mr Barry you are…you are appearing in court as senior counsel and also as mentor to young Solomon Islands lawyers.

Barry: Yes.

Court: The judges have been trying very hard to instil in young Solomon Islanders proper decorum in the court room and so as robing is concerned. You are not helping us in that regard, Mr Barry.

Barry: Well my Lord, this is the third week of the trial and for you to raise this issue at this point in time, I must say I'm quite surprised by it. I admit I meant no offence to the court if I'm not wearing the right coloured pants. I've worn these trousers many times in this court throughout this trial without any comment from your Lordship but I will endeavour to wear the proper colour from now on. I must say I'm not aware of the regulation with the greatest of respect

Court: Well, Mr Barry you, you are senior lawyer. You are senior lawyer.

Barry: Yes.

Court: You know.

Barry: I'm not aware of it.

Court: The Australian practices is very, very strict. Very strict in Australia and elsewhere.

Barry: In Australia is it?

Court: Very strict

Barry: I'm not aware of that.

Court: Well if you are appearing in the High Court or the Supreme Court you should be aware.

Barry: I'm aware of dress standards my Lord, generally, in relation to courts and never, at any stage in my legal career, have I sought to flout the rules. It would be disrespectful and I'm not intending to do so now.

Court: Well what I will do it, I will allow you…I will hear you on condition that when the court resumes this afternoon you will be properly robed, Mr Barry.

Barry: Well I am properly robed my Lord. I have my robes on with the greatest of respect and if you're telling me that I have the wrong coloured pants on, I will go home now and change them.

Court: Do you wish to do that?

Barry: I do, if that's such a great issue.

Court: I'm mindful of the fact that there's been two days' delay in this trial and some of our witnesses are overseas and witnesses who have come and are ready to go back. I am prepared to hear you until the court rises this morning.

Barry: No, I'm not prepared to go on in these circumstances I must say. If your Lordship's telling me that I'm improperly attired to appear in this court., I'll go home and change.

Court: Alright.

Barry: It's simple as that. I'll do it now. I might indicate to you I don't possess a long sleeve shirt so I won't be wearing one. I can't wear them, they're too hot and I don't wear them in this country.

Court: Dark trousers, Mr Barry.

Barry: Yes, I've got a pair of dark trousers and I've worn them just about everyday in this court.

Court: Well, everyday, not today

Barry: No.

Court: Not today. Well do you wish me to adjourn now?

Barry: Yes, please. I might indicate my Lord, none of the time wasted in this trial has being due to the prosecution in this stage.

Court: I've said that I'm prepared to hear you on condition that…

Barry: No, no I'm not prepared to go on, I might say my Lord. You've indicated to me that I'm improperly attired.

Court: Yes.

Barry: …and that's a breach of the rules. I don't intend to breach any rule.

Court: Very well.

Barry: It hasn't been done deliberately, it's been done inadvertently and if your Lordship thinks it's such a moment, then I will go and rectify it immediately. In my submission, the matter should have been raised privately with me by your associate rather than raise it in open court at this point in time. It is with the greatest of respect what I consider a trivial matter.

Court: Is it?

Barry: Yes.

Court: I'm surprised Mr Barry.

Barry: I'm not.

Court: I'm surprised. You are a senior lawyer in this jurisdiction and you are here as a mentor, right. You are being watched.

Barry: Obviously.

Court: You should be setting a good example for young lawyers in this country. Alright.

Barry: I am my Lord, I am.

Court: You are not at the moment. They're going to wear scrappy uniform in this court. That is the point.

Barry: Well if you're suggesting that I'm wearing scrappy clothing, I take offence to it.

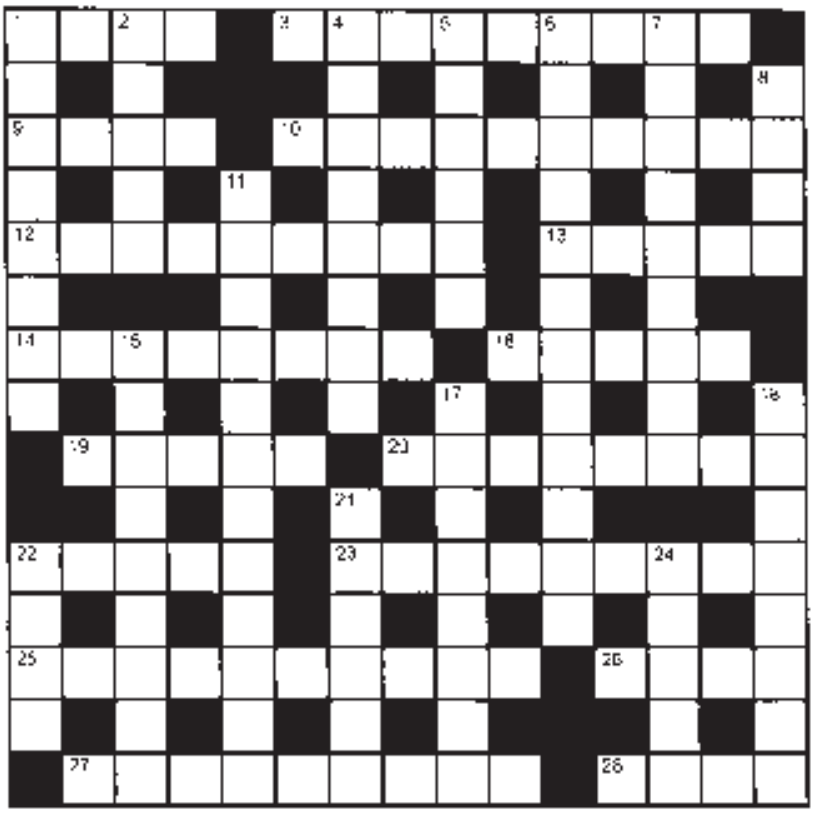
Court: I'm not saying that you are.

Barry: My Lord, I don't understand the point then. If they're the wrong colour, they're the wrong colour and I apologise, but I'm not gonna stand here and be insulted by your Lordship about my clothing.

Court: It is not an insult. It is normal practice in other jurisdictions.

Barry: Alright. Well, I apologise for not being aware of an obscure regulation in relation to it and I'll rectify it

Court: Very well. Court will adjourn until 2.00pm this afternoon. Court will rise.



Across

1 Her majesty surrounded by knight radical. (4)

3 Single amp recharged the current CJ. (9)

9 Urges English leader to precede 1-across, preceding head of state? (4).

10 Lawless directions lead to judgment. (10)

12 Italian slowly got in a lather, loosely without key. (9)

13 Former NSW CJ does Latin (and around a cask). (5)

14 Honour within hairdressers for a CJ who never wigged for the bench. (8)

16 Fergie's second daughter drops European debut for an Arabian sprite. (7)

19 A quilt of the male French animal doctor. (5)

22 Mum, mum backed around daughter for a French wife. (5)

23 "Disseise without the covenant." Sure motto out on the edge? (9)

25 Streamlined brook shape for idiom collection. (6-4)

26 Purveyor of porgies unceremoniously dropped the kids. (4)

27 Epics iron out exactness. (9)

28 Last love buries doubt, all for nothing!. (4)

Down

1 Sound leak back, beneath and without the ridge on the under surface. (8)

2 "Okay?... de Coverley?" (5)

4 Pain can force scene (8)

5 Lizards that climb up Wall Street? (6)

6 Machination machines I selected rot weirdly? (3-9)

7 "We are merely dogs"; a doctrine minimal, as designed (9)

8 Single flat. (4)

11 Bach cries "mum"? Works many of his works. (7,5)

15 Confused underlayer loses yen to be a cleaner? (9)

17 A brilliant musician? Its own reward loses note an alien orchestra leader (8)

18 I too roar in tune for music with voices. (8)

21 First NSW CJ of Serb extraction?. (6)

22 A little bike dropped dead, being dejected. (4)

24 Evildoer upped and dropped wine, for something in a martini. (5)

Solution on page 83

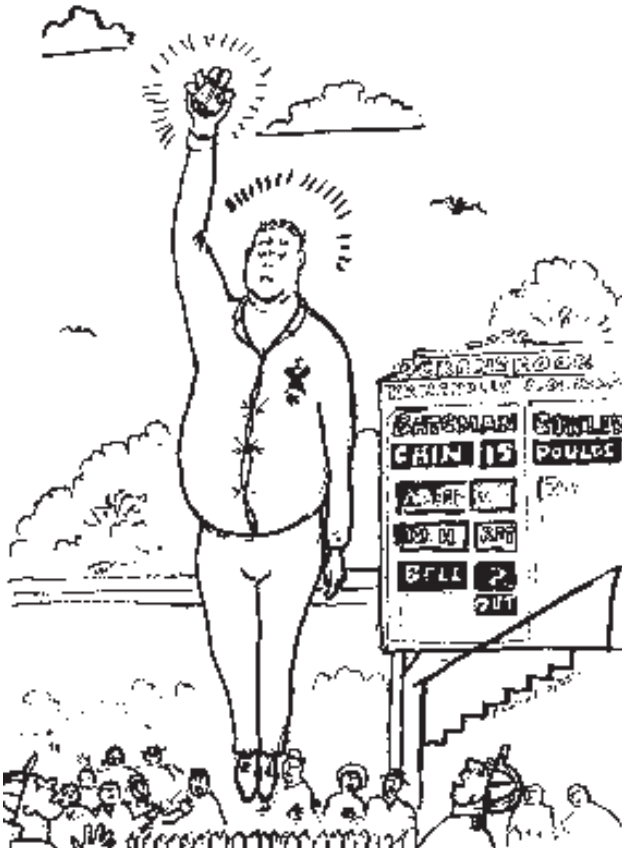
Silks v Juniors cricket match

By Andrew Bell

Thanks to the energy and organising ability of Julian Hammond of the junior Bar, this match was played on what became a hot and sunny Sunday in early February at the Hordern Oval at Cranbrook School. The silks were strengthened by the recent elevation to that status of Durack and the secondment of James Sheller whose inclusion in the silks side brought down the average age significantly.

Batting first, Bilinsky (23) and Scruby (45 not out) powered along impressively until Bilinsky was bowled by the evergreen Hastings. Stowe and Chin advanced the total until, in the highlight of the day, Chin struck Poulos for what looked to be a towering six until Ireland left the ground, Warwick Capper-like, flung out his right paw and intercepted the ball with a nonchalance he usually reserves for his High Court appearances. Poulos, of course, claimed the credit and illustrated the moment for prosperity's sake. Hammond (35 not out) and, at the end, Gyles (24) with a late flourish advanced the total to 185 after 40 overs, Hastings ending with figures of 2 - 21, Sheller with 2 - 19, Poulos with 1 - 28 (off three overs) and Ireland 1 -16.

The silks responded with a total of 140 from their allocated overs with Durack (48 not out) and Morrison (31 not out) the leading scorers. Sheller (13) and Poulos (batting without headwear) (10) also advanced the total. Callaghan, who had dined well the night before, was dismissed for four, caught Lachlan Gyles, bowled William Gyles (aged eight). The younger Gyles had fielded for both sides and demonstrated greater mobility than some of the other players. As Hugh Marshall said in his lilting tone, and with a flash of inspiration and originality, 'cricket was the winner on the day'



Without the gloves...


With the gloves...Ireland QC behind the stumps.

NSW Bar XI v Queensland Bar XI

By Lachlan Gyles

On 2 April 2005 the NSW Bar cricket team travelled to Brisbane for its annual clash with the Queensland Bar, hoping to emulate the feat of the NSW Pura Cup team the weekend before.

The team had not won north of the border since 1993, but hopes were high due to an injection of youth into the side, and the old heads from Queensland did appear to be somewhat concerned when the young New South Wales side arrived at Souths, the former home ground of GS Chappell and IA Healy.

The track looked flat and hard and Gyles had no hesitation in sending the Queenslanders into the field when given the opportunity to have first use of the wicket.

Bilinski(33) and Steele(20) got the visitors away to a steady start, but the highlight of the innings was the partnership for the third wicket between Durack(48) and Carroll(74). Durack was at his wristy best, while Carroll took to the Queensland bowlers like a Russ Hinze to a smorgasbord, helping himself to five sixes until dismissed short of a well deserved century with the score at 4/186.

Scruby(16), Stowe(6), Gyles(12 n.o.) and Neil saw the total to 223 off the allotted 40 overs, and we went to lunch better placed than we had been for many years for an elusive away win.

Queensland got off to a flyer, Drysdale and Taylor amassing 70 of the first eight overs. Carroll then removed Drysdale and Durack spun one past the wide bat of the Queensland captain Traves for Stowe to whip the bails off with the former Sheffield Shield player out of his ground. 2/94 and NSW was back in it.

Durack then removed Taylor, the stubborn Queensland opener, well caught by sub Collins, who it was said had not taken a catch for years for the local side. He then came on to bowl and picked up the crucial wicket of Neate, and with Bilinski chiming in with another two, at 7/140 approaching the last ten overs, we had already booked a seat for the Callinan trophy on the Qantas flight home.

Padded up.

Alas, a swashbuckling 60 by debutante and Queensland no. 9 Crawford got the home side to within four runs with seven balls left. A run out through a Bilinski direct hit then set the scene for a dramatic climax, with Queensland needing four runs off the last over with nine wickets down, but to our dismay Queensland no. 11 Roney steadied the ship and was able to see the Queenslanders home with two balls to spare.

All in all a great match, followed by an equally good post match function at the home of Greg Egan in which the visitors were left to reflect on 'the one that got away'.

There's always next year…

Bilinsky watchful, Morrison SC on the move (Silks vs Juniors).

The Barbour Cup

By Anthony Reynolds

The original Barbour Cup for the Bench and Bar Tennis Competition was donated by Richard Barbour in 1965. In 1994 the cup became known as Barbour-Backhouse Cup, named after two District Court judges.

This double competition has been principally played at the Royal Sydney Golf Club between the years 1965 to 2004.

Without doubt theses magnificent facilities (ten lawn courts, the tennis house and the use of the Sports Bistro dining room for the luncheon and after final drinks) offered to the NSW Bar Association each year by that club's Tennis Committee, is testimony to the golf club's acceptance that judges and barristers have to have one day a year to relax and enjoy playing in a tennis tournament rather than their usual daily rigors of court attendances. No other organisation is granted this privilege to use the golf and/or tennis facilities for a day's play at the club.

The 2004 tennis day was held on Tuesday, 21 December 2004. The Grand Final was won by Justice Michael Walton and Frank Veltro defeating Randall Powell and Warwick Reynolds 6/4 6/4.

This competition has had many double pairs over its forty years history (1965-2004). There has been one player who has had an outstanding history in winning this competition with different partners. His record will never be repeated in our lifetime!

Bryan Beaumont won as junior counsel in 1968, 1972 and 1976; as senior counsel in 1979, as a justice of the Federal Court in 1988 and in 1999 the pair of justices Brian Beaumont and Kevin Lindgren were leading in the day's competition for the semi-finals when they were urgently requested by the registrar to attend back at the Full Court of the Federal Court, Queens Square by 3.30pm that afternoon. Play was rescheduled to include the fifth pair for the semi-finals.

Not until after his last appearance in the 2002 year's competition due to his ill health in 2003, did Justice Beaumont put his racket up and not be in the winner circle! In both the 2001 and 2002 years' competition Justice Beaumont played with Justice Roger Giles. They were defeated in the 2001 year by Randall Powell and Nicholas Beaumont (the judge's son) in a long lasting Grand Final that took over 1 1/4 hours to complete (after 7 rounds during the day) - 6/3, 3/6, 6/1.

In the 2002 year they lost in the semi-finals to Nicholas Beaumont and Michael Elkaim 7/5.

Justice Bryan Beaumont on the occasion of his retirement.

It is a great achievement for any tennis player to be able to compete at such a high level for thirty eight years (1965 - 2002) in such a competition where all players are evenly graded each year for the day's play.

All the players miss Bryan at the yearly competition and wish him the best in his retirement from competitive tennis and the Federal Court where he also achieved, before his recent retirement from same in 2005, the position of the highest ranked Federal Court judge other than the chief justice of the Federal Court of Australia.

Three cheers for Bryan !!!

Coombs on cuisine

Handy

In the late 1970s, I was to lunch with a (then) party of the third part, and discreetly chose the dining room of the Cricketers' Arms Hotel in Surry Hills. There I discovered one Paul Merroney was cooking up a storm. I wrote a review for *Bar News* in which I said, unwisely, 'Eschew the ground floor bar which is inhabited by sturdy females in overalls, drinking schooners of black, and engaging in vigorous arm wrestles. Go directly to the first floor where a tyro called Paul Merroney is wielding the pans.'

This provoked a *Sydney Morning Herald* hack to say that I must be *so effete*. An old friend, Ivan Judd, leapt to my defence – ('No effete he, a man of the people etc') – the controversy raged for circa 24 hours and doesn't matter anyway, but I claim to have discovered Merroney!

History traces him thru a small gig of his own somewhere in the near east and then to Merroney's at Circular Quay, with our own Bruce Solomon as silent partner. Initially very successful the venture ultimately failed, I think, because the shiny floors & full length glass walls made it just too noisy. (Tax law changes & RBT may have also had an impact, but the food was always special.)

The great news is that Paul is back! *And how*! He is proprietor chef at Bistro 163 a few yards down from Elizabeth in King St. All his super specials are there to be had. I will mention only my personal favourites: deep-fried Blue Eye cod with chips & tartare; the beer batter is wafer thin, smooth and fine as a sheet and so crisp; leg of lamb, 'Irish stew style', brilliantly traditional, with fresh peas and potato, but with gorgeous baby lamb rather than the noisettes of County Clare in the rich lamb stock.

Not quite so handy

A sibling lunch with sister Janet (the Mother Hen of so many of the talented women who adorn our Bar), brother Jim, now a roving stipendiary magistrate, brother Jerry who puts people to sleep professionally and a stray niece, took us to Ecco at the Drummoyne Sailing Club. A stunning location, view wise, even for Sydney, this is a family operation in a very Italian style.

What was most impressive was the choice of the freshest ingredients, local in season produce. Figs lightly grilled, wrapped in prosciutto and topped with Gorgonzola were delicious. Ditto zucchini flowers stuffed with pecorino and deep-fried.

For mains, the stand-outs were skewered seafood grilled with garlic butter prawns, scallops, Atlantic salmon bits and a yabbie, and also a stunning, glutinous, melt in your mouth osso bucco.

A shared creme brulee stopped us dead.

The wine list is well chosen and won't bankrupt you. We drank Villa Maria sauvignon blanc from New Zealand and a Rosemount cabernet sauvignon.

Don't go on Sunday unless you like a lot of noise! I went back on a Tuesday and found it suited me better.

Home fare

During the rugby season, I am partial to a meat pie. Last week, knowing we had steamed chicken and some mushrooms I suggested chicken and mushroom pies. The party of the second part said, 'Leave it to me.' At half time in the Waratahs match she presents me with a large mushroom stuffed with chicken and onion in white sauce, topped with a circle of puff pastry. Not your Four'N Twenty, but healthier and very yummy.

Bistro 163

163 King Street, Sydney

Ph: (02) 9231 0013

Breakfast, lunch: Monday – Friday

7am to 4pm

Ecco,@ Drummoyne Sailing Club

2 St Georges Crescent, Drummoyne

Ph: (02) 9719 9394

Lunch: Tuesday – Friday & Sunday

Dinner: Tuesday – Saturday

John Coombs QC