barnews
THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2019

A special edition on

PRACTICE & PROCEDURE

PLUS

The future of the independent Bar in Australia

Assessing early appropriate guilty pleas one year on

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Practice and Procedure

A special edition

While this might come as a surprise to our large and regular readership, the editor of *Bar News* is not normally inundated with correspondence. It is comparatively rare for an edition to generate more than a single letter or note. As a result, those I do receive I cherish.

For example I remember fondly a letter I received in response to Autumn 2018, a special edition on First Nations on the Bar, which the author described as bearing an overall theme of victimhood, containing descriptions of our world-enviable democracy as a 'tyranny of the majority', proselytising Marxist Gender Theory, and actually deriding serving politicians.

So you can perhaps understand why I was pleasantly surprised by the reaction to our last edition (Autumn 2019, *We are the Bar*, a special edition on Diversity). Instead of one or two well-meant missives, I received dozens of notes, emails and phone calls commenting on the edition. Beyond pointing out that the fold-out *Vanity Fair* cover featured models that in a couple of cases fell short of being entirely convincing as barristers, the response was entirely positive. Amongst them I counted more than six personal notes from Supreme Court Judges congratulating the committee. One Queensland Judge was so impressed he had an electronic copy forwarded to the entire Queensland judiciary. And the President of the Court of Appeal, Justice Andrew Bell (past *Bar News* editor and a fine judge of a good cover) invited the whole committee to drinks so that the members of the Court of Appeal could thank them in person.

I have to say it *was* a good edition, for which substantial thanks must go to the Association's Diversity and Equal Opportunity committee who helped identify and curate many of the articles. What made it so good was that it revealed the stories behind members of the Bar – demonstrating what the Bar is like now and what it is becoming. It is a more inclusive place.

I was pondering this while reading one of articles for this edition, the interview with Andrew Pickles. The interview addresses a glaring omission from the last edition, namely a substantial piece on LGTBI barristers. That

***Bathurst CJ foreshadows the impact of technology ... presaging a time when* 'physical appearances in Court might start to become a rarity'.**

omission came about as a result of the untimely if richly deserved appointment of Richard Weinstein to the Bench just as we reached our copy deadline. But I digress.

In Andrew Pickles's interview he speaks of his role as an Advocate for Change, being a prominent advocate for the LGTBI community. It reminded me of something I was told by a Judge who came to the Bar in the early 90's. He said that when he successfully applied for readership at one of the Bar's leading floors (they would say The leading floor) he had been careful not to reveal he was gay. He is certain that if he had told them he would not have been offered a readership.

That anecdote is both outrageous and telling. Outrageous because that was barely 25 years ago; telling because in today's Bar such attitudes are seen as prehistoric – a glimpse into another era when women were novel, dark skin a rarity, and men were, well, only one way inclined.

Let me turn from the last edition to this one. As our loyal readers can attest, I appreciate a special edition. Following in the mould of the excellent (and for many now well-thumbed) special edition on Expert Evidence, the committee decided to publish an edition focusing on Practice and Procedure.

This gave us a wide canvass to work with, and we have married together some wonderful pieces written by our leading jurists on practice at the Bar today and tomorrow, with more practical pieces ruminating on practice and procedure in specific jurisdictions which we hope will be of assistance to those who are seeking to practise in those areas.

Leading the charge are three wonderful pieces by Chief Justice Kiefel (*The Australian Bar – Change and Future Relevance*), Chief Justice Allsop (*The Future of the Independent Bar in Australia*) and Chief Justice Bathurst (*The Role of the commercial bar in the mid-21st century*). The latter envisages the Bar of the future, made up of counsel who are more empathetic and better listeners enabling them to obtain a greater familiarity with clients' business environments and an understanding of what it is like to work in the particular industry. Bathurst CJ foreshadows the impact of technology, going beyond online Courts to online ADR and virtual appearances, presaging a time when *'physical appearances in Court might start to become a rarity'*.

On the practical side there is a fascinating examination of one the most significant procedural changes in criminal law in NSW in recent decades, the Early Appropriate Guilty Plea reforms. I am very grateful to Belinda Baker who obtained views, one year on, from those best positioned to consider the impact of the reforms, including Chief Judge Justice Price, DPP Lloyd Babb, Richard Wilson Deputy Senior Public Defender, and three defence counsel.

Further, there are a number of wonderfully instructive pieces, such as Judge Scotting's concise note as to how to approach a sentencing hearing in WHS matters, Penny Thew's guide

to obtaining leave to appear before NCAT and Justice Sackar's note on proceedings in the Equity Division's expedition list.

This edition also carries a number of other important articles, including a thoughtful piece titled *The Psychological Impact of Judicial Work* by Kylie Nomchong and Peter McGrath, which starts by identifying the shockingly high incidence of judicial bullying and goes on to examine what might be thought as the causes of such behaviour, leaving the reader all but convinced that Judges are human too.

Another important article is Penny Thew's piece summarising the International Bar Association's findings on bullying and harassment in the legal profession.

There are also a number of entertaining pieces, including a wonderful interview with Justice Kelly Rees, who is widely admired as a lawyer and a person. Her response to the opening question is worth the cost of this edition alone.

I finish by thanking the committee for their sterling work in pulling together another edition, including Farid Assaf for collating much of the practice and procedure pieces, Kevin Tang for his beautifully written appointments and obituaries, and Victoria Brigden and Daniel Klineberg for obtaining notes on an interesting collection of recent cases, going beyond just the most important High Court decisions.

The August 2019 *We are the Bar* edition

Every year there must necessarily be some turnover of the committee. It is always difficult when committee members leave, however necessary given the many applicants. I would like to thank the two outgoing and highly valued committee members, Juliet Curtin and Lyndelle Barnett, for their contribution over recent years to the committee.

I look forward to receiving your views on the current edition. And for those inclined to write for the benefit of a wider audience, I also welcome by 1 November draft articles for the next (Summer) edition.

Ingmar Taylor SC

Challenges for practice at the NSW Bar

By Tim Game SC

In this column I would like to concentrate on two major issues currently facing practice at the Bar, namely the parlous state of legal aid funding and the effect of the Government's restrictive compulsory third party regime on the rights of injured people, and also mention major initiatives in the area of advocacy training.

Legal Aid

In June I made a statement to the Bar in which I said that members should not feel that they have any obligation to take on legal aid briefs when they will not receive anything approaching adequate payment for work done. This involves not just wholly inadequate rates, but an entrenched failure to make proper allowance for work actually done, particularly in relation to preparation. These two features of the current system have a compounding negative effect.

The circumstances that led to that statement are well known to those who have regularly undertaken legal aid work. There has been no increase in the amount paid to private practitioners by Legal Aid since 2007 – there has not even been indexation for CPI increases over those twelve years, and in fact in 2012 (the last time there was a formal consultation regarding fees) there was actually a modest reduction in rates due to a reclassification of fee levels undertaken by Legal Aid NSW. Barristers undertaking legal aid work have seen at least a 20 per cent reduction in fees in real terms over the twelve year period from 2007. Accordingly, it is simply financially unsustainable for many barristers to spend the time and do all that is necessary to undertake legal aid work and properly prepare their clients' cases and satisfy their professional obligations in this regard.

The Association's position has received ongoing coverage in the media, and I have been gratified to receive many messages of support from members, which indicates the degree of concern about, and the seriousness of, this issue.

The impact of the issue on the administration of justice was exemplified by

This is not the only serious trial date that has had to be vacated because of the difficulty in securing counsel or securing a sufficient grant of legal aid.

the judgment of Fagan J in *R v Munshizada; R v Danishyar; R v Baines* (No 2) [2019] NSWSC 834, which was handed down on 3 July.

In that matter his Honour vacated the date for a four month murder trial as a direct result of the inability of the accused to obtain defence counsel in a trial where Legal Aid fee scales would apply. In the course of the judgment his Honour said that the 'inability to secure the services of trial counsel at legal aid rates on reasonable notice for a long trial is a problem that requires urgent attention to enable this Court to do its work'.

His Honour noted that the Legal Aid Senior Criminal Law Solicitor in the Grants Division of Legal Aid NSW had 'provided a straightforward economic explanation' for the inability to secure counsel. This included that while barristers 'take on larger and longer legally-aided matters because of their commitment to justice', they 'cannot base their practice exclusively on legally-aided briefs otherwise they will not generate sufficient income to meet their overheads, chambers fees and generate sufficient income for their personal commitments…'. His Honour summarised the evidence of the solicitor that 'counsel's fees payable by Legal Aid are insufficient to secure representation for accused persons by professionals of the required standing and ability'. His Honour accepted that this 'systemic explanation' corroborated the evidence of the solicitors in the trial that the lack of representation was beyond the control of the accused.

This is not the only serious trial date that has had to be vacated because of the difficulty in securing counsel or securing a sufficient grant of legal aid. The Association is very concerned that these circumstances have become more frequent and will continue to have long term implications for the delivery of justice in this State. Without an urgent and substantive increase in legal aid rates for counsel, important criminal trials may proceed with either no representation or inadequate representation. Alternatively, they may be delayed with negative effects for parties and victims of crime.

More recently I have written to the Government and Legal Aid NSW urging them to approve an immediate increase in legal aid rates in order to address the current crisis in our criminal justice system.

I have also initiated a formal consultation process with Legal Aid NSW pursuant to section 39 of the *Legal Aid Commission Act 1979*. Under the Act, Legal Aid NSW is required to consult with and take account of the views of the Bar Association in respect of fees to be paid to barristers.

Briefly put, our position is that Legal Aid NSW is obliged to pay fair and equitable rates for work actually done, not, as is currently the

case, to maintain unsustainably low rates based on false assumptions about some kind of de minimis engagement by counsel in the case at hand.

The Association will continue to advocate strongly for a fair and equitable system of legal aid rates and I will keep members informed of developments regarding this crucial issue. I would urge members who have been involved in matters adversely affected by inadequate legal aid rates to bring them to the Association's attention.

Advocacy Training

The Bar Association is strongly committed to providing specialised ongoing training to support and hone the skills necessary for a successful practice at the bar. As part of this commitment, the Association has subsidised two new training programs aimed at promoting excellence in advocacy. The Association is the first independent state bar to offer its members the Vulnerable Witness Advocacy Program, which provides practical training in the sensitivities involved in dealing with vulnerable witnesses in Court.

The second program, the Advocacy Skills for Trial Advocates Workshop, is specifically aimed at barristers with 3-5 years' experience. This workshop will provide participants with the opportunity to hone their in-Court (criminal trial) advocacy skills.

The new programs will be held in October and November respectively.

CTP

Next I would like to say something about the Government's 2017 compulsory third party scheme. For some time, the Association has been advocating the need for change to the 2017 CTP scheme. Regulations made under the *Motor Accident Injuries Act 2017* operate on the basis of an excessively broad definition of 'minor injury', which means that people who are permanently injured in motor accidents can be denied access to common law rights and receive only a limited amount of statutory benefits. That may occur even in circumstances where their injuries mean that they are unable to resume their chosen occupation.

Data provided to the Association regarding the scheme indicates that claim levels are far lower than originally estimated and could justify a reduction in CTP premiums. To date, however, the Government does not appear to be prepared to consider an increase in benefits for the injured despite the low level of claims. Contrary to earlier suggestions by the Minister that if the scheme targets were exceeded the response would be an improvement in benefits, it appears that this is no longer the preferred option.

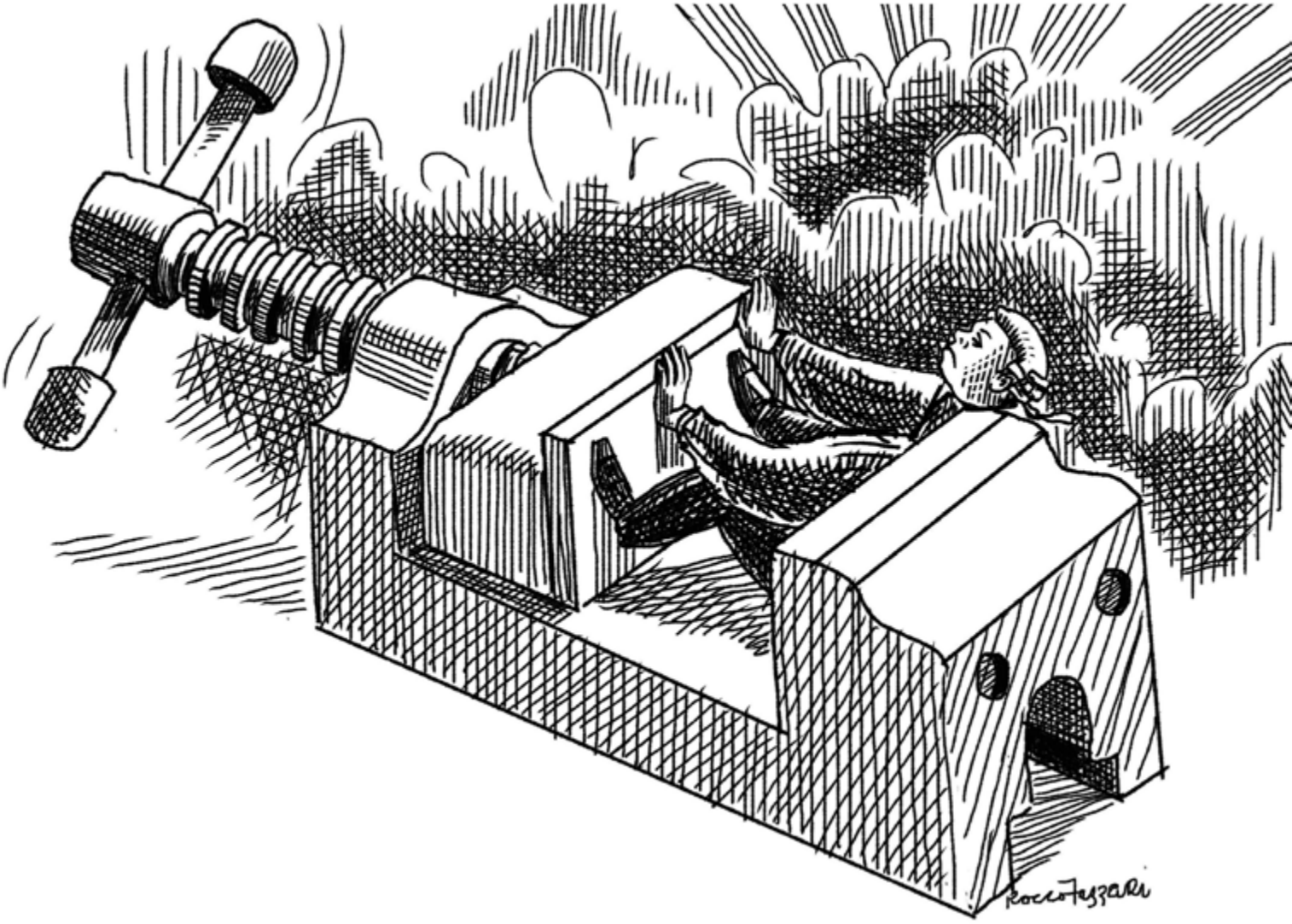
The Common Law Committee has been monitoring the situation as closely as it can, although the dearth of information (sought from government but not forthcoming) has meant that we have had to undertake our own work as to the underlying picture and future projections. On the basis of what we have seen, compared with earlier projections about uptake an excessive number of claims have been disposed of as minor injuries at an early stage (close to 60%). This means that far fewer cases will progress as damages claims even though injured motorists may have suffered what, in ordinary parlance, might be described as quite serious injuries. Depending on how one looks at it, this either leads to wildly inadequate benefits for injured motorists or excessive profits for insurers. The last comment is not an idle one given that information available to us going back to 2000 shows insurer profits running year after year in excess of 20%.

Although it is early days in the life of the 2017 CTP scheme, it appears to us that the lack of provision for proper legal advice at an early stage is one reason why claims are not being made, and determinations are not being challenged, after insurers have assessed particular injuries as minor.

A related issue involves the Government's proposal to establish a merged personal injury jurisdiction, which would involve a single tribunal to deal with matters currently heard by the Workers Compensation Commission and the Claims Assessment and Resolution Service. The Association is concerned to ensure that the proposal does not limit the current level of access of parties to the Courts. We are not aware of any particular problems regarding the number of matters involving work related accidents and motor accident schemes that proceed to Court, or of any disproportionate impact on the Courts in this regard. Nor are we aware of any significant delays in the District Court where most of these matters are heard. In those circumstances, we do not believe that it is necessary to place any part of the current jurisdiction of the Courts under the schemes within the proposed tribunal.

Together with senior members of the Common Law Committee, I have met with the Minister for Customer Service to pursue the Association's concerns regarding the 2017 CTP scheme and the merger proposal, and I will keep members informed regarding progress on these crucial issues affecting practice at the NSW Bar.

NEW SOUTH WALES
BAR ASSOCIATION



The psychological impact of judicial work

Australia's first empirical research measuring judicial stress and wellbeing: an overview of a recent study

By Peter McGrath SC and Kylie Nomchong SC (Wellbeing Committee)

Over the last 18 months, the work of the Wellbeing Committee of the NSW Bar Association has included research into judicial conduct and in particular bullying behaviour. This evolved out of the Quality of Working Life Survey undertaken by the NSW Bar Association in which 66% of respondents indicated that they had been subjected to judicial bullying. Qualitatively, that conduct ranged from inappropriate comments to abusive behaviour. The key feature of it was that the effect on the barrister was demeaning and humiliating.

One of the responses by the Wellbeing Committee was to publish an article in the *Judicial Officers Bulletin*[1] in which, among other things, the causes of bullying were explored. This included the recognition of the work pressures under which judicial officers are required to perform.

The article said '…..there needs to be a more comprehensive understanding of the pressures facing judges. While there has been a reluctance to acknowledge the problem of judicial bullying, equally problematic is the reluctance to discuss the stresses of judicial life arising from (among other factors), the loneliness of the role, the strain of constant non-delegable decision-making,

the potential exposure to criticism from the media and the increasing demand on finite judicial resources often resulting in mounting caseloads.

Despite the emergence of counselling services and wellbeing programs, the suicide of Melbourne magistrate Stephen Myall earlier this year demonstrates that crippling caseloads is still an issue of critical importance. Similarly, the mental health issues consequent upon dealing with a long running hearing into child sexual abuse was made clear by Magistrate Heilpern in his address at the 2017 Tristan Jepsom Memorial Foundation Lecture.

While judicial stress does not justify bullying behaviour, it is a contributing factor and one which must be addressed in a thoughtful way. Our judicial system relies on both judges and advocates in order to operate efficiently and fairly. Judges are equally entitled to a workplace free from the overwhelming pressure caused by unmanageable caseloads and inadequate resources.

Recently, a study was published called 'The Psychological Impact of Judicial Work: Australia's First Empirical Research',[2] by C Schrever, C Hulbert, T Sourdin. In that article, the authors described the outcome of studies conducted between July 2016 and April 2017 for the purposes of ascertaining the sources, nature, prevalence and severity of judicial stress in Australia.

The sample pool comprised judicial officers with appointments to five Australian Courts (of the 38 currently in operation). The identities of the participating Courts is not revealed. However, it was confirmed that the Courts range from summary to appellate of varying territorial jurisdictions.

The average age of the participants was 57.8 years and the average length of service as a judicial officer (at the time of the study) was 9.5 years.

The testing was carried out by way of a tiered approach, comprising the following three distinct components:

1. A self-administered survey focussed on stress symptoms and experiences which also involved the collection of some limited demographic information.
2. A self-administered survey focussed on mental health literacy, burnout, secondary trauma, and alcohol use.
3. A semi-structured interview relating to the participants' particular experiences of work-related stress, major sources of judicial stress and ideas for programs and initiatives to reduce stress.

152 judicial officers participated in the first tier of testing. That number declined considerably in the subsequent tiers to 125 and 60 respectively.

The pattern of stress and psychological ill-health among judicial officers differed from that of the Australian legal profession generally. By comparison with barristers, judicial officers reported higher rates of non-specific psychological distress in the 'moderate to high' range. However, the rate of distress in the 'very high' range was considerably lower for judicial officers than all levels of the legal profession.

Rather, judicial officers reported symptoms of depression and anxiety at rates similar to those suggested for the general population, which is dramatically lower than those of the Australian legal profession.

In the 'moderate to extremely severe' range, the rates of depression, anxiety, and stress symptoms for barristers and solicitors were more than three times that of judicial officers.

Although there is not evidence of a widespread mental health problem among the Australian judiciary, there is a stress problem. According to the report, i.e., a finding consistent with statistical data collected in the United States of America.

The authors propose three hypotheses as an explanations for the differences in psychological symptomology between Australian judicial officers and the Australian legal profession generally:

1. Given judicial officers are invariably picked from the pool of legal practitioners; the workload of a judicial officer is less demanding than that of a practising solicitor/barrister, such that the key driver of mental health issues within the legal profession is less applicable to judges.
2. Practitioners appointed to the bench are more well-equipped for legal work, implying that the judicial appointment process is effective.
3. Given judges tend to serve their appointment at the mid-point of their lives, it may be a reflection on the well-documented observation that middle life tends to be a period of relative mental stability.

However, symptoms of 'burnout' and secondary trauma are features of the occupational stress experienced by many judicial officers. In that regard, 4% of judicial officers in the study scored within the 'highest risk' profile (i.e., high levels of exhaustion, cynicism, and low professional efficacy) for occupational stress. Only 24.8% of participants fell within the 'lowest risk' profile. This means that just under three quarters of the participating judicial officers had symptoms consistent with a degree of burnout risk.

The average score with respect to professional efficacy was in the 'high range' and exceeded that of other 'at-risk' professions (i.e., psychiatric workers, civil servants, and military). It is opined that, although judicial officers are more vulnerable to burnout, their experiences of burnout symptoms are likely to be characterised by feelings of emotional depletion and loss of meaning rather than feelings or manifestations of incompetence or ineffectiveness.

The study places emphasis on findings in respect of Secondary Traumatic Stress (**STS**), which is also referred to as 'vicarious trauma'. The mean scores of participating judicial officers suggested that STS is a common feature of the occupational stress experienced by Australian judicial officers. An overwhelming majority of judicial officers met at least one symptom of STS at the time of assessment. More significantly, 30.4% of participating judicial officers fell within the 'moderate to severe' range for STS. It is suggested that, in conformity with some relevant research on the topic, 'moderate to severe' levels of STS are likely to satisfy the diagnostic criteria for Post-Traumatic Stress Disorder psychopathology.

Finally, the study concluded that rates of alcohol use among Australian judicial officers was comparable with that of the Australian legal profession generally. However, those rates are considerably higher than the documented level of alcohol use within the general Australian population. Over 30% of judicial officers participating in the study scored in the 'medium to high' risk levels indicating problematic alcohol use (as compared to 18.8% of the general population).

The Wellbeing Committee is continuing to pursue initiatives to come to a shared understanding of what constitutes judicial bullying, why it occurs, and an agreement from the Courts to address it.

A protocol or set of guidelines would also serve as a useful educational tool in orientation and legal development programs for newly appointed judges and also for barristers. Such a protocol would help reshape expectations of what is considered appropriate Courtroom behaviour. In time, there may be an appetite by the judicial system to adopt a Code of Conduct. In the meantime, the development of a transparent set of guidelines is being considered in many of the Courts. Further, the Wellbeing Committee is considering a number of other initiatives, including Courtroom observation by objective observers, further data collection to provide concrete examples of the types of conduct which are and are not acceptable and seeking ways in which complaints of judicial bullying can be made so as to maintain confidentiality of the complainants.

ENDNOTES

1 K. Nomchong SC 'Judicial Bullying: the view from the Bar' *Judicial Officers Bulletin* November 2018, vol 30 No 10.

2 This article is available via Westlaw AU: Schrever et al, 'The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing' 28 *JJA* 141.

The incredible shrinking Bar

By Anthony Cheshire SC

Each stage of my career at the bar seems to have been marked by arriving just after the bar's golden age, whether it was the fun of civil jury trials, the pre-mediation era of cases settling on the steps of the Court (followed by a long lunch), the pre-Civil Liability Act personal injury rural circuit bonanza or the Friday long-lunch that apparently everyone used to do in the olden days.

I do, however, miss the old level 7 of the Supreme Court building. The registrars all sat on that level at 9am, which meant that one could have several briefs in different lists and flit between the Courts. Apart from the fun of juggling several matters at once and the obvious monetary reward of doing so, there were many other advantages that flowed.

It was a good place to start a career and learn Court craft, not only from the personal advocacy experience (and mistakes) but from watching others (and their mistakes). Even those who had made those appearances as a solicitor were able to learn the difference in appearing as counsel.

It was also a good place to learn that cooperation and compromise on directions were unlikely to harm the client's interests, but in an appropriate case might well advance them. Apart from the client's interests, agreeing a timetable would allow a matter to be dealt with by consent at the top of the list and avoid the lengthy wait to achieve what was usually a similar result an hour or so later. There was also cooperation between members of the profession in holding a matter in the list or mentioning it by consent when the opponent was appearing in one of the other Courts.

Then there were the professional links that were forged: with the senior person on the floor who was too busy or important to appear in person; reporting back to a new solicitor on a job well done; establishing a reputation with opponents; and demonstrating competence to the Court.

Such appearances also often led to new contacts and an unexpected, but enjoyable and fruitful, new area of practice.

The Court renovations made it more difficult to flit between lists, but there are two other developments that have damaged this lifeblood of the junior bar and which seem to have passed without comment: online Courts: and solicitors doing their own appearance work.

Online Courts remove the opportunity to have that informal constructive discussion at an early stage; and mean that the settlement discussions often only take place after significant costs have been incurred and often unnecessarily so, making a settlement more difficult to achieve and more likely to leave the clients (justifiably) dissatisfied that the only winners from the litigation appear to be the lawyers.

The advantages I have discussed above were largely from the point of view of the bar and in particular the individual junior barristers, but there were also advantages to the client.

Many cases seem to start on a false basis, in an unnecessary and unproductive adversarial manner or in a rather haphazard way without much regard to the real issues (whether legal or commercial) or the real merits. Where that has occurred, a conversation between counsel pointing out a weakness in an opponent's case, identifying the real legal commercial issue for one's client or suggesting early settlement negotiations will often advance the client's interests far better than an adversarial discussion about timetabling. This is particularly so if it takes place at an early stage in litigation before costs have got out of control and become an impediment to settlement.

Online Courts remove the opportunity to have that informal constructive discussion at an early stage; and mean that the settlement discussions often only take place after significant costs have been incurred and often unnecessarily so, making a settlement more difficult to achieve and more likely to leave the clients (justifiably) dissatisfied that the only winners from the litigation appear to be the lawyers.

Allied to this has been solicitors keeping their appearance work in-house, often to give young solicitors the opportunity to practise their advocacy as part of transitioning to the Bar.

Solicitors then carry out the online directions hearings and appear in person where required, so that barristers are being briefed less and briefed later. That is often not in the best interests of the client, but it is definitely not in the best interests of the junior bar.

However, rather than embarking on a marketing drive, stressing the advantages of the junior bar, including objectivity, a second opinion, cost and advocacy expertise, and seeking to expand into the lower Courts, the junior bar rushes to increase its rates and compete with established practitioners for the slim pickings of final hearings

in the higher Courts. This in turn makes it less likely that solicitors will engage junior barristers for directions hearings, with all the disadvantages discussed above.

There is only a finite amount of trial work in the higher Courts and thus the effect of this is to increase the level of competition between barristers and reduce the amount of work for many. This is especially so for the junior bar, who are being squeezed for work between solicitors and more established barristers. It's little wonder that there is an increasing number of grumblings from the junior bar about insufficient work and low earnings.

Add to this that Court filings are down and the feeling that a recession is on the way, and things are not looking particularly rosy for the bar and especially for the junior bar. It may not be time to panic yet, but it is time for a major rethink as to how the bar presents itself and its unique advantages. A good starting point would be an honest and frank conversation about levels of work and earnings; and a discussion about whether the bar wishes to be seen as providing specialist advocacy services for all appearances or whether it is content to limit its area of work to trials and contested motions.

'Us Too?' – findings on bullying and harassment in the legal profession[1]

By Penny Thew

Described as the largest ever global survey of legal professionals, the results of the 2018 survey conducted by the International Bar Association were released in May 2019 in a report entitled *'Us Too?' Bullying and Harassment in the Legal Profession* (the **IBA report**).

The opening words to the executive summary of the IBA report are '[t]he legal profession has a problem', words that do appear to be supported by the stark data revealed in the report. Almost 7,000 individuals from legal workplaces across 135 countries responded to the survey, including barristers, solicitors, in-house counsel, the judiciary and legal professionals employed within government.

The results of the survey disclosed that 50% of women respondents and one in three men who responded had been bullied in the workplace, while one in three women respondents and one in 14 men had been sexually harassed in connection with work (p8). These figures were significantly higher when only Australian data was considered, which disclosed that 73% of women responding and 50% of men had been bullied and 47% of women respondents and 13% of men had been sexually harassed (p87). Of those globally who reported having been bullied, 65% had left or were considering leaving the workplace as a result (p9), with 57% of bullying cases and 75% of sexual harassment cases said to have gone unreported (p8). Australia had the highest response rate to the survey by country with the IBA concluding that 'bullying and sexual harassment are rife in Australian legal workplaces' (p87).

This data is not new and surveys conducted within the legal profession in Australia have in the past demonstrated similar rates of those surveyed reporting having been bullied and/or harassed. In 2014 the Law Council of Australia National Attrition and Re-engagement Study Report (the **NARS report**), which surveyed approximately 4,000 legal professionals across Australia, disclosed that 50% of women respondents, and over 33% of men, reported having been bullied in their current workplace. When the results of only women barristers were considered, the NARS report indicated that 55% of all practising women barristers surveyed across the country had experienced sexual harassment, and 80% had experienced bullying or intimidation.

The results of a survey conducted with practising certificate renewals in 2014 by the New South Wales Bar Association showed that 42% of women barristers who responded to the survey said that they had experienced harassment and 64% reported being bullied.[2]

The consistently high percentage of legal professionals, and barristers in particular, reporting being bullied and/or harassed is of concern.

On 26 June 2019, an LSJ Speaker Series panel discussion entitled 'Bullying in the legal profession' was conducted based on the findings of the IBA survey, with a central message being that significant reputational damage occurs to the profession generally as well as to individuals and organisations when a culture of bullying is left unaddressed. This message was echoed in both the IBA report (p16) and the NARS report (p87), with the latter inversely referring to the positive reputational impact on business and the profession of addressing harassment and bullying and identifying this as a driver for change. Linked to this, the IBA report in addition cited research demonstrating the negative impact of bullying and harassment on productivity and profitability, as well as the estimated financial loss resulting from bullying and harassment (p15-17).

Significantly, the IBA report emphasised that, while women in the legal profession are disproportionately affected by both bullying and sexual harassment, the data disclosed that 'these are not 'women's issues'', given bullying and harassment impacts all genders both directly and indirectly, the latter as a result of the adverse workplace impact (p17-8).

In its report, the IBA makes 10 recommendations, which importantly include implementing policies and standards and exploring flexible reporting models (p10). According to the IBA report, effective reporting systems that empower targets of bullying and sexual harassment to report their experiences are 'among the most critical elements' of a strategy to address such conduct (p106).

At the NSW Bar, reporting mechanisms are available for individual chambers to implement, for instance in the form of the Bar Association's Model Grievance Handling Best Practice Guideline (the **Grievance Handling BPG**). While the BPGs have had a successful rate of adoption across the NSW Bar, with more than 52% of chambers at the NSW Bar adopting one or more of the BPGs, and while the BPGs are successfully used, as with all workplaces there will be occasions where those within chambers do not feel able to make a complaint internally within the workplace.

A reluctance to report is an issue facing workplaces universally and is not unique to the legal profession or the NSW Bar. The most commonly cited reason for individuals not reporting, according to the IBA report, was fear of repercussion and a lack of confidence in reporting procedures (p106). For the NSW Bar, added to this is that, while over half of all chambers in NSW have adopted the BPGs, almost half have not, meaning that there is no internal complaint mechanism within those chambers. The observation made generally in the IBA report was that '[t]he profession should therefore urgently consider revising existing reporting models… [including] in external organisations that receive reports (a function often held by professional regulators or law societies and bar associations)' (p106).

A model held up by the IBA in its report as one to be considered is that adopted by the Victorian Bar Association whereby an anonymous complaint or reporting portal is available via a link on the Victorian Bar Association's webpage,[3] with complaints thereafter investigated, conciliated and/or (where appropriate) referred to the professional regulator (p107).

As is acknowledged within the IBA report, improving flexible reporting models will not be a cure-all. Other strategies, which could be implemented in tandem with an anonymous reporting mechanism, include incorporating 'bystander provisions' within the existing framework, including for instance within the BPGs.

Bystander provisions would require those witnessing bullying, harassing or discriminatory conduct to report, rather than leaving that responsibility solely with the target. Such a strategy is recognised in the IBA report as one 'showing significant promise', with bystander intervention training recommended (p102-3) and is a strategy in line with the current framework of the BPGs and a position advocated generally in continuing professional development seminars given by the NSW Bar Association in relation to the BPGs. Many organisations already impose not dissimilar obligations on senior members of the workplace to assist in minimising the risk of vicarious liability under statute.

Significantly, however, obligations on bystanders to report will be of no utility in the absence of somewhere (for both bystanders and victims alike) to make the reports or complaints of bullying, sexual harassment and/or discrimination. The anonymous complaint portal adopted by the Victorian Bar Association and held up as a model by the IBA, or a variation thereof, is one that could provide bystanders and victims at the NSW Bar with somewhere to report.

The results of the survey disclosed that 50% of women respondents and one in three men who responded had been bullied in the workplace, while one in three women respondents and one in 14 men had been sexually harassed in connection with work (p8).

Commensurate with the IBA recommendations, in June 2019 the New South Wales Office of the Legal Services Commissioner called for 'disclosures of' sexual harassment and bullying and launched its guide to reporting bullying, sexual harassment or discrimination under rule 42 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* or rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*.[4] The guide is said to apply to those subject to the conduct or those who have witnessed it or have knowledge of it and states that those who practise from barristers' chambers 'have an obligation to prevent a culture of harassment and bullying.'

Australian Women Lawyers has in addition called for the reinstatement of mandatory continuing professional development seminars, as well as practising certificate declarations, in respect of sexual harassment and bullying in the wake of the IBA report.

Overall, the findings in the IBA report demonstrate the ongoing work needed to address what is recognised as a significant issue within the profession, with the reader urged in the Foreword to the report to absorb the findings and 'then make a difference.'

ENDNOTES

1 This article, drafted on 14 July 2019 under the title *'Us Too': the International Bar Association's survey findings on bullying and harassment in the legal profession*, was used as a briefing paper for speakers in a Continuing Professional Development seminar hosted by the Bar Association's Diversity and Equality Committee on 21 August 2019.

2 *NSW Bar Association 2014 Member Profile Report* (Urbis Pty Ltd, March 2015).

3 https://www.vicbar.com.au/public/about/governance/internal-conduct-policies-and-reports.

4 http://www.olsc.nsw.gov.au/Documents/Information%20sheet%20Inappropriate%20Personal%20Conduct%202019.pdf.

Insolvency of corporate trustees

Amelia Smith reports on *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia* [2019] HCA 20

The High Court has resolved a longstanding uncertainty as to the distribution of trust assets in the liquidation of an insolvent corporate trustee.

The High Court determined that:

- 'property of the company' for the purposes of the statutory priority rules in ss 433 and 556 of the *Corporations Act 2001* (Cth) (Act) includes the company's proprietary rights to trust assets arising by operation of the trustee's right of exoneration; and
- such property must be applied in accordance with the statutory priorities, but only in satisfaction of 'trust creditors'.

Background

Amerind Pty Ltd (Amerind) carried on business solely as a trustee of a trading trust. It had a series of debt facilities, variously secured. After failing to meet its obligations to its lender, receivers were appointed. The receivers realised most of Amerind's assets and discharged all of the lender's debt, leaving a receivership surplus of approximately $1.6 million. They were in a position to retire, save that they were confronted with competing claims in respect of the surplus.

Relevantly, there were two competing claimants to the surplus. The first was the Commonwealth, which had paid $3.8 million in employee entitlements under a statutory scheme known as the Fair Entitlements Guarantee Scheme, and which sought, pursuant to s 560 of the Act, reimbursement at the same priority as the employees would have enjoyed under s 433 of the Act. Section 433 relevantly provides that a receiver either (a) appointed by a holder of debentures secured by a circulating security interest, or (b) who has taken possession of property subject to a circulating security interest, must pay out of the 'property of the company' certain amounts identified in s 433(3) (including amounts owed to employees) in priority to any claim for principal or interest under the debentures.

The second claimant was Carter Holt Harvey Woodproducts Australia Pty Ltd (Carter Holt), a creditor of Amerind, which submitted that the Commonwealth was not entitled to priority treatment.

The High Court has resolved a longstanding uncertainty as to the distribution of trust assets

Carter Holt advanced two principal arguments. First, it argued that the trustee's interest in the trust assets arising from its right of exoneration was not 'property of the company', with the effect that the priority regime in s 433(3) did not apply. Secondly, it argued that although the right of exoneration itself could be described as property of the company, that right (as opposed to any consequential rights in the trust assets) was not subject to the circulating security interest, with the result that the pre-conditions to the operation of s 433(3) were not met.

The litigation focussed predominantly on the first argument. Three approaches had emerged in the case law on the question of whether a trustee's right of exoneration comprised property of a corporate trustee to which the statutory priority regimes would apply:

- first, in *Re Enhill Pty Ltd* [1983] 1 VR 561, the Full Court of the Supreme Court of Victoria decided that the statutory priority regimes did apply, and the trust assets were to be divided between *trust and non-trust creditors* according to those statutory priorities;
- secondly, in *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, the Full Court of the Supreme Court of South Australia decided that the statutory regime did apply, but the trust assets were to be distributed according to those priorities *only to trust creditors*; and
- thirdly, in *Re Independent Contractor Services (Aust) Pty Ltd (in liq)* (No 2) [2016] NSWSC 106, Brereton J decided that the statutory regime did not apply, because trust property was not 'beneficially owned' by the trustee company. The property of the trust was therefore to be distributed to *trust creditors pari passu.*

In *Amerind*, the Victorian Court of Appeal held that ss 433, 555 and 556 of the Act did apply to the distribution of property constituted by a corporate trustee's right of exoneration against trust assets: *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (receivers and managers appointed) (in liq))* (2018) 354 ALR 789. Since the only creditors of Amerind were trust creditors, the approaches in *Re Suco Gold* and *Re Enhill* did not produce different results, and it was unnecessary to decide between them. However, the Court of Appeal indicated that *Re Enhill* should continue to be followed in Victoria unless and until it was overturned: at [286].

Shortly after the Court of Appeal's decision, the Full Federal Court's delivered its decision in *Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* (2018) 260 FCR 310 (*Killarnee*). In that case, the Full Court held by majority that *Re Enhill* was wrong and that *Re Suco Gold* represented the correct approach.

The High Court decision

In three sets of reasons, the High Court unanimously dismissed the appeal, but in

doing so, affirmed the approach in *Re Suco Gold* and *Killarnee*, and said that the approach in *Re Enhill* was wrong: at [44] (Kiefel CJ, Keane and Edelman JJ), [92] (Bell, Gageler and Nettle JJ), [154] (Gordon J).

As to the first of Carter Holt's two principal arguments, Kiefel CJ, Keane and Edelman JJ noted that the exclusion of property held on trust from the property of an individual trustee in bankruptcy had long applied by undisputed analogy in the case of corporations, but said that that general principle did not apply to the extent that the trustee derived any personal benefit from the rights held on trust: at [26]-[28]. One means by which a trustee can benefit personally from the trust assets is through the trustee's power to use those assets to indemnify itself from liabilities. The existence of that 'right of indemnity' means that, to the extent of the power, the trust rights are 'no longer property held solely in the interests of the beneficiaries of the trust': at [28].

The Court held that where trust assets need to be sold to exonerate the trustee, the trustee holds a proprietary right to those assets (as opposed to a mere personal power in respect of them) that ranks ahead of the beneficiaries' beneficial interest: at [32] (Kiefel CJ, Keane and Edelman JJ), [81]-[82] and [95] (Bell, Gageler and Nettle JJ), [133] and [142] (Gordon J). Gordon J noted that having regard to the breadth of the definition of 'property' in s 9 of the Act, there could be no question that such proprietary rights fall within that definition: at [141].

Kiefel CJ, Keane and Edelman JJ stated further that a trustee's proprietary rights to trust assets are commensurate with the trustee's power to use those assets to discharge the trustee's personal liability for liabilities properly incurred as trustee: at [35]. It followed from this that the use of trust funds by a trustee was confined to the discharge of trust debts: at [44] (Kiefel CJ, Keane and Edelman JJ) and [156] (Gordon J). Nothing changes upon liquidation. Kiefel CJ, Keane and Edelman JJ approved the reasoning of Allsop CJ in *Killarnee* to the effect that the 'nature and character' of the power of exoneration, namely that it is exercisable only to pay trust creditors, is not altered in the hands of the liquidator or trustee in bankruptcy: at [35].

The conclusion that the trustee's rights in the trust assets comprised property in the company that was subject to the statutory priority regime, but available only to satisfy trust creditors, was found to be consistent with the underlying purpose of the relevant provisions. The Court said that it would be perverse if the Act operated to deny employee creditors a particular priority over the holders of a circulating security interest solely for the reason that the company which employed them was trading as trustee. Moreover, the statutory priority schemes in ss 433 and 556 had been enacted in 2001 at a time when *Re Suco Gold* had stood for 17 years and was well-regarded: at [58] (Kiefel CJ, Keane and Edelman JJ citing Allsop CJ in *Killarnee* at [106]-[108]) and at [96] (Bell, Gageler and Nettle JJ); see also at [144] (Gordon J).

As to Carter Holt's second argument, the High Court found that the trustee's right of exoneration was not a circulating asset, but that it was enough that Amerind's property rights to the trust assets (to the extent that it had power to use them for its own benefit) were themselves circulating assets and were therefore 'property of the company' for the purposes of s 433: at [49], [50] (Kiefel CJ, Keane and Edelman JJ), [86]-[87] (Bell, Gageler and Nettle JJ) and at [108] (Gordon J).

Remaining questions

There are a number of issues which remain to be decided. In particular, there remains uncertainty about the correct order for the payment of trust creditors after the payment of priority creditors and about the marshalling of claims where a creditor has access to more than one fund. Complications might also be expected where a corporate trustee has carried on business as trustee for more than one trust, or as trustee of a trust and on its own account. Bell, Gageler and Nettle JJ and Gordon J suggested that a possible solution to this may be to construe s 556 as if the liquidator held separate funds, each for different groups of creditors: at [97], [160].

It would be perverse if the Act operated to deny employee creditors a particular priority over the holders of a circulating security interest solely for the reason that the company which employed them was trading as trustee.

Another unresolved issue concerns the fact that, due to the 'shape' of the liquidator's interests in the trust assets, the liquidator is necessarily limited in how he or she can deal with those assets. The liquidator has no general power to sell trust assets, notwithstanding that the core function of a liquidator is to get in the property and distribute it among the creditors: *Killarnee* at [89]; ss 474(1), 477(2)(c), 555 of the Act. In *Killarnee*, the Full Court decided that in circumstances where property rights were insufficient to support a sale of the underlying assets, the statutory powers of sale in s 477 could not be used to improve the liquidator's position: at [89]. This decision was contrary to previous authority. Instead the Full Court suggested that a liquidator could obtain orders for sale of the kind that would ordinarily be granted to the holder of an equitable lien over property, or apply for a parallel appointment as a receiver: *Killarnee* at [91], [98].

Another issue concerns how the unfair preference provisions in Part 5.7B of the Act will be applied to transactions involving trust assets. In *Amerind*, the Victorian Court of Appeal held, consistently with prior authority, that recoveries of unfair preferences initially made out of trust assets were repayable to the company and to be distributed between *all* creditors: at [69]-[77]. However, the normative rationale for the provisions, which is to augment the estate for the benefit of creditors is brought into sharp focus when the transaction in question has diminished the assets of the trust as opposed to the general pool. It may sit uncomfortably in a 'dual fund' situation.

Accordingly, notwithstanding the High Court's decision, there remain several opportunities for further litigation in this area.

Liability of air carriers in negligence for psychiatric harm

Amy Campbell reports on *Parkes Shire Council v South West Helicopters Pty Limited* [2019] HCA 14

The High Court has unanimously held that non-passengers' claims for psychiatric harm arising from the death of a passenger in the course of air travel are exclusively governed by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**CACL Act**) and the general law of tort does not apply.

CACL Act

The CACL Act is a legislative response to, and gives effect to, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) (**Warsaw Convention**). Section 28 of the CACL Act provides that, where Pt IV of the CACL Act applies to the carriage of a passenger, '*the carrier is liable for damage sustained by reason of the death of the passenger… which took place on board the aircraft…*'.

Section 35(2) of the CACL Act relevantly provides that '*…the liability under this Part is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger…*'.

A temporal limit on claims under s 28 is imposed by s 34 of the CACL Act, which extinguishes the right of a person to damages if an action is not brought within two years.

Background

The Aappellant, Parkes Shire Council (**Council**), engaged the respondent, South West Helicopters Pty Ltd (**South West**) to assist it to carry out by helicopter a low-level aerial noxious weed survey. In February 2006, a helicopter piloted by an employee of South West carrying two of the Council's officers including Mr Ian Stephenson crashed, killing all three occupants.

Among other claims, Mr Stephenson's widow, daughter and son (**Stephensons**) claimed damages for negligently inflicted psychiatric harm against the Council and South West. Those claims were commenced in 2009, outside the two year time period imposed by s 34 of the CACL Act.

At first instance before Bellew J, each of the Stephensons was successful against the Council, and the Council in turn obtained judgment against South West as co-tortfeasor under the CACL Act. Bellew J held that the

Stephensons' claims did not fall within s 35(2) of the CACL Act. His Honour considered himself bound by the decision of the Full Court of the Federal Court of Australia in *South Pacific Air Motive v Magnus* (1998) 87 FCR 301 (***Magnus***), in which the Court held that claims by non-passengers for psychiatric harm were outside the scope of Pt IV of the CACL Act.

South West's appeal was successful in the Court of Appeal (Basten and Payne JJA; Leeming JA dissenting). Basten JA (Payne JA agreeing) considered the decision in *Magnus* to be, at best, of limited and indirect relevance. His Honour considered the claims to be excluded by s 35(2), as it was not possible as a matter of the ordinary use of language to characterise the claims as other than assertions of liability '*in respect of*' Mr Stephenson's death. Therefore, the claims were excluded by s 35(2). Leeming JA held that s 35(2) did not preclude a non-passenger's claim, having regard to the regime reflecting a compromise between contracting parties, *Magnus* and the totality of legislation in the area with respect to the rights of non-passengers.

The High Court's decision

The Court unanimously held the Stephensons' claims were excluded by s 35(2) of the CACL Act.

Kiefel CJ, Bell, Keane and Edelman JJ, in a joint judgment, considered that '*[a]s a matter of the ordinary and natural meaning of s 35(2) of the CACL Act, the Stephensons' claims asserted the civil liability of the respondent in respect of the death of the passenger*': at [32]. Their Honours observed that there was an '*immediate and direct relationship*' between the asserted liability and the death of the passenger: at [32]. The effect of s 35(2) was that the Stephensons' entitlement to claim damages was exclusive of their rights in negligence under the law of tort: at [33].

As to the three matters referred to by Leeming JA, their Honours considered that the liability contemplated by s 28 of the CACL Act was event-based and not tied to a contractual relationship between carrier and passenger: at [34]. The dicta in *Magnus* should not be followed; the use of '*in respect of*' in the context of s 35(2) was '*distinctly inappropriate*' to confine the operation of the CACL Act: at [35]. Their Honours also noted that the purpose of the CACL Act, in giving effect to the Warsaw Convention, was to achieve uniformity in the law relating to the liability of air carriers and a construction consistent with that purpose was to be preferred: at [36].

Gordon J similarly considered the Stephensons' claims to be within the scope of s 35(2). After analysing the Warsaw Convention, her Honour concluded that the absence of a contractual relationship did not preclude the application of the CACL Act and, to the extent *Magnus* held to the contrary, it should not be followed: at [104]-[114]. Her Honour considered that the history and scheme of the Warsaw Convention did not support a distinction being drawn between the liability of carriers for passengers and non-passengers: at [115].

Her Honour also rejected the Council's contention that claims by non-passengers were '*derivative*' and were to be treated separately. Her Honour observed that such a distinction was '*distracting*' and did not address the question posed by the CACL Act, which was concerned with the occurrence of an event: at [115]-[122].

Determining a place of burial

Benjamin Goodyear reports on *White v Williams* [2019] NSWSC 437

A person dies. The deceased's surviving loved ones cannot agree on where the deceased should be buried. How does the Court assess where burial should occur? To what extent are Aboriginal cultural and spiritual beliefs of the deceased and of the survivors accommodated in determining the place of burial? These are the challenging issues that arose for consideration by Sackar J in *White v Williams* [2019] NSWSC 437.

The issue

The Deceased was an Aboriginal man with strong ties to the Redfern and Waterloo area. He died suddenly, on 7 February 2018, without having left a will or instructions as to his wishes concerning burial. His partner, with whom he had two children, wished for him to be buried in Sydney at the La Perouse/Botany Cemetery. His mother opposed that course. She wished for him to be buried on country in Cherbourg, Queensland, where she and the Deceased's father (a Wakka Wakka man) had once lived.

The Court proceedings

In the days following the Deceased's death, his partner (Plaintiff) became aware that the coroner had released the Deceased's body to his mother (Defendant) for burial in Queensland.

The Plaintiff brought an urgent application against the mother before the Equity Duty Judge. The Plaintiff sought orders that she be appointed administrator of the Deceased's estate and that she be entitled to take possession of the Deceased's body and to bury him in the Sydney cemetery.

As an interim measure, Rein J ordered that the body of the Deceased be released to the Plaintiff for burial in the Sydney cemetery, but his Honour made it clear that this was not a final decision. Accordingly, a three day hearing took place shortly thereafter, in the Expedition List before Sackar J, to determine the Deceased's permanent resting place.

The law on burial rights

Justice Sackar canvassed the authorities concerning burial rights, noting the following in particular:

- In the ordinary course, if a deceased has left a will, a named executor has the right to arrange the burial: at [16] citing *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 691.
- If, however, a deceased made no will, then 'usually the person with the best claim to the letters of administration [has] the right to determine the place and manner of burial' at [18], quoting Doyle CJ in *In the Estate of Jones (deceased); Dodd v Jones* (1999) 205 LSJS 105 at [30].
- But there is no hard and fast rule. Furthermore, there may be no likelihood of an application for a grant of administration in intestacy. The deceased may have no assets to administer. In those circumstances, 'an approach based on extent of interest, or entitlement to apply for a grant, takes on an air of unreality': at [19] quoting Perry J in *Jones v Dodd* (1999) 73 SASR 328 at [50].
- Ultimately, the proper approach requires a balancing act. On the one hand, the common law is inclined to grant burial rights towards the person with the best claim to the letters of administration. On the other hand, a Court will have regard to 'practical considerations' and any 'cultural, spiritual and/or religious factors that are of importance': at [22] citing Campbell J in *Darcy v Duckett* [2016] NSWSC 1756 at [27].

Evidence and findings

His Honour received a range of evidence from the Plaintiff, extended family, friends and expert evidence from a Court-appointed anthropology expert, who gave evidence on Aboriginal burial customs in Redfern and Cherbourg: at [75]-[80], [104]-[106].

His Honour accepted that the Plaintiff had been in a de facto relationship with the Deceased at the time of his death: at [97], [100]. In respect of religious, cultural, and spiritual matters, his Honour noted evidence of the Deceased's blood ties to Cherbourg, and of the traditional significance of burial on country for Aboriginal people. His Honour found, however, that notwithstanding the Deceased's visits to Cherbourg and his respect for his ancestors from that area, the Deceased had 'a much more intense and passionate attachment to the Redfern/Waterloo area' in light not only of his 'urban lifestyle' but also due to the fact that his children, the Plaintiff, the Defendant, and other family members lived there: at [106]. The ability of family members to visit and tend to the grave (which would be enhanced if the Deceased were buried locally) was 'extremely important and awarded considerable weight': at [108]. The needs of the children in that regard were 'of the utmost importance': at [113].

Ultimately, his Honour accepted that the Plaintiff and her two children were best able to deal with the Deceased's remains in a manner consistent with his background, some of his wishes, and the importance of his Aboriginal culture: at [114].

The Plaintiff's application, therefore, was successful and the Deceased remained undisturbed in his resting place in the Sydney cemetery. His Honour, therefore, did not need to determine the further difficult question as to whether, had his Honour found against the Plaintiff as to who was best able to deal with the remains of the Deceased, exhumation should be ordered: at [115].

Postscript

It may be noted that his Honour made no order as to costs. The legal practitioners appeared pro bono with the Court recording its 'gratitude for their generosity and professionalism': at [7].

Protesting and the implied freedom of communication

Sarah Danne reports on *Clubb v Edwards; Preston v Avery* [2019] HCA 11

The High Court unanimously upheld the constitutional validity of two statutes prohibiting particular conduct within 150 metres of pregnancy termination clinics. The statutes in question were found to burden the implied freedom of communication about governmental or political matters, but not impermissibly so. This decision reinforces that the implied freedom is not personal in nature and that it is permissible to burden that freedom where to do so is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and is otherwise in accordance with the relevant invalidity test.

Background

The decision resulted from two separate proceedings against individuals in different States. Mrs Clubb and Mr Preston were each found guilty at first instance in the Magistrates Court of Victoria and Tasmania, respectively. The charges in both cases concerned their engagement in prohibited behaviour, including certain communications about the termination of pregnancy conducted within 150 metres of termination clinics.

In response to both charges, the defence that the relevant statutory provisions impermissibly burdened the implied freedom

of communication was unsuccessful. It was accepted in both matters that the behaviour of each individual was prohibited by the relevant Act on its face. Both individuals appealed their respective first instance decisions, most relevantly on the basis of the abovementioned defence, and each Supreme Court removed certain aspects of those appeals to the High Court where the two matters were heard together.

The provisions of the two Acts that were challenged by the appellants, s 185D of the *Public Health and Wellbeing Act 2008* (Vic) and s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas), contained substantial similarities to one another.

However, the Tasmanian legislation prohibited 'a protest' about terminations whereas the Victorian legislation prohibited more generally 'communicating by any means' about terminations.

Other notable differences included that the Victorian legislation set out its own objects and the relevant prohibition was limited by a requirement that the communication be reasonably likely to cause distress or anxiety. Both these elements were absent in the Tasmanian Act.

Ultimately, these distinctions did not result in different outcomes in the appeals.

Decision

Despite the unanimous dismissals, five judgments were handed down with complex and varied reasoning.

All judges considered the issue of necessity as a precondition to constitutional adjudication. In separate judgments, Gordon, Edelman and Gageler JJ all determined that the facts did not necessitate determination of

the constitutional question of validity of the Victorian Act in relation to the Clubb appeal and declined to proceed further on that point. The four judges who did consider the constitutional question in relation to Clubb did so in two separate judgments. The joint judgment of Kiefel CJ with Bell and Keane JJ and the separate judgment of Nettle J found that the communication prohibition which was breached by Mrs Clubb burdened the implied freedom insofar as the first step of the invalidity test was to be applied. The entire bench found that the prohibition breached by Mr Preston burdened the implied freedom.

In line with previous High Court decisions concerning the invalidity test, there remained a diversity of views on the bench as to use of the structured proportionality analysis on the question of whether the law was reasonably appropriate and adapted to advance its legitimate object.

Certain submissions were made to the Court to the effect that any burden imposed by the relevant Act, particularly in the case of the Victorian Act, was 'of small magnitude' or 'insubstantial' and that the Court should not be persuaded that it need examine the matter further. However, the Court emphasised that it is not the magnitude of the burden which determines the question and that determination as to whether the challenged law is reasonably appropriate and adapted for its purpose must proceed regardless, if a burden is identified (Kiefel CJ, Bell and Keane JJ at [65] and Nettle J at [260]-[261]).

The judgments consistently emphasised that the geographical limitations imposed by the Acts were significant in reducing the burden placed on the implied freedom. However, Gageler J found that 150 metres must be 'close to the maximum reach that could be justified as appropriate and adapted' to achieve the legitimate purpose of the prohibited conduct law under the Tasmanian law and that any greater distance would have likely imposed an undue burden (at [213]).

Most of the Court addressed the premise that the object of the statutes of protection of human rights was an important consideration, and central to the maintenance of the constitutionally prescribed system of representative and responsible government. Several members of the Court cited the protection of dignity as contributing to the importance of the underlying statutes (Kiefel CJ, Bell and Keane JJ at [49]-[51] and Edelman J at [497] – [499]).

Necessity as a precondition to constitutional adjudication

The implied freedom of communication about government and political matters is found as a necessary implication of sections 7, 24, 64 and 128 and related sections of the Constitution. It is not a personal right or freedom granted by the Constitution. Rather, it is a limitation on the ability of government to regulate communication relating to matters of government and politics. Various judgments confirmed these points as a prelude to consideration, which was given by each judge, regarding whether the constitutional question needed to be addressed.

The Court reflected on the established practice to decline to answer a constitutional question unless it were clear that it was necessary to do so in order to determine a right of liability in issue. It was observed that it is sometimes considered inappropriate for a Court to determine a hypothetical question for reasons including imprudence, over-eagerness and also that justice does not require the question to be resolved (Kiefel CJ, Bell and Keane JJ at [30]-[36], Nettle J at [217], Gordon J at [336]).

It was unanimous that the constitutional question must be addressed in Mr Preston's appeal because, among other factors, Mr Preston had clearly engaged in communication relating to political matters.

However, this was distinguished from the Victorian matter, in which Mrs Clubb did not accept that she had engaged in communication relating to political matters. On this basis, the Attorney-General of the Commonwealth submitted that as a result, the High Court should not find it necessary to determine the validity or otherwise of the Victorian provisions because, even in the case of invalidity, their application to political communication could be severed therefore leaving the provision available for present purposes.

Even those judges who found it necessary to answer the constitutional question accepted that there was force in the Attorney-General's submission. However, the joint judgment pointed to the established practice as not being a 'rigid rule' and proceeded on the basis that it was 'expedient in the interest of justice' (Kiefel CJ, Bell and Keane JJ at [36] and [40]). Nettle J proceeded on the basis that there was sufficient support for the proposition of disposing of an attack on the constitutional validity of a law to conclude that, 'assuming without deciding that the impugned law would otherwise be invalid, it could be read down or severed operation in relation to the plaintiff and so be considered as valid to that extent' (Nettle J at [230]).

In their separate judgments, Gageler, Gordon and Edelman JJ decided that the constitutional question was not necessary to address. They each addressed severance first to determine necessity, and two found severance to be available in relation to the legislation and therefore determined that no further analysis was required. Edelman J differed, finding that severance could not be applied but instead that the legislation could be partially disapplied if necessary, therefore reaching the conclusion that the appeal could be disposed of nonetheless (at [434] to [443]).

Test for invalidity

The High Court reinforced the test for invalidity which it previously adopted in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and subsequently explained and applied in *McCloy v New South Wales* (2015) 257 CLR 178 and *Brown v Tasmania* (2017) 261 CLR 328. It is summarised as follows (Kiefel CJ, Bell J, Keane J at [5]):

1. Does the law effectively burden the implied freedom in its terms, operation or effect?

2. If 'yes', is the purpose of the law legitimate in that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If 'yes', is the law reasonably appropriate and adapted to advance that legitimate object in a manner i.e., compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Four members of the Court supported the use of a proportionality analysis to assist with the third step (Kiefel CJ, Bell J, Keane J at [6] and Nettle J at [215]). Namely, if it can be found that the relevant law is both (i) 'suitable', in that it has a rational connection to the purpose of the law, and (ii) 'necessary', in that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom, then the final question to be answered is whether the relevant law is 'adequate in its balance'.

The appropriateness of the proportionality analysis for constitutional matters was challenged by three members of the Court. Gordon and Edelman JJ did not abandon the validity of the analysis as a tool but cautioned its unqualified use (Gordon J at [390] and Edelman J at [408]). Gordon J referred (at [403]) to its civil law origins and cited Gageler J in *McCloy* at [142] who noted that the difficulty with adopting 'standardised criteria' to apply uniformly across many kinds of laws, and the incongruity of this approach with the common law method. Gageler J maintained reservations about the tool but declined to repeat his reasoning (at [160]). The High Court's decision in this matter did not settle conclusively the use of proportionality analysis for future decisions but did effectively provide confirmation that it is currently accepted as a valid tool for use, although not without qualification or the possibility for further evaluation.

Moubarak by his tutor Coorey v Holt:

The Court of Appeal permanently stays proceedings seeking damages for alleged historical child abuse

Nicholas Bentley reports on *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102

The introduction of s 6A to the *Limitation Act 1969* (NSW) on 17 March 2016 removed any limitation period that applied to personal injury actions for damages resulting from an act or omission that constituted child abuse.

This reform, combined with an inadequate National Redress Scheme, has seen the filing of a dramatically increased number of historic child abuse claims in NSW Courts – with over 200 claims having been filed in the Common Law Division of the Supreme Court since 2017. However, s 6A still preserves a Court's power to stay or dismiss proceedings. Moubarak v Holt is the Court of Appeal's first decision considering an application for a permanent stay of a claim that would have otherwise been time barred if not for s 6A.

Importantly, the decision identifies particular circumstances where the ordering of a permanent stay will be granted, potentially paving the way for further stay applications in similar historic abuse cases.

The facts and rulings of the trial judge

By her statement of claim, the plaintiff, Ms Holt, alleged that in the early 1970s Mr Moubarak, her uncle, sexually assaulted her on four occasions when she was 12 years old. The Statement of Claim did not suggest that the assaults were witnessed by anyone. The plaintiff told her friend, Ms Evans, of the assaults in 1987 and her second husband and sisters in 1991. In February 2013, the plaintiff told her general practitioner and then several psychologists about the assaults.

In February 2014, the defendant (aged 85) moved into a nursing home, having scored 13/30 on the Rowland Universal Dementia Assessment Scale (RUDAS) (30 being the normal score). In the same month, Mr George Coorey was appointed the defendant's legal guardian and financial manager.

Although the plaintiff reported the assaults to police in May 2015, the defendant was never made aware of the allegations. Statements were provided to the police by the plaintiff, Ms Evans, and Mr Coorey. No statement was obtained from the defendant who, as of October 2015, had a RUDAS score of 0. Expert evidence indicated that he was severely demented, unable to walk independently and no longer able to comprehend English. Police subsequently informed the plaintiff that they were unable to proceed as the defendant's physical and mental condition rendered him unfit for trial.

In December 2016, the plaintiff commenced her civil claim in the District Court seeking damages against the defendant. While over 40 years had elapsed since the assaults, the claim was not barred as a consequence of s 6A to the *Limitation Act 1969* (NSW).

By way of his tutor, Mr Coorey, the defendant filed a defence and a subsequent notice of motion seeking a stay pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) (CPA), or dismissal pursuant to UCPR r 13.4(1)(c). It was common ground that defendant was not competent to give evidence or instructions. However, Wilson DCJ dismissed the defendant's motion, concluding that the doctrine of fitness to stand trial was not relevant to determining a permanent stay application and that there was no evidence that the other occupants of the house, where some of the alleged offending took place, were not available. By his tutor, the defendant sought leave to appeal.

The Court of Appeal decision

President Bell delivered the leading judgment, with Leeming JA and Emmett AJA agreeing. Leave to appeal was granted on the basis that the application raised questions of significant public importance.

Specifically, Bell P referred to the numerous historic child abuse claims being commenced decades after the alleged abuse as a consequence of the introduction of s 6A (at [12]-[13]), while Emmett AJA noted that the principles and criteria for granting permanent stays in light of s 6A were by no means settled (at [204]).

The principles governing the discretion to order a permanent stay were summarised by Bell P (at [68]-[71]) as follows:

(i) the onus of proving that the stay should be granted lies on the defendant;

(ii) the stay should only be ordered in exceptional circumstances;

(iii) the stay should be granted when the interests of the administration of justice so demand;

(iv) the categories of cases in which a permanent stay may be ordered are not closed; and

(v) the stay may be ordered where the continuation of the proceedings would be vexatious, oppressive, manifestly unfair to a party or would otherwise bring the administration of justice into disrepute.

Citing Lord Sumption in *Abdulla v Birmingham City Council* [2013] 1 All ER 649, Bell P acknowledged that two forms of unfairness can result from delayed proceedings: (1) prolonged uncertainty (which is not to be considered where there is no limitation period) and (2) the impoverishment of the evidence available to determine the claim, particularly where a trial is exclusively or heavily dependent on oral evidence and thus the quality of witnesses' memory and recollection (at [72]–[77]).

President Bell held that the primary judge had erred when considering this second form of unfairness by incorrectly finding that there was no evidence of the unavailability of any pertinent witnesses (at [61]-[67]). Of the five potential witnesses (excluding the plaintiff and the defendant), the plaintiff's sister was the only witness still alive and she had not seen the alleged assaults.

President Bell also considered that the primary judge had erred in disregarding the principles established in *R v Presser* [1958] VR 45. In that case, Smith J (at [48]) considered whether the accused, because of a mental defect, could be tried 'without unfairness or injustice to him'. In Smith J's view, the accused had to be able to answer to and defend the charge, understand generally the nature of the proceeding and give instructions to counsel when represented. This test was identified in *R v Rivkin* (2004) NSWLR 251 (at [248]) as the 'test directed to the minimum requirement for a fair trial'. Although *Presser* was a criminal matter, Bell P said that coherence is a quality that the common law values, and it would offend commonsense to maintain that a defendant could not obtain a fair trial in criminal proceedings but could secure a fair civil trial with identical factual allegations (at [107]-[109]).

President Bell and Leeming JA emphasised that granting a permanent stay will heavily turn upon the facts of the particular case (at [111] and [193]). Usefully, Bell P highlighted this point by referring to the three most recent decisions considering stay applications in which allegations of historical sexual abuse were made (at [113]-[148]), two of which (*Judd v McKnight* (No 4) [2018] NSWSC 1489 and *Anderson v Council of Trinity Grammar School* [2018] NSWSC 1633) are presently being appealed.

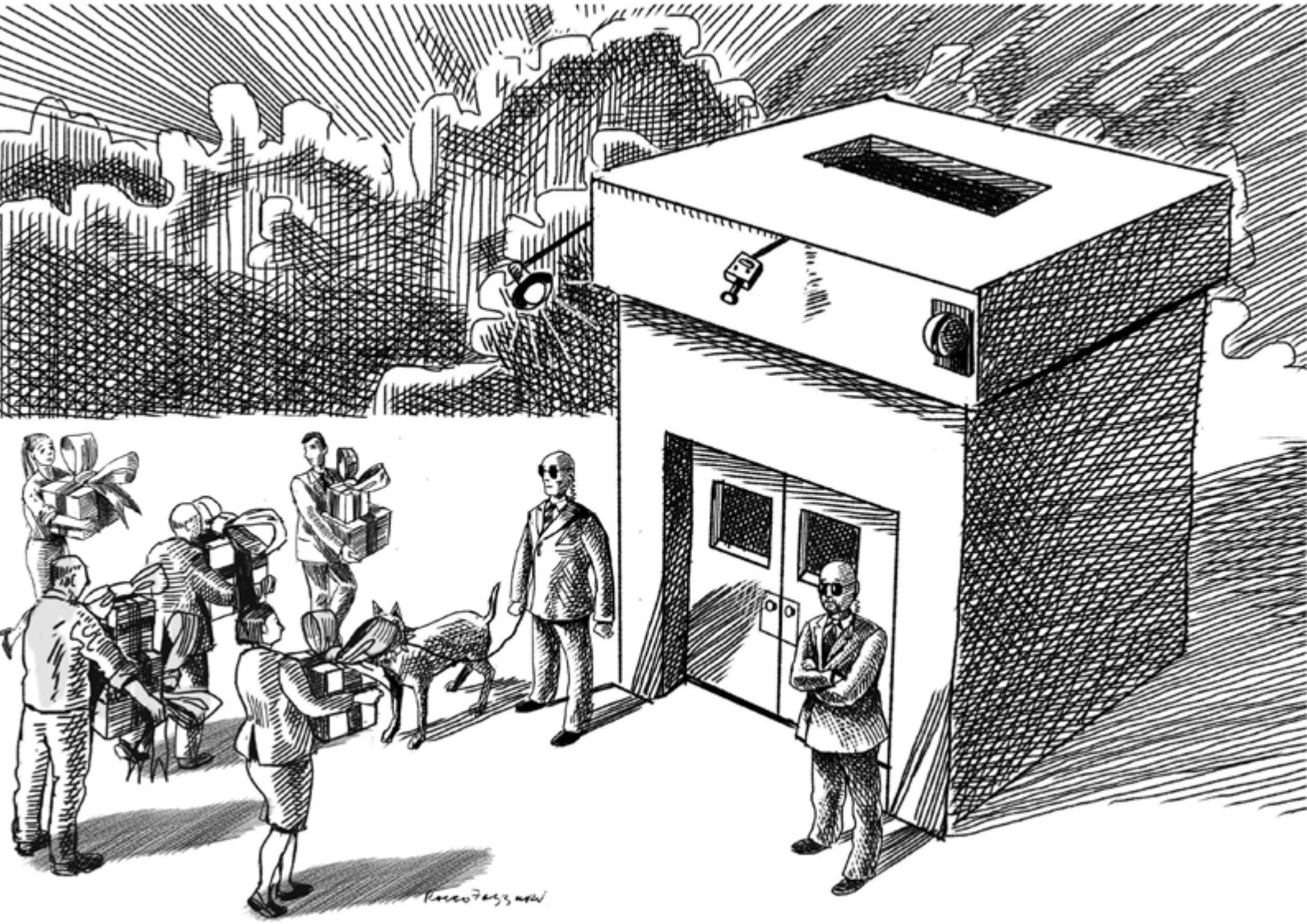
In the first decision, *Connellan v Murphy* [2017] VSCA 116, the Court of Appeal of Victoria granted a permanent stay, citing the disadvantaged position of the defendant (who was 12 at the time of the alleged conduct), the lack of evidence and the inadequate explanation given by the plaintiff for the delay. In contrast, Garling J was satisfied in *Judd* that, though the defendant was deceased, a trial against the estate would not be an unfair one. His Honour cited the available evidence, the limited enquiries made by the estate, the fact that the deceased defendant had largely admitted the alleged conduct, the public interest in permitting claims for damages for child sexual abuse, and the fact that there was no suggestion that the plaintiff's delay was the consequence of any intentional conduct. Similarly, in *Anderson*, four of the assaults were admitted, and the real issue was whether the Council of Trinity Grammar School was vicariously liable for the conduct of the accused teacher at school camps. Rothman J refused the stay, accounting for the available documents provided from the school concerning the camps, the fact that the accused and other teachers were available and the Council's failure to take reasonable steps to obtain other available evidence.

Bell P's decision provides practical guidance on the principles to be applied and circumstances that will warrant the granting of a permanent stay of proceedings concerning historic child abuse.

President Bell concluded that none of the possible avenues for the defendant to obtain evidence could remedy the fact that the defendant was at all relevant times unaware of the allegations made against him and unable to give instructions in relation to them (at [158]). His Honour determined at [159] that since the trial would take place in the defendant's involuntary absence, it would produce manifest unfairness to the defendant and bring the administration of justice into disrepute.

Overall, his Honour listed nine salient features that warranted a permanent stay of the proceedings (at [162]-[171]), including the fact that the defendant was never confronted with the allegations (in contrast to *Judd* and *Anderson*), no statement responding to the allegations was obtained by the defendant, the defendant had advanced dementia from the outset of the proceeding, there were no eyewitnesses to the alleged assaults, the defendant was unable to give instructions or evidence, any potentially relevant witnesses were now dead or unavailable, and there was no credible suggestion that any documentary evidence was in existence that would bear upon the likelihood that the alleged assaults occurred. Special leave to appeal this decision was not sought.

Although the circumstances of Moubarak are somewhat unique, Bell P's decision provides practical guidance on the principles to be applied and circumstances that will warrant the granting of a permanent stay of proceedings concerning historic child abuse. The pending appeals to the Court of Appeal in *Judd* and *Anderson* will indicate whether these applicable circumstances will be expanded upon. Different considerations might also apply where the claim is against an institution, especially where the liability is direct and not vicarious, and where there is evidence that the perpetrator was a known offender. For the time being, however, defendants seeking a permanent stay in similar circumstances to *Moubarak* will need to prove (likely through exhaustive searches and inquiries) that the perpetrator and any pertinent witnesses are, and have been, unable to give evidence or otherwise respond to the allegations, and that no documentary material bearing upon liability exists that would outweigh the prejudice or unfairness arising from the deterioration or absence of witness testimony.



A fresh federal fight about political donations

Alison Hammond reports on *Spence v Queensland* [2019] HCA 15

The High Court once again handed down judgment in a dispute concerning Commonwealth and State government regulation of political donations.

This time, the Court grappled with the validity of, and interaction between, Queensland's ban on political donations from property developers, and the Commonwealth's express authorisation of certain political gifts.

The High Court held that s 302CA of the *Commonwealth Electoral Act 1918* (Cth), which purported to override certain State prohibitions on political funding, was wholly invalid because the legislation was beyond the power of the federal legislature. Accordingly, the relevant provisions of the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld), which purported to prohibit specified political donations of property developers, were upheld a*Spence v Queensland* contains a veritable smorgasbord of constitutional issues to be considered: the scope of Commonwealth legislative power, the implied freedom of political communication, s 109 inconsistency, exclusive powers, inter-governmental immunities and even echoes of the long-abandoned doctrine of State reserve powers.

Background

Many political parties promote the election of their chosen candidates to both Commonwealth and State parliaments. Political parties are typically unincorporated associations organised by State. In Queensland, five political parties hold seats in both the Legislative Assembly of Queensland and either the Federal House of Representatives or Senate.

When a political donation is made to one of these parties, a giver may specify that the gift be used for a particular purpose – campaigning for a Federal election, campaigning for a State election, or a non-campaign purpose. Alternatively, a giver may not direct the use of their gift at all, making the gift part of what Edelman J described as the 'unallocated middle'. Gifts will then ultimately be directed towards one or more of these uses at the choice of the party.

The question raised in *Spence* is – to what extent can the Commonwealth, or Queensland, regulate gifts in each category?

The Queensland Law

In 2018, Queensland's government introduced amendments to the Electoral Act and the Local Government Electoral Act. Those amendments banned property developers from making donations to political parties that promoted the election of candidates to the Legislative Assembly or local councils in Queensland (even if they also promoted the election of candidates to the Federal Parliament).

Queensland's ban applies to any donation, regardless of whether or not the donation is earmarked or used for State or local government campaigning.

Queensland's laws are modelled closely on the pre-existing New South Wales ban on donations by property developers. Those laws were themselves the subject of a High Court challenge in 2015. In *McCloy v NSW* (2015) 257 CLR 178, the High Court held that the New South Wales laws did not impermissibly burden the implied constitutional freedom of political communication (as reported in the Summer 2015 issue of *Bar News*).

The Commonwealth Law

In 2018, the Commonwealth government also amended the Commonwealth Electoral Act to introduce s 302CA.

Section 302CA(1) permitted donations to federally registered political parties, 'despite any' State electoral law, if, first, the Commonwealth Electoral Act did not otherwise prohibit the donation, and, second, the gift 'is required to be, or may be, used for the purposes' of influencing voting in a federal election.

Section 302CA(3) provided three explicit exceptions to s 302CA(1). The permission in s 302CA(1) did not apply to:

1. donations given on terms requiring the gift to be used only for State electoral purposes (s 302CA(a));

2. donations that were required by a State law to be kept separately in order to be used only for State electoral purposes (s 302CA(b)(i)); or

3. donations that a gift recipient kept separately to be used only for State electoral purposes (s 302CA(b)(ii)).

In each of those circumstances, State electoral laws would apply to the gifts.

If valid, s 302CA would render Queensland's ban on property developer donations inoperative (by virtue of the inconsistency provision in s 109 of the Constitution) except to the extent donations were earmarked for use in Queensland state or local elections.

Importantly, Queensland's ban would not apply to any donation in the 'unallocated middle' – a donation that '*may be*' used for federal election campaigning, but equally '*may be*' used for State elections.

***Spence v Queensland** is an important decision about the operation of federalism in 21st century Australia. It is a relatively rare example of a 'win' for the States in an area of overlapping regulation.*

The High Court's Decision

The case was brought in the High Court's original jurisdiction by former LNP Queensland president Gary Spence. Mr Spence's role in the property development industry led him to quit his role in the party following Queensland's introduction of the ban (which also prohibited property developers from encouraging others to make political donations).

Mr Spence's challenge to Queensland's laws was supported by the Attorney-General of the Commonwealth, while the Attorneys-General for each other State and the ACT intervened in support of Queensland, making for a very full bar table.

Validity of s 302CA / s 109 Inconsistency

In a joint judgment, Kiefel CJ and Bell, Gageler and Keane JJ held that s 302CA was beyond the scope of the Commonwealth's legislative power. The Commonwealth had identified s 51(xxxvi) of the Constitution, which confers power over 'matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides', as the relevant source of legislative power, observing that the 'matters in respect of which the Constitution makes provision' include federal elections by virtue of ss 10 and 31 of the Constitution.

The vice found with s 302CA was that it purported to apply to donations that merely 'may be', but were not required to be, used for federal electoral purposes. As a result, s 302CA conferred a broad immunity from the operation of State electoral laws, including laws limiting the availability of funds for activities with no connection to federal elections. The significance of this impact, compared to the impact on federal elections, was said to 'point strongly to a purpose that cannot be said to be incidental' to the Commonwealth's power over federal elections (at [81]).

The majority held that the invalid operation of s 302CA was incapable of severance, such that the section was wholly invalid (at [91]).

Given the invalidity of s 302CA, the majority held that Queensland's ban on property developer donations was not inconsistent with the Commonwealth Electoral Act.

In the minority, Nettle, Gordon and Edelman JJ, each writing separately, concluded that s 302CA was within the scope of Commonwealth legislative power. Their Honours would have held that the Queensland ban was inconsistent, and therefore inoperative, with s 302CA to the extent the laws purported to apply to donations not specifically earmarked for state or local government electoral purposes (at [151], [275], and [375]).

Implied freedom of political communication

Mr Spence also submitted that Queensland's ban on property developer donations in State elections impermissibly burdened the implied constitutional freedom of political communication.

The Queensland law, he submitted, was distinguishable from the law upheld in *McCloy* because Queensland did not have the same history of corrupt developer influence in State politics. Interestingly, Mr Spence did not attempt to distinguish *McCloy* as regards Queensland local government elections. At the local level, there was a significant recent history of corrupt influence.

Each member of the High Court rejected the argument that *McCloy* could be distinguished. Even if there was less evidence of corruption, the State parliament was entitled to act prophylactically in enacting the ban (at [95]-[97], [113], [264], and [322]-[326]).

Exclusive power, intergovernmental immunities and Melbourne Corporation

The parties made several interconnected arguments related to the interaction of State and Federal power. First, Mr Spence argued that federal elections are an area of *exclusive* Commonwealth legislative power. This would render the Queensland

ban invalid regardless of the constitutional validity of s 302CA.

The majority, joined on this point by Edelman J, rejected the argument that the Commonwealth's power with respect to federal elections is exclusive (at [46], and [305]). Federal elections are not among the exclusive powers set out in s 52 of the Constitution, and no exclusivity could be implied. In doing so, the Court effectively overruled a 1912 decision which contained statements to the contrary, *Smith v Oldham* (1912) 15 CLR 355.

Second, Queensland argued that s 302CA infringed the doctrine of intergovernmental immunities. Third, Mr Spence argued that the Queensland ban did likewise.

As many readers will recall, since *The Engineers' Case* (1920) 28 CLR 129, constitutional grants of power to the Commonwealth have been construed expansively – they are 'plenary'. One significant qualification to this is the intergovernmental immunities doctrine expounded in the *Melbourne Corporation Case* (1947) 74 CLR 31. *Melbourne Corporation* held that, because the Constitution assumes the existence of both State and Commonwealth governments, 'neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers'.

In light of s 302CA's invalidity, the majority found it unnecessary to decide the *Melbourne Corporation* point in relation to s 302CA (at [84]). In relation to the Queensland ban, the majority affirmed that the doctrine of intergovernmental immunities could operate to invalidate a State law, but that in this case, the Queensland ban did not attract its operation. The ban was not directed to the Commonwealth and imposed no special disability or burden on the Commonwealth (at [109]).

Principle in Metwally

Spence raised one final point of interest to constitutional enthusiasts.

In *University of Wollongong v Metwally* (1984) 158 CLR 447, the High Court held that the Commonwealth cannot retrospectively legislate to ensure that a State law is not rendered invalid by s 109. While the Commonwealth can amend federal laws to prospectively remove a s 109 inconsistency, to do so retrospectively was held to undermine the operation of the Constitution.

Section 302CA contained a note on the operation of s 302CA(b)(ii). As explained above, that section preserved the operation of State electoral laws in relation to donations earmarked by a recipient specifically for a State electoral purpose. The note provided that a recipient may identify the intended purpose of a gift at any time prior to using that gift. It then gives an example – if a gift originally has no mandated purpose, and is later used for a State electoral purpose, the 'giving, receipt, retention and use' of that gift must comply with the State electoral law.

As a result, s 302CA(1) may initially apply to a gift, but if it is later earmarked for a State electoral purpose, the operation of s 302CA(b)(ii) means s 302CA(1) will no longer apply.

Queensland suggested that this constituted retrospective removal of a s 109 inconsistency in the manner deemed impermissible by *Metwally*.

Given the invalidity of s 302CA, the majority found it unnecessary to decide the question (at [34]). The minority justices, however, would have upheld s 302CA(b)(ii), holding it imposed a condition precedent on the operation of State electoral laws, instead of entailing any retrospective operation (at [147], [237], and [374]).

Significance

Spence v Queensland is an important decision about the operation of federalism in 21st century Australia. It is a relatively rare example of a 'win' for the States in an area of overlapping regulation.

The decision is also directly relevant to several ongoing disputes about electoral law. For example, at the time of writing, the Queensland Court of Appeal is reserved in the case of *Awabdy v Electoral Commission* (Qld) (CA 3505/18), which concerns the overlapping Commonwealth and Queensland regimes for the disclosure of political donations.

The High Court began 2019 with its decision in *Unions NSW v New South Wales* [2019] HCA 1, which concerned restrictions on election spending. In the circumstances, *Spence* is very unlikely to be the High Court's last word on the subject of electoral regulation.

The Bowraville Murders

Statutory exception to the double jeopardy principle

Jillian Caldwell reports on *Attorney General for New South Wales v XX* [2018] NSWCCA 198 and *Attorney General for New South Wales v XX* [2019] HCATrans 052

Between September 1990 and February 1991, three children – Colleen Walker, Clinton Speedy and Evelyn Greenup – disappeared from the northern NSW town of Bowraville. The respondent was tried and acquitted of the murders of Clinton Speedy and Evelyn Greenup. On 16 December 2016, the Attorney General for New South Wales made an application to the Court of Criminal Appeal ('CCA') under s 100(1) of the *Crimes (Appeal and Review) Act 2001* (*CARA*) for an order that the respondent be retried for the murders of Clinton Speedy and Evelyn Greenup. The application was the first to be made under s 100(1) of *CARA*. If the application was successful, it was proposed that the respondent would be retried for those offences and for the murder of Colleen Walker at a single trial on the same indictment.

The CCA (Bathurst CJ, Hoeben CJ at CL and McCallum J) dismissed the application. In doing so, the Court undertook a detailed analysis of the scope of the provisions inserted into *CARA* in 2006 which provide an exception to the principle of double jeopardy for a person convicted of a life sentence offence where there is fresh and compelling evidence against the acquitted person in relation to the offence and it is in the interests of justice for the person to be retried. The High Court refused an application for special leave to appeal.

Background

On 13 September 1990, Colleen Walker (aged 16) disappeared after attending a party at which the respondent was present. Her remains were never discovered, but items of her clothing were found in a river. On 3 October 1990, Evelyn Greenup (aged 4) disappeared after she attended a party with her mother and siblings, which was also attended by the respondent. On 1 February 1991, Clinton Speedy (aged 16) went missing after he and his girlfriend fell asleep in the respondent's caravan after a party. The remains of Evelyn Greenup and Clinton Speedy were found in bushland near Bowraville in April 1991.

The respondent was charged with the murders of Evelyn Greenup and Clinton Speedy. Prior to the commencement of the trials, the trial judge ordered that the counts be tried separately and concluded that the 'similar fact' evidence which the Crown relied on as connecting the two murders was not admissible in either trial. That order was made prior to the introduction of the *Evidence Act 1995*. The respondent was acquitted by a jury of the murder of Clinton Speedy, following which the Crown determined not to proceed with the charge of murdering Evelyn Greenup.

A coronial inquest into the death of Evelyn Greenup and the disappearance of Colleen Walker was held in 2004. The respondent was subsequently charged with the murder of Evelyn Greenup and was acquitted by a jury of that offence in 2006.

Statutory provisions

Section 100(1) of *CARA* provides that the CCA may order an acquitted person to be retried for a life sentence offence if satisfied that there is 'fresh and compelling evidence against the acquitted person in relation to the offence' and 'in all the circumstances it is in the interests of justice for the order to be made'. 'Life sentence offence' is defined in s 98(1) to mean murder or any other offence punishable by imprisonment for life. Section 102(2) provides that evidence is 'fresh' if (a) it was not adduced in the proceedings in which the person was acquitted and (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence. Section 102(3) provides that evidence is 'compelling' if it is reliable, substantial and in the context of the issues in dispute in the proceedings in which the person was acquitted, highly probative of the case against the acquitted person. Section 105(7) of *CARA* provides that the CCA may consider more than one application for a retrial at the one hearing, but only if the offences concerned 'should be tried on the same indictment'.

The Court of Criminal Appeal

The applicant submitted that the evidence relating to the disappearance of Colleen Walker ('the Walker evidence') was fresh evidence, as it was not adduced in the trials for the murder of Clinton Speedy or Evelyn Greenup. The applicant argued that, once that evidence was considered, the probative value of the evidence relating to the Speedy and Greenup offences significantly increased. He contended that the Walker evidence would establish that coincidence reasoning was permissible between the three murders and that each of the children was murdered by the same person, the respondent. The applicant identified other categories of evidence which were said to be 'fresh', but accepted that they would not be sufficient to justify setting aside the acquittals if the Walker evidence was not found to be fresh.

There were two principal issues arising out of the application, namely, whether s 105(7) of *CARA* required the Court to consider whether the Walker evidence was fresh and compelling in relation to the murders of Clinton Speedy and Evelyn Greenup together or separately and whether the Walker evidence was 'fresh' in relation to the murder of Evelyn Greenup for the purposes of s 102(2). The CCA declined to consider whether the Walker evidence was fresh in relation to the murder of Clinton Speedy as the application

was made on the basis that the respondent would be tried for the three murders together.

Construction of s 105(7) of CARA

The applicant argued that the question of whether the evidence was 'fresh' in relation to each acquittal could be considered jointly. He submitted that if the Court found that the offences 'should be tried on the same indictment' for the purposes of s 105(7) of *CARA*, then the evidence in respect of each offence would be 'fresh' in relation to each other, given that there had been separate trials for the Speedy and Greenup offences and no trial for the Walker offence. In contrast, the respondent submitted that the application to quash each acquittal should be considered separately and on the basis that the other acquittal still stood. When the evidence in respect of each offence was viewed separately, it could not be said that the evidence was 'fresh'.

The CCA rejected the respondent's construction on the ground that it gave s 105(7) no work to do. However, the Court found that it did not follow that the question of whether the evidence was 'fresh' in relation to each acquittal could be considered jointly. The applicant's submission failed to take into account that the concepts of 'fresh' and 'compelling' were dealt with separately in s 102 of *CARA* and comprised separate elements. Section 102(2) looked at the evidence itself and whether it was fresh in relation to particular proceedings, rather than whether there could be a change in the use to be made of the evidence in those proceedings. Further, s 105(7) did not go so far as to provide that where it could be established that any new trial for the relevant offences 'should be tried on the same indictment', what is found to be fresh evidence in relation to one acquittal will be fresh evidence on the other (at [167]-[172]).

The Court stated that this approach did not mean that s 105(7) had no work to do. If the Court determined that there was evidence which was 'fresh' in relation to one or more acquittals and that those offences 'should be tried on the same indictment' for the purposes of s 105(7), then the question of whether the evidence was 'compelling' would be considered in the context of a future joint trial of those offences. The Court noted, however, that it must be the evidence which has been found to be 'fresh' which must also be 'compelling'. It was not enough that the fresh evidence added to the body of the evidence against the person acquitted; the fresh evidence must be compelling of itself (at [173]-[176]).

'Fresh evidence'

The question of whether the Walker evidence was 'fresh evidence' against the respondent turned on the proper construction of the word 'adduced' in s 102(2) of *CARA*. The applicant submitted that the term 'adduced' meant 'admitted', so that fresh evidence would extend to evidence which had not been admitted in the earlier proceedings and could not have been admitted with reasonable diligence. The applicant accepted that this approach would have the effect that changes to the rules of evidence – such as the enactment of the coincidence provisions in the *Evidence Act* – could result in evidence that was previously available but inadmissible falling within the meaning of 'fresh evidence' in s 102(2). He argued that, on that construction, the Walker evidence was 'fresh' in the Speedy and Greenup proceedings and that the evidence in each of those proceedings was 'fresh' in relation to the other.

The Court rejected the applicant's construction, accepting the respondent's argument that the word 'adduced' meant 'tendered' or 'brought forward'. Therefore, evidence satisfied s 102(2)(a) only if it was not tendered in the proceedings in which the person was acquitted and evidence satisfied s 102(2)(b) only if it could not have been tendered or brought forward in those proceedings with the exercise of reasonable diligence, irrespective of the admissibility of the evidence at the previous trial. Accordingly, evidence that was available but not tendered due to a view that it was inadmissible at the time would not be evidence which falls within s 102(2)(b) (at [225]-[248]).

The Court concluded that, as the Walker evidence was available prior to the Greenup trial, and part of it was sought to be tendered at that trial, the evidence was not 'fresh' within the meaning of s 102(2) (at [256]).

The Court rejected the applicant's other arguments and dismissed the application.

The High Court

The Attorney General applied for special leave to appeal to the High Court on the basis that the CCA had erred in its construction of s 102(2) of *CARA*. Kiefel CJ, Bell and Gageler JJ refused the application. In the Court's oral reasons, Kiefel CJ noted that 'when a party wishes the evidence of witnesses to be taken into account in a trial it puts that evidence before the Court and if the Court considers it qualifies as legally admissible evidence, it receives or admits that evidence. There are, in effect, two stages'. Her Honour observed that the CCA had held that the word 'adduced' in s 102(2) refers to the first stage. The Court could find no reason to doubt the correctness of the decision of the CCA.

A PAPER PRESENTED AT THE ABA/NSWBA rise2018 NATIONAL CONFERENCE 15 & 16 NOVEMBER, SYDNEY

The Australian Bar – Change and Future Relevance

The Hon Susan Kiefel AC Chief Justice of Australia

This Conference will examine ways in which the legal profession can remain 'relevant', 'resilient' and 'respected' in a changing society. It will discuss the legal profession's ability to adapt to change which, of course, is a test of its resilience. It will discuss how to foster respect for the profession and the judiciary which is essential to the maintenance of the rule of law. Whether or how the profession is able to garner that respect and the support of the community may answer the question of its continuing relevance.

There is always the concern that a profession as old as the Bar might one day lose its relevance to society. And it may be thought that future technology, including some forms of artificial intelligence, may render many of the services of the Bar redundant. Similar concerns have been expressed about the future of Courts.

In 2016 Professor Richard Susskind predicted that the legal profession will experience more change 'in less than two decades' than it has 'over the last two centuries' and that traditional legal businesses will fail unless they are able to adapt[1]. A claim of change of this magnitude may warrant reflection. There have been periods in the past when the Bar has been faced with challenges, different in nature but nevertheless serious in their potential impact.

It is as well to recall that the opening for a class of laymen to practise as advocates was itself created by change. That opening was brought about as a result of the prohibition placed by the church in England upon clerks in holy orders appearing as advocates in secular Courts[2]. These new advocates were known as pleaders, along with some other titles, and were trained in law by their Inns. It was necessary for the Inns to provide legal training to their apprentices because the degrees offered by universities at Oxford and Cambridge at this time were useful only if one intended to practise in the ecclesiastical Courts. The burgeoning profession effectively trained itself.

The legal profession, in the sense of an 'occupation professed'[3] is considered to have first become organised with the establishment of the Order of Serjeants in or around the time of Edward I[4]. The Serjeants were a small, elite society of specialist advocates, appointed by royal warrant, who appeared principally in the main common law Court of that time, the Court of Common Pleas, where they had an exclusive right of appearance.

There is always the concern that a profession as old as the Bar might one day lose its relevance to society.

The office of Serjeant was a public one and they took an oath of office accordingly. There is evidence of the standard of professional conduct required of Serjeants from the exhortations of Chief Justices to the order in the reign of Henry VIII[5]. The standard of conduct expected of them reflected their public office. It was high. They were obliged to assist the poor and oppressed and to give counsel to those who sought it. They were to be truthful at all times in the conduct of their profession and do nothing to the wrong of good conscience. It was their duty to 'deal with business expeditiously and not prolong it for gain'.

And they were subject to a duty, which remains just as important today, to dissuade clients from pursuing unjust causes and to advise them to abandon causes if it appeared that they were in the wrong[6].

The history of the Serjeants teaches us many lessons. Chief among them is the respect which may be gained by a profession which has an evident sense of public duty and which demands of its members high standards of conduct and ethics. Their history also teaches us that one cannot assume that things will continue as they are.

It has been said[7] that it was the destiny of the Serjeants to decline with the Court to which they belonged, the aforesaid Court of Common Pleas. The competition from the lower ranks of barristers was also a factor. The demise of the Serjeants coincided with the ascendancy of barristers and the new office of King's Counsel.

The end of the era of the Serjeants commenced with another change – a change in pleading practice. Cases were no longer to be orally pleaded, which was their forté. They were now reduced to writing. At the same time, the Serjeants lost their elite status and exclusive character, not the least, by the excessive number of Serjeants who came to be appointed[8] (a factor which might be borne in mind by those responsible for the appointment of Silk today).

The Inns of Court themselves fell into something of a decline so far as concerns their role in legal education. By the early 19th century the public teaching of English law had essentially come to a halt[9]. The universities were regarded as faculties of Roman law, with English law only being taught as an optional subject[10]. By the 1820s however the number of lawyers in England was growing rapidly no doubt in response to the Industri-

al Revolution and population growth which fuelled an increasing amount of litigation[11]. This period was to mark a critical turning point in the history of the legal profession. It was faced with a decline in the reputation of lawyers amid criticism of high fees and a lack of professional competence and integrity on the part of some lawyers[12].

The profession responded by forming the Law Society which was to advocate for improvements in legal education and the standards of the legal profession[13]. As one author observes[14], lawyers became 'concerned about the behaviour of other attorneys and solicitors, believing that it inevitably reflected upon their own status and reputation'. Reform was necessary in order for the profession to remain relevant and respected.

In the decades which followed, the Law Society began to provide lectures for articled clerks[15], introduced examinations for solicitors and attorneys[16] and published materials on ethics[17]. It played a significant role in drafting the Solicitors Act of 1843, which consolidated laws relating to solicitors and established the Law Society as the regulatory body for solicitors[18].

Barristers in England also took steps towards reform. The Council of Legal Education was formed in 1852 to regulate the education of barristers and mandatory bar examinations were introduced in 1872[19]. In 1894 the Bar Council was established to regulate professional conduct and etiquette[20].

These developments influenced the legal profession which was developing in the Australian colonies. Beginning in the 1840s, law societies were formed to promote professional standards and public confidence in the profession[21].

Legislation established admission boards to regulate the admission of lawyers. English law was first taught at the University of Melbourne in 1857 and later at the University of Sydney[22]. Towards the end of the 19th century, bar associations were established in Victoria and New South Wales and by the turn of the century the bar associations and law societies of the States had begun to bring disciplinary proceedings against 'rogue' lawyers in the Courts[23].

The early decades of the 20th century brought new challenges for the Australian legal profession. It did not always meet them and reform was often left to the legislature.

One example was the admission of women to the profession. By the end of the first decade of the 20th Century women had gained the right to vote in all Australian jurisdictions, but admissions boards and Courts ruled that women could not be admitted to the profession on the basis that they were not 'persons' for the purpose of legal practitioners' legislation. This year marks the centenary of the legislation introduced in New South Wales to remedy that position (for which there will be appropriate celebration). Between 1903 and 1923 similar legislation was introduced in all States.

Another example was the problem of defaulting solicitors. As the Great Depression took hold, a 'spate of misappropriations of trust funds and other financial improprieties' by solicitors in the 1920s and 1930s prompted calls for greater accountability within the profession[24]. Legislation was introduced in most States which required solicitors to keep clients' money in separate trust accounts and granted law societies disciplinary power over their members. Fidelity guarantee funds were established.

The early decades of the 20th Century brought new challenges for the Australian legal profession. It did not always meet them and reform was often left to the legislature.

The latter half of the 20th century brought calls for reform of the legal profession. They may be seen to reflect a certain degree of disillusionment with the profession in an age which was concerned with consumers and access to justice. In 1976 the Attorney General of New South Wales referred the New South Wales Law Reform Commission to examine 'the law and practice relating to the legal profession' and to consider whether reforms were desirable[25]. Over the next two decades, various reports were published by law reform commissions and government committees[26]. Common themes were the need for reforms in relation to complaint handling, legal education and restrictive practices.

It was to be expected that there would be differences of views within the profession about proposals for change. Some members of the profession expressed concern that increasing government regulation would undermine lawyers' independence[27]; while others argued that it was imperative that the profession embrace change or argue its case where it considers change inappropriate[28]. The reports and inquiries ultimately led to a range of legislative reforms in the late 1980s to early 2000s which marked a shift away from self-regulation and towards co-regulation. Multidisciplinary practices and incorporated legal practices were now permitted.

The growth of national law firms and in some cases the internationalisation of large law firms together with multidisciplinary practices were expected to reduce the work of the Bar. The reality is perhaps more complex. And the development of a global market for legal services, facilitated by increasing trade and developments in technology, has enabled some Australian lawyers to practice internationally[29], particularly in the South East Asian and European markets[30].

The production of reports about the legal profession has continued unabated in recent years. They have sought to identify the drivers of change and ways in which the profession might adapt to such change[31]. One of the key drivers is said to be the globalisation of the legal services markets. Another, unsurprisingly, is technological advances. Professor Susskind suggests that advances in areas such as artificial intelligence and machine learning will fundamentally change the way that lawyers work[32].

It may be accepted that the way in which lawyers and the Courts work will be changed, perhaps even fundamentally, by advances in these areas. It has already started in some legal procedures such as discovery where questions as to whether 'predictive coding' should be used in cases involving large numbers of documents have been raised[33]. (A simpler question might be whether the process has real utility).

Justice Nettle has suggested that there are at least two aspects of legal work that are likely to survive the effects of computational law. The first is litigation involving disputed facts. He suggests that the intellectual processes involved in the evaluation of evidence 'are so complex and so much informed by human intuition and experience as to defy synthesisation by any presently available artificial intelligence system'[34]. Even if future advances in technology make such

synthesis possible, Justice Nettle considers that it is questionable whether society would accept the use of computers to assess oral evidence. The other aspect his Honour identified is litigation involving 'the application of open-textured laws'.

There is a difference, he observes, between the scientific reasoning employed by computers and legal reasoning: scientific reasoning assumes there can only ever be one proper outcome, whereas where a law is open-textured, 'logic and reason (as applied under the rubric of legal reasoning) will often yield more than one possible outcome'[35].

In order to survive, the legal profession, and the Bar in particular, may need to readjust its focus to skills such as critical thinking and persuasion that cannot easily be replaced by technological innovation.

In order to survive, the legal profession, and the Bar in particular, may need to readjust its focus to skills such as critical thinking and persuasion that cannot easily be replaced by technological innovation. These are not new skills. They are those which were practised and honed by the early advocates.

Having skills which are marketable may not be enough to ensure the continuing relevance of the Bar. Its relevance will depend largely upon society's perception of it and what it stands for. This has always been the case. It is those special characteristics of a barrister which sets the Bar apart as a profession which may command the respect of society. Integrity, independence, and intellectual rigour, obedience to their duty to the Courts and a strong sense of public duty, which the Serjeants understood so well; these are the characteristics which must be maintained if the Bar is to remain relevant. It should not be overlooked that the rule of law, which is essential to our society, depends in large part on the existence of a strong Bar.

ENDNOTES

1 Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (2nd ed, 2017) xvii, 3.
2 W J V Windeyer, *Lectures on Legal History* (2nd ed, 1957) 139.
3 C T Onions et al (eds), *Oxford Dictionary of English Etymology* (1976) 713.
4 Windeyer, *Lectures on Legal History* (2nd ed, 1957) 139.
5 Sir John Baker, *The Oxford History of the Laws of England: Vol VI 1483-1558* (2003) 430.
6 Sir John Baker, *The Oxford History of the Laws of England: Vol VI 1483-1558* (2003) 430-431.
7 Sir John Baker, *The Oxford History of the Laws of England: Vol VI 1483-1558* (2003) 424.
8 Baker, *The Order of Serjeants at Law* (1984) 111.
9 William Holdsworth, *A History of English Law*, vol VI (2nd ed, 1937) 493.
10 Sir John Baker, *Collected Papers on English Legal History*, vol 1 (2013) 291.
11 Christopher Brooks and Michael Lobban, *Lawyers, Litigation and English Society since 1450* (1998) 101-103, 184.
12 Christopher Brooks and Michael Lobban, *Lawyers, Litigation and English Society since 1450* (1998) 103-104.
13 Christopher Brooks and Michael Lobban, *Lawyers, Litigation and English Society since 1450* (1998) 141.
14 David Sugarman, 'Bourgeois Collectivism, Professional Power and the Boundaries of the State – The Private and Public Life of the Law Society, 1825 to 1914' (1996) 3 *International Journal of the Legal Profession* 81 at 88.
15 Sir John Baker, *Collected Papers on English Legal History*, vol 1 (2013) 301.
16 Richard Abel, *The Making of the English Legal Profession 1800-1988* (1998) 156.
17 David Sugarman, 'Bourgeois Collectivism, Professional Power and the Boundaries of the State – The Private and Public Life of the Law Society, 1825 to 1914' (1996) 3 *International Journal of the Legal Profession* 81 at 94.
18 David Sugarman, 'Bourgeois Collectivism, Professional Power and the Boundaries of the State – The Private and Public Life of the Law Society, 1825 to 1914' (1996) 3 *International Journal of the Legal Profession* 81 at 96; Edmund Christian, *A Short History of Solicitors* (1983) 217.
19 Richard Abel, *The Making of the English Legal Profession 1800-1988* (1998) 50.
20 'Our History', *Bar Council*, available at: https://www.barcouncil.org.uk/about- us/what-is-the-bar-council/our-history/.
21 See e.g. 'History of the Law Society', *Law Society of New South Wales*, available at: https://www.lawsociety.com.au/about-us/organisation-and- structure/history.
22 David Barker, *A History of Australian Legal Education* (2017) 34.
23 Francesca Bartlett and Linda Haller, 'Australia: Legal Services Regulation in Australia – Innovative Co-regulation' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (2017) 161 at 166.
24 Rob McQueen, 'Together We Fall, Divided We Stand: The Victorian Legal Profession in Crisis 1890-1940' in W Wesley Pue and David Sugarman (eds), *Lawyers and Vampires: Cultural Histories of Legal Professions* (2003) 293 at 312-314.
25 New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure*, Report No 31 (1982) 4.
26 See e.g. Clarkson Committee, *Inquiry into the Future Organisation of the Legal Profession in Western Australia* (1983); Government of South Australia, *White Paper: The Legal Profession* (1992); Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48 (1992); Law Reform Commission of Victoria, *Access to the Law: Restrictions on Legal Practice,* Report No 47 (1992); Trade Practices Commission, *Study of the Professions: Legal: Final Report* (1994).
27 See e.g., Graham Molloy, 'The Future of the Profession: A Pessimistic View' (1985) 23 *Law Society Journal* 142.
28 R D Nicholson, 'Inquiries into Legal Services in New South Wales and in the United Kingdom' (1977) 51 *Australian Law Journal* 764 at 765.
29 S Stuart Clark, Robert Leeder and Nicholas McBride, 'Change drivers and their likely effects: Shifting sands beneath Australian solicitors' (2016) 90 *Australian Law Journal* 413 at 417.
30 Law Council of Australia, *Fourth Legal and Related Services Export Survey* (15 December 2014) 3.
31 See e.g. Law Society of England and Wales, *The Future of Legal Services* (2016); Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada* (2014); Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (2017); Law Society of Western Australia, *The Future of the Legal Profession* (2017); American Bar Association, *Report on the Future of Legal Services* (2016).
32 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2nd ed, 2017) 10-15.
33 See e.g. *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors* (No 1) [2016] VSC 734; *Pyrrho Investments Limited v MWB Property Limited* [2016] EWHC 256 (Ch).
34 Justice Nettle, 'Technology and the Law' (Speech presented at Bar Association of Queensland Annual Conference, 27 February 2016) 9.
35 Justice Nettle, 'Technology and the Law' (Speech presented at Bar Association of Queensland Annual Conference, 27 February 2016) 16.

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The role of the commercial bar in the mid-21st century

The Hon T F Bathurst, Chief justice of New South Wales

The bar of the late twentieth century would look very odd to a reader in 2018. Briefs delivered in folders were unheard of, trolleys were only for shopping and phones were an enormous contraption attached to a desk. The next ten years saw the emergence of the trolley, and a somewhat more remarkable invention called the facsimile machine. This was soon followed by email, smartphones and the availability and acceptance of the essentiality of online research. The manner in which a barrister conducted his or her practice changed significantly over the course of this time.

In another 50 years, it is doubtful the bar will bear much resemblance to its present appearance. Advocates tend to be the most adamant of all lawyers that their practices are insulated from the forces of technological and societal change. There are a few reasons to believe this is not the case. The first is simply that because some practitioners do not foresee dramatic change does not mean it will not happen. The technological revolutions that have swept other industries were probably unforeseeable to those on the brink of it.

In any event, the bar is not just comprised of people who will only be around for the foreseeable future. Of the 2409 barristers in New South Wales, 600 or around 25% are within five years of call and nearly 500, or around 20% are in their thirties or younger.[1] Assuming this generation works until their sixties, at least, is it really conceivable that in 30 years' time – say in 2050 – practice at the bar is going to involve wigs, wood-panelled Courtrooms, trolleys stacked to precarious heights, and arcane legal jargon?.[2] The existing Court system is, on one view, an antiquity, ever-evolving but not really radically different from its existence in the 19th century.[3]

While high-value and very complex work will likely continue in the conventional manner for some time, not all barristers are engaged all the time in this type of work. Outside this niche are foreseeable and imminent changes, catalysed by both economic and structural factors.

In terms of economics, while many in the profession have assumed that things would return to the business as usual of the early 2000s, the nature of the legal market is arguably different: it is a buyers' market.[4] The expectation that external firms and counsel will 'do more for less' is not waning, and there is little to no commercial appetite for old-school inefficiencies.[5]

While there has been a clear cyclical downturn in the legal market associated with economic conditions, a structural downturn associated with technology has also been at play. Much like many other white-collar industries, basic tasks have been replaced by computation, automation and soft artificial intelligence.[6] It is inconceivable that technology will transform every other profession but somehow the legal system and the Courts will carry on as normal.

The final contributing factor is the pernicious problem of access to justice. It is simply the case that too many people do not have adequate advice or representation. The problem is chronic and regularly dissected in the continuous stream of reports and inquiries into unmet legal need. The most recent iteration is the 'Justice Project' report, which was released in August by the Law Council of Australia.[7] Over the course of 1500 pages, it provides a review of the national state of access to justice, with some 59 recommendations. It adds to the large existing body of literature evidencing that a significant proportion of Australians simply do not enjoy equal justice.

In the author's opinion, there are therefore two catalysts for change: continued pressure from clients to contain costs and pressure on governments to make the civil justice system more accessible. One response might be that these two pressures have always existed. What has changed is the capacity of technology. It is not a panacea for all problems, but if experience from other professions is any guide, it would be unwise to dismiss it entirely.

It is in this context that this paper considers the role of the commercial bar in the fast approaching mid-21st century. This analysis is undertaken in full awareness of the folly of prediction; in retrospect correct predictions look predictable and incorrect ones are laughable. Or, as Niels Bohr said: 'prediction is very difficult, especially about the future'.[8] On the other hand, as Wayne Gretzky, the ice hockey player famously advised, you 'skate where the puck's going, not where it's been'.[9]

Building relationships and reputations

What does it mean for a barrister to be operating in a buyers' market? In a tightening legal market, relationships will be important. In addition, the bar will come to be relied on more to recommend solutions to problems rather than legal opinions on discrete issues.

This will firstly require barristers to have a greater commercial understanding of client's needs than before. This provides both challenges but also a real opportunity. In the disrupted legal world, counsel will have more direct interaction with the client, more direct contact with corporate counsel and more pressure to provide a holistic solution. Indeed, it is not unimaginable that in the case of commercial work, the traditional divide between barristers and solicitors will

be blurred, both as to the work they do and their relationship with clients.

It will also require a wider range of softer skills than was previously necessary.[10] A fine legal mind may not suffice to the extent it has in the past.[11] Barristers will need a greater familiarity with clients' business environments and a clear understanding of what it is like to work in the particular industry. This in turn requires the skill of empathy, and the capacity for listening.[12]

Clients have long been sceptical of detailed learned advices, they want counsel's views. No-one likes an eleven-page advice, five pages learnedly saying why a particular proposition is correct, five pages saying why it is not, with the eleventh page blank. However, the future will involve more than simply providing views on particular legal topics. Barristers will be expected to formulate views as to what is feasibly to be achieved by litigation or another form of dispute resolution, and in doing so, provide holistic solutions that meet the needs of the client.

The bar may also see the emergence of more advanced online reputation systems. It is trite that a barrister's practice depends largely on reputation. Plenty of these systems of course already exist, such as Doyle's Guide, Chambers & Partners and the AFR guide. However, with due respect to their respective publishers, they are probably an early incarnation of what is possible, which might include clients sharing views on performance, outcomes and pricing.[13] These might be connected in with technology similar to the recently launched 'Barristers Select' website, which may again be an early incarnation of the future of briefing.

The impact of technology

These changes are inextricably linked to the broader impact of technology. It has obviously already infiltrated every aspect of litigious work. E-filing, ediscovery, real time transcription services, electronic Courtrooms, the use of video links for witnesses and the use of devices on the bench and at the bar table are now a matter of course. Nevertheless, the fundamental work styles and orientations of the bar have not yet undergone radical transformation.

The bar and the Courts are regularly subjected to pejorative descriptions like old-fashioned, elitist or anachronistic.[14] However, the bar is better placed to adapt than the general profession, by the very nature of its practice. It has flexibility, and the absence of a bureaucratic structure, which are essential prerequisites in a technological age.[15]

The structural changes wrought by technology on the solicitor's branch of the profession have been well documented, and include things like document automation, online legal guidance relying on systems rather than humans, open-sourcing of legal information and document analysis systems that are able to outperform humans in document review.[16]

No-one likes an eleven-page advice, five pages learnedly saying why a particular proposition is correct, five pages saying why it is not, with the eleventh page blank.

Emerging technology includes legal 'question answering' systems, a widely cited example being that based on IBM's Watson, which was built to compete on the quiz show *Jeopardy*. In 2011 it beat the two best ever human competitors. On the cusp of facing defeat, Jennings, the 74-time consecutive Jeopardy champion wrote on his video screen: 'I, for one, welcome our new computer overlords'.[17]

Powered by the Watson technology is 'Ross', which performs legal research in a manner approximating the experience of working with a human lawyer – i.e., it can respond to questions in natural language.[18] Importantly, and despite all the hype, its developers don't claim it can replace the human, just make them more efficient and more accurate. The common objection is that for all the talk about artificial intelligence replacing lawyers, the threat is yet to materialise. Amara's law, however, comes to mind: that we tend to overestimate the effect of technology in the short run and underestimate its effect in the long run.[19]

For the most part, however, the work of the oral advocate is not easily replaceable by technological innovation, and barristers will probably not be welcoming their 'i-Advocate' overlords anytime soon.[20] Work that is routine and repetitive is far more susceptible to the forces of automation and systemisation than that which is bespoke or unique. It is of some comfort that Professor Richard Susskind, who has been predicting the demise of lawyers for some time now,[21] states that 'it is not at all obvious how the efforts and expertise of the Courtroom lawyer might be standardized or computerized'.[22]

The fact is, however, that Courtroom lawyering will change when the Courtroom itself changes. This is already happening in areas such as case management. The traditional in-person arrangements are time and administration intensive. In an average week in the NSW Supreme Court, the relevant registrar will oversee 107 directions hearings in the Equity List, 39 in the Corporations List, 169 in the Common Law Lists, 26 in the Court of Appeal List, and 117 in the Court of Criminal Appeal and bails lists. For each of these hearings, physical attendance is ordinarily required of practitioners for each represented party, as well as self-represented litigants, creating a substantial inconvenience and cost for matters which are typically uncontroversial.

In 2018 the Court trialled an online Court system in the Corporations Registrar's List, which has proved quite successful. In the month of March, the Registrar recorded 104 directions in the online Court. The relevant parties were relieved of the need to appear physically in the registrar's Court for the determination of orders by consent or non-complex timetabling orders, or to obtain a referral to the Corporations List judge as the matter was ready for case management or hearing.

None of these 104 directions required the use of a physical Courtroom, needed to occur at a particular time, or required parties to spend significant time waiting for their matter to be called from the list. A substantial amount of time was likely saved without compromising the quality of the communication between the parties and the registrar, or the case management process. Further efficiencies will soon be created by transitioning most matters into the online Court system and expanding the types of orders that can be made.

This will impact on junior barristers' work. There is no doubt that barristers will be less likely to be briefed to do matters such as consent adjournments and the like, particularly when working with solicitors previously disadvantaged by physical proximity,

such as country or suburban solicitors. On the other hand, it will not necessarily eliminate counsel's involvement in more complex online matters, particularly if the barrister concerned actually has the best appreciation of the case and the client's needs.

Beyond case-management, however, lie proposals for proceedings conducted entirely online. It is instructive to consider some of the reforms undertaken in the United Kingdom as a guide to potential future directions in this country.

In September 2016 the Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals released a 'joint vision statement' announcing a £1 billion transformation of the justice system[23] to make it 'digital by default'.[24] The announcement came in the wake of Lord Justice Briggs' report in 2016 on the structure of the Civil Courts,[25] which found, in his words, that while 'the Civil Courts of England and Wales are among the most highly regarded in the world', their 'single, most pervasive and indeed shocking weakness' is that they 'fail to provide reasonable access to justice for the ordinary individuals or small businesses with small or moderate value claims.'[26] This is certainly a problem which exists in Courts of this country.

To address this 'missing middle', it recommended a three-tiered online Court, initially for claims up to £25, 000. It would involve an automated 'triage' stage including advice to help claimants articulate their cases, exchanges between claimants and defendant and the preparation of the claim form and particulars of claim. The second stage would be an ADR stage, involving telephone, online or face-to-face mediation or early neutral evaluation, and finally, for those cases still not settled, a determination stage which could comprise a conventional hearing, or a telephone or video hearing. It could also be legal determination without a hearing. The essential concept was a new, more investigative Court, designed for navigation without lawyers.[27]

In a very real sense it represents a departure from the adversarial litigation system which has always been a feature of the common law. Briggs' proposal also incorporated aspects of the Canadian Civil Resolution Tribunal,[28] which was launched in 2016 as that country's first entirely online tribunal. The CRT resolves small claims disputes and is a graduated process of fully integrated ADR going from negotiation, to facilitation, to an online determinative process.[29]

The resulting reform plan, which is ongoing at the time of writing, involves over 50 separate projects. The crime program is developing a common platform for securely sharing information on a single system and summary 'nonimprisonable' offences will be taken out of the Courtroom and heard on the basis of a file. In serious cases plea indications will be done online and judges and magistrates will be able to conduct remand hearings remotely. In the civil, family and tribunal program, the plan is to unite all the administrative and judicial procedural steps on one digital platform with a single access portal, with automated triage and more frequent use of ADR.

It may be that there are disadvantages that arise from moving away from traditional oral hearings in a physical place, but these have to be weighed against the realities of the current civil justice system, not an idealised version of it.

There will be less use of physical buildings, with sales generating income required for investment elsewhere, as video hearings reduce Courtroom needs. A digital tool will automate aspects of scheduling and listing and Courts and tribunal 'service centres' will be created as centralised locations for contact and case administration.[30] Funding was allocated to these reforms on the expectation that the Courts would make long-term spending reductions, from fewer physical hearings and fewer physical buildings to maintain. Court staff numbers are also to be reduced from 16, 500 to around 10, 000.[31]

Returning however to this country, the question arises as to what a 'digital by default' reform agenda look like for the commercial bar? On the one hand it might be said that this won't affect barristers' practices at their core all that much. The real justice gap that these reforms aim to plug relate to low value civil claims, for which it is plainly very difficult if not impossible for individuals and small businesses to presently obtain advice or representation. If it be the case, however, that resolution in an online Court keeps costs down without sacrificing proper consideration of the relevant facts and law, why wouldn't corporate clients push for the resolution of their matters without the expense of a traditional hearing?

Physical appearances in Court might start to become a rarity, with perhaps more virtual appearances. This will require new and different types of advocacy skills to those traditionally held. The other major opportunity of technology is the ability to move to a much more iterative process, where appellant, respondent and judge can iterate and comment on the progress of a case as it develops rather than waiting until everyone is in one room to discover that some critical procedural step or piece of evidence is missing. This will impose a greater burden on the judge and shift the system more generally towards an inquisitorial rather than adversarial style.[32]

In terms of appellate advocacy, unlike the US Supreme Court, it is unlikely at least in the near future, that stringent time limits will be imposed in appeals, such as ten minutes for oral argument. However, there will be far greater emphasis on written material and an increasing expectation that counsel confine themselves to propositions based on that material with the bulk of the oral argument involving dealing with questions arising out of the Court's reading of that material.

That probably throws up two challenges: first, and fundamentally, it must be recognised that written advocacy will be as vital and indeed in some cases more important than the oral presentation. Second, even greater flexibility than now will be required in oral advocacy. A hearing which is designed to elucidate particular problems judges see in submissions will not be very comfortable for the 'plodding barrister', i.e., a barrister who confines him or herself to carefully reading some prepared script without any appreciation of where that script might have flaws.

In considering the response of the bar to these changes, it is important to keep in mind the drawbacks of the present system, which too often excludes litigants with credible claims. It may be that there are disadvantages that arise from moving away from traditional oral hearings in a physical place, but these have to be weighed against the realities of the current civil justice system, not an idealised version of it.[33]

In that context it is also important to keep in mind what clients actually want. In 2010, Ebay commissioned a study to evaluate its online dispute resolutions systems, which handle 60 million disputes per year. It randomly assigned several hundred thousand users to two groups and compared their buying and selling behaviour for three months before and after their experience with the dispute resolution system. The hypothesis was that those who 'won' the dispute would engage in greater activity while those who 'lost' would engage in less. This did occur, but more significantly, it found that the only buyers who decreased their activity post-dispute were those for whom the process took a long time: more than six weeks. Buyers preferred to lose their case quickly than have the resolution process go on for an extended period of time.[34] It serves as a reminder of the importance of evaluating what is vital about the civil justice system from the perspective of the public, whose interests it exists to serve.

Alternative Dispute Resolution

If reforms like the United Kingdom ones are adopted, there will be greater emphasis on mandatory ADR as part of an iterative online Court process. The UK reforms take the linking of ADR with judicial adjudication one step further than Court-annexation or Court-referral has done in the past. It instead blurs the boundaries between the two processes, merging them into one convenient online package. The Master of the Rolls, Sir Terrence Etherton has stated there is a 'fundamental' difference in the new online process, as while the old approach 'encourages' ADR processes the online Court 'embeds them into the pre-trial process for the first time, and requires the Court actively to facilitate them'.[35] Lord Justice Briggs described it as 'designed to take the A out of ADR'.[36]

It must be recognised that whether future reforms adopt the model advocated by Lord Justice Briggs, the Canadian model, or some alternative, there will be pressure to reduce costs in respect of smaller claims by eliminating or minimising the role of lawyers in the dispute resolution process. That means it is increasingly important in this area and other areas of ADR for barristers to show that they can really add value to the process. If these processes make non-lawyer dispute resolution a real alternative to resolving disputes with or through lawyers, then it will be up to lawyers, including barristers, to show that the expense of retaining them either for the whole or part of matters, is worth the cost. It goes without saying that it will not be worthwhile where the costs exceed the amount of the claim, particularly where these new models make no provision for costs orders in favour of the successful parties.

Traditional ADR will also continue to be affected by 'ODR', or online dispute resolution, with tools such as AI-based diagnostic programs that can make forecasts about likely outcomes or suggest optimised settlement options based on party preferences.[37] Evidently this will require the bar to be familiar with emerging technology, have the capacity to know its limits, and to handle the disputes that will inevitably arise out of its use. There will be opportunities here for practitioners to use these systems to the advantage of their clients by developing the skills and methods necessary to participate as an advocate, perhaps in e-mediation or e-negotiations.

Traditional ADR will also continue to be affected by 'ODR', or online dispute resolution, with tools such as AI-based diagnostic programs that can make forecasts about likely outcomes or suggest optimised settlement options based on party preferences.

It is also helpful to remember that online ADR is not simply the offline versions moved online.[38] A process using technology may be different in nature to its original form. That this is true is evident in the simple fact that many of the 'values' of ADR touted as significant in the 1970s and 1980s like face-to face resolution, individualised processes and confidentiality of data are not present in their online counterparts, which are conducted remotely, use standardised systems and collect data.[39]

In the short term the pressure of 'more-for-less' will mean ADR and ODR continue to grow in importance. It will be important for the bar to develop the skills necessary to recommend solutions appropriate to the particular dispute and client, whether that be traditional mediation, arbitration or ODR.

Regulatory Practice

Finally, it is important to consider the changing substantive nature of commercial practice. It is likely to involve an increasing amount of regulatory proceedings, given the views expressed in the Final Report of the Banking Royal Commission.[40] In his chapter on regulation and regulators, Commissioner Hayne notes that traditionally ASIC's starting point has been: how can this be resolved by agreement? His view is that this 'cannot be the starting point for a conduct regulator' and rather, the regulator should first ask whether it can make a case for breach and if it can, 'why it would not be in the public interest to bring proceedings to penalise the breach'.[41]

In the Final Report, the Commissioner noted that ASIC had submitted a response to these views, which had previously been expressed in the earlier Interim Report. The response stated that ASIC would do three things.[42] First, accelerate its enforcement activities and its capacity to pursue actions for serious misconduct through greater use of external expertise and resources. Second, move more quickly to, and accordingly, conduct more, civil and criminal Court actions against larger financial institutions. Third, it accepts that the proper starting point is for it to ask the question 'why not litigate', and turn its mind to whether enforcement tools should be deployed in response to each and every contravention of the law.[43]

This has consequences for commercial practice. First, ASIC's evinced intention to pursue Court action more often will obviously generate more work, both on behalf of regulators and for corporations. Secondly, it may be that the nature of regulatory practice alters in some ways. In the Report, commenting on whether the law should be changed, Commissioner Hayne noted that 'basic norms of behaviour' must inform the conduct of financial services entities, being: 'obey the law; do not mislead or deceive; act fairly; provide services that are fit for purpose; deliver services with reasonable care and skill; and when acting for another, act in the best interests of that other'.[44] In his earlier Interim Report, he had commented that 'these ideas are very simple' and in his view their simplicity pointed 'firmly towards a need to simplify the existing law rather than add some new layer of regulation'.[45]

It seems to be his view that the more complicated the laws, the more they are seen as 'a series of hurdles to be jumped or compliance boxes to be ticked',[46] and that in doing so it becomes easier to in fact develop cultures that are unfavourable to compliance.[47] What may therefore emerge is a move towards open-ended unifying principles in this area of regulation, such as unconscionability and unfairness.

This raises the question of the proper balance between rules-based and principles-based regulation, and between certainty and flexibility. On the one hand, prescriptive rules provide greater clarity, rendering it easier for a regulated entity to determine what rules it must comply with. Julia Black, a key proponent of principles based regulation, conversely states that they are prone to gaps and rigidity, and therefore, 'creative compliance'.[48]

Principles-based regulation is demanding when it comes to the judicial task of interpreting quite general or 'rubbery' standards. The risk is that the question of whether certain conduct is unconscionable or unfair becomes an idiosyncratic determination of justice in a particular case: unconscionability or unfairness in the eye of the beholder.[49] On the other hand, as Lord Wilberforce recognised in *Photo Productions Ltd v Securicor Ltd*, consumer protection legislation can reduce the amount of bad law emerging from hard cases in which judges strain contractual language to avoid harsh consequences.[50]

A major drawback of principles based regulation has generally been the perceived absence of precision, certainty and predictability. The possibilities of technology may start to ameliorate these pitfalls. The ability of technology using Big Data to detect patterns and correlations has proven more capable than predictions of lawyers engaged in traditional legal research.[51] Professor Daniel Katz, in the United States context, has developed an algorithm which was able to correctly predict results in 70.2% of the 28,000 decisions US Supreme Court decisions, as compared to 66% human expert accuracy.[52] Much of legal work traditionally has involved only qualitative predictive methods.[53] It is probably one of the 'remaining outposts of the corporate world' whose operations are 'dictated mainly by human experience'.[54]

Prediction is a core component of the guidance that lawyers offer – think of questions as simple as 'do I have a case', 'what is our likely exposure and 'how much is this going to cost'.[55] but until recently has involved very little quantitative evaluation. The scope of a lawyer's ability to answer these questions is currently limited by lived experience and their capacity to research past events. Quantitative legal prediction can draw from trends of thousands to millions of prior events, which combined *with* human reasoning will offer more accurate predictions than either operating alone.[56] Of course, incorporating these tools into legal practice assumes that there are lawyers out there who can actually do mathematics. It might be the greatest challenge yet.

It seems increasingly likely that either what have traditionally been soft law principles will be translated into hard legal obligations under a principles-based approach, or that existing soft law obligations, which still serve important regulatory functions, will expand in scope.

Relatedly, another emerging trend will be the need for commercial practitioners to have a greater understanding of the methods and principles of public law. This paper does not propose to delve into the normative debates on the public/private divide. However, it goes without saying that one of the increasing opportunities for commercial lawyers will be to advise their clients on the navigation of complex regulatory requirements and in appropriate cases the means by which they can be challenged. There remains a suggested dichotomy between what is generally described as the commercial bar and the administrative, or public law, bar. To the extent the dichotomy exists, it is not the interests of commercial lawyers to abandon the field, nor is it in the interests of their clients. The experience gained in the commercial arena will provide commercial lawyers with an understanding of the challenges to corporations arising from regulation and how best to deal with them.

Soft Law

The other area that will become increasingly important to commercial practice is for barristers to have a firm grasp of the relevant corporate soft law, and the ability to advise on what it means for corporate practice. This is particularly so in relation to corporations and particularly directors' duties.

For example, in the Royal Commission Interim Report, the Commissioner had made mention of the Banking Code of Conduct. He commented that 'significant instances of conduct identified and criticised' were not compliant with the banking industry code of practice as it stood at the relevant time. However, given that a contravention of the Banking Code, although a breach of contract, is not a breach of the law, it is enforceable only at the behest of aggrieved customers, at a point at which they will generally not have the means or the will to 'take on the battle'.[57] In the Final Report, Commissioner Hayne recommended that industry codes of conduct such as the Banking Code include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law,.[58]

Another significant source of soft law is the ASX Corporate Governance Principles and Recommendations, which state, e.g., that listed entities should act 'ethically and responsibly'.[59] In May 2018, the Council released the consultation draft for the fourth edition of the principles and recommendations, which it described as 'anticipating and responding to' some of the recent governance issues.[60] The key change was a substantial redraft of Principle 3 to address corporate culture and the inclusion of this concept of a 'social licence to operate' by requiring a listed entity to act 'in a socially responsible manner'. It stated that preserving this social licence required that the board 'must have regard to the views and interests of a broader range of stakeholders than just the entity's security holders', including employees, customers, suppliers, regulators and the local community.

The submissions in response on the whole were to the effect that the proposed change was undesirable. The Business Law Section of the Law Council, e.g., has said that the concept of the social licence to operate was 'too vague and uncertain to serve as the touchstone for an important piece of regulatory policy'.[61] It was also decried as inconsistent with the fundamental principle that directors owe their duties to the company

and not to any other persons.[62]

The final version of the fourth edition was released in February 2019, with a response indicating where changes had been made from the consultation draft. It noted the strong objections to the inclusion of a reference to a listed entity acting 'in a socially responsible manner',[63] and this phrase was removed from the final version.[64] However, it is telling that changes of this nature were even proposed in the first place. It seems increasingly likely that either what have traditionally been soft law principles will be translated into hard legal obligations under a principles-based approach, or that existing soft law obligations, which still serve important regulatory functions, will expand in scope.

Either way, there will be opportunities for commercial advocates. There will always be disputes as to whether actions of corporations are complying with their hard legal obligations. In addition, there will be increasing opportunities to cast an independent view over a corporation's activities to see whether it is complying with soft tlaw obligations.

Conclusion

In among all the change, there are two certainties. The first is challenging, the second comforting. First, the bar will have to be ready to adapt to a changed technological and commercial environment for their practices to thrive. Second, just as you can't have law without lawyers, so you can't have commercial law without commercial lawyers.

I express my thanks to Ms Naomi Wootton for her assistance in the preparation of this address.

ENDNOTES

1 See New South Wales Bar Association, 'Statistics' <www.nswbar.asn.au/the-bar-association/statistics>.
2 See Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017) xix.
3 Scott J Maybury, 'The 'new' advocacy': What does it mean for legal practice?' (2016) 41 *Australian Bar Review* 246.
4 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2010) 270.
5 Susskind, above n 2, 88.
6 Daniel Martin Katz, 'Quantitative Legal Prediction – Or – How I learned to stop worrying and start preparing for the data-driven future of the legal services industry' (2013) 62 *Emory Law Journal* 909, 910.
7 Law Council of Australia, *The Justice Project: Final Report* (Report, August 2018) <https://www.lawcouncil.asn.au/justice-project/final-report>.
8 See generally TF Bathurst, 'The Folly of Prediction' (Speech delivered at the Opening of Law Term Dinner, Sydney, 30 January 2013) <http://www.supremeCourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_2013.01.29.pdf> 1-2.
9 Quoted in Susskind, above n 2, xxi.
10 Ibid 75.
11 Ibid 75.
12 Ibid 76-77.
13 Ibid 47.
14 Ibid 12.
15 See TF Bathurst, 'iAdvocate v Rumpole: Who will survive? An analysis of advocates ongoing relevance in the age of technology' (2015) 40 *Australian Bar Review* 185, 192.
16 See generally Susskind above n 2, 43-55
17 Quoted in Katz above n 6, 926.
18 See IBM, 'Ross and Watson tackle the law' <https://www.ibm.com/blogs/watson/2016/01/ross-and-watson-tackle-the-law/>.
19 Coined by Roy Amara, former head of the Institute for the Future at Stanford University.
20 See Bathurst, above n 15.
21 See Susskind, above n 2; Susskind above n 4.
22 Susskind, above n 2, 65.
23 Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, 'Transforming Our Justice System' (Joint Vision Statement, September 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf>.
24 See Dame Hazel Genn, 'Online Courts and the Future of Justice' (Birkenhead Lecture 2017, delivered at Gray's Inn, 16 October 2017) 3.
25 Michael Briggs, 'Civil Courts Structure: Interim Report' (December 2015) <https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf> and Michael Briggs, 'Civil Courts Structure Review: Final Report' (January 2016) <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-Courts-structure-review-final-report-jul-16-final-1.pdf>.
26 Briggs, 'Final Report', above n 25, 28.
27 Ibid 36.
28 Ibid 44.
29 Civil Resolution Tribunal, 'How the CRT Works' <https://civilresolutionbc.ca/how-the-crt-works/>.
30 See generally Joshua Rozenberg, 'The Reform Projects' <https://longreads.thelegaleducationfoundation.org/origins-of-the-online-Court/>.
31 Ibid 'HMCTS Reform'.
32 See generally Genn, above n 24.
33 Susskind, above n 2, 120, who cites Voltaire in this regard: 'the best is the enemy of the proportionate'.
34 See Ethan Katsh and Colin Rule, 'What we know and need to know about Online Dispute Resolution' (2016) 67 *South Carolina Law Review* 329, 334-5.
35 Sir Terence Etherton, 'The Civil Court of the Future' (The Lord Slynn Memorial Lecture, 14 June 2017), 9-10.
36 Michael Briggs, 'The Online Solutions Court: affordable dispute resolution for all' (JUSTICE Lecture, October 2016) <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/10/Lord-Justice-Briggs-JUSTICE-lecture-Oct-2016.pdf> 10.
37 See Susskind, above n 2, 116.
38 See Katsh and Rule, above n 34, 330.
39 Ibid. See also Robert J Condlin, 'Online Dispute Resolution: Stinky, Repugnant or Drab' (2017) 18 *Cardozo Journal of Conflict Resolution* 717, 751-3.
40 Financial Services Royal Commission, *Final Report* <https://financialservices.royalcommission.gov.au/Pages/reports.aspx>.
41 Ibid, Vol 1, 424.
42 Australian Securities and Investments Commission, 'Response to Interim Report' <https://financialservices.royalcommission.gov.au/Submissions/Documents/interim-report-submissions/POL.9100.0001.1060.pdf>; see also Financial Services Royal Commission, above n 40, 425–6.
43 Ibid 6-7.
44 Financial Services Royal Commission, *Final Report*, above n 40, 376.
45 Financial Services Royal Commission, *Interim Report* <https://financialservices.royalcommission.gov.au/Pages/reports.aspx> 290.
46 Ibid 162.
47 Ibid 291.
48 Julia Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) London School of Economics and Political Science, 7.
49 See *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, [196]
50 [1980] UKHL 2; [1980] AC 827 cited in A M Gleeson, 'Advocate, judge and arbitrator: perspectives on commercial law' (2018) (Spring) *Bar News* 37, 43.
51 Susskind, above n 2, 53-4.
52 Daniel Martin Katz, Michael J Bommarito II and Josh Blackman, 'A general approach for predicting the behaviour of the Supreme Court of the United States' (2017) 12 Plos One <https://doi.org/10.1371/journal.pone.0174698>.
53 Susskind, above n 2,53-4.
54 Katz, above n 6 quoting Farhad Manjoo, 'Will Robots Steal Your Job', SLATE (29 September 2011) <http://www.slate.com/articles/technology/robot_invasion/2011/09/will_robots_steal_your_job_5.html>
55 Katz, above n 6, 912.
56 Ibid 929.
57 Financial Services Royal Commission, *Interim Report*, above n 45, 291-2.
58 Financial Services Royal Commission, *Final Report*, above n 40, ch 6.
59 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd ed, 2014) <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>.
60 ASX Corporate Governance Council, *Proposed Fourth Edition of the Corporate Governance Principles and Recommendations* (2 May 2018) <https://www.asx.com.au/documents/asx-compliance/mark-up-to-third-edition.pdf>.
61 Law Council of Australia Business Law Section, 'Submission on Draft Fourth Edition of the Corporate Governance Principles and Recommendations' (30 July 2018) <https://www.asx.com.au/documents/regulation/law-council-of-australia-business-law-section.pdf>.
62 See, e.g., King & Wood Mallesons, 'Submission on the proposed fourth edition of the Corporate Governance Principles and Recommendations' (27 July 2018) <https://www.asx.com.au/documents/regulation/king-wood-mallesons.pdf>.
63 ASX Corporate Governance Council, *Fourth Edition of the Corporate Governance Principles and Recommendations: Consultation Response* (27 February 2019) <https://www.asx.com.au/documents/regulation/cgc-consultation-response-fourth-edn.pdf> 9.
64 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, 2019) <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf> 16.

A PAPER PRESENTED AT THE ABA/NSWBA rise2018 NATIONAL CONFERENCE 15 & 16 NOVEMBER, SYDNEY

The future of the independent Bar in Australia

By Chief Justice James Allsop AO

I propose to discuss aspects of the Bar at the present time as a basis for discussing the future. The future, with all its possible changes, should still be seen as rooted in some immutable considerations.

This speech will commence by reflecting upon the place of the independent profession, and in particular the Bar. The independence of the judiciary and the judicature is premised on an independent profession, and, in particular, the Bar, in the administration of justice. This requires some comments on the Rule of Law.

The independence of both Bench and profession (and so, Bar) is an underpinning foundation of the Rule of Law. That is, in part, because the Rule of Law is a state of affairs involving a spirit of liberty and freedom that lives within a framework that has a constituent element of the subservience of all power to the law of the polity. The Rule of Law in this conception sees law not merely as the rules to be set by the powerful. It is a conception of legitimate representative and organised power, reflecting democratic and social values that make subjection to the Rule of Law an aspect of civil society's protection of the individual, not an aspect of domination by the powerful.

At the core of this conception of the Rule of Law is the irreducible character of judicial power that cannot be exercised, or required to be exercised, other than fairly, equally and justly.[1]

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In an adversarial system, the protection of the citizen against the exercise of public or private power depends on the skilled and faithful propounding of the rights of the client, in a framework of an ultimate and overarching duty to the Court as the instrument and embodiment of judicial power and justice. One sees this in the very acts of day-to-day practice – in the reliance of the Bench upon the Bar for skilled and scholarly advocacy; for the advocacy to be the product of the application of the duty not to propound meritless points; and for behaviour of the highest standards in bringing disputes to an early resolution with only issues genuinely in dispute being ventilated.

The place of the profession, and especially the Bar, as officers of the Court, and the relational duty and respect created by that position, can be seen at admission ceremonies. You should attend one every now and again. The ceremony will remind you of the living nature of that relationship of Bench and profession.

The importance of the Bar comes from its place in the judicial process. In *Re Nolan*,[2] Gaudron J referred to the judicial process as partaking of the same fundamental importance as the democratic process.[3] Justice Gaudron expressed the importance of the judicial process to the nature of judicial power and the resolution of controversies fairly, in the maintenance of an open, free and just society. The judicial process and its features can be seen as explained in numerous cases, especially by Gaudron J.[4] One clear expression of the matter by her Honour is in *Nicholas v The Queen*:[5]

> …the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a Court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.

One sees in this articulation a strong structure of rule and principle, but weaving in values and their indefinable texture, to create the strength of a whole conception rooted in fairness, dignity and equal treatment before and by the law, in its practical and real life application. Without independent representation informed by the fiduciary principle and the duty to the Court the protective judicial power is stunted. So, the profession, and so the independent Bar, forms an integral part of the judicial process and so judicial power.

What is the independence of which I speak? I cannot be exhaustive. I wish to explore the notion. There are some obvious considerations. For both Bar and Bench, it involves the financial independence not to be beholden to a master who will control or

influence independent judgment. For both, it also involves skill, expertise and scholarship, which permit and foster the confident independence of mind necessary for the difficult tasks involved. For any institution of skill, integrity and independence, one of the greatest challenges to its independence is the entry into, or appointment to, its ranks of less than qualified and less than competent people. Independence can be undermined by incompetence as much as by venality.

The notion of the independence of the Bar requires a constant appreciation that it is a profession not a business. The difference is impossible to define; but the distinction arises in everyday activity. There is, however, a difference, not hard to recognise upon granular examination. At the risk of over-simplification, the profession of law is marked by scholarship, a service to the public, and the daily recognition that the professional is bound, in **everything** he or she does, to or for his or her client by the fiduciary duty so compellingly encapsulated by Cardozo CJ ninety years ago:[6]

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition i.e., unbending and inveterate. Uncompromising rigidity has been the attitude of Courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court.
>
> (Citations omitted.)

Cardozo had a gift with words and ideas. So did Holmes. In 1898, Holmes (then a judge on the Massachusetts Supreme Judicial Court) gave a speech to Boston law students. He spoke of professionalism and money in a characteristically pointed and illuminating way. The speech is a classic of jurisprudence, legal philosophy and advice to the young. It is an insight into life, the law, and the Bar. It survives in his collected works, as 'The Path of the Law.' In the speech he was prescient. He began with a lament, and proceeded to the truly human:[7]

> The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. 'The fortune,' said Rachel, 'is the measure of the intelligence.' That is a good text to wake people out of a fool's paradise. But, as Hegel says, 'It is in the end not the appetite, but the opinion, which has to be satisfied.' To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. … Read the works of the great German jurists and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success.

To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas.

The practice of barristers as the practice of a profession cannot be reduced to any statement of propositions or a checklist or a list of boxes that might be ticked. The practice of a profession is much more complex than that. Properly practising in the profession of being a barrister is very much an attitude of mind, a state of being, a way of behaving towards the problems and people presented i.e., reflective of a greater set of values rather than purely the conduct of a business. A business is different.

That professional character of the Bar is well-illustrated by the important consideration of collegiality as binding the Bar together as a college which binds its members through mutual support and recognition of a mutual responsibility to each other, and a corporate responsibility of the group to uphold the fundamentals of independence, skill, scholarship, fiduciary service, and the duty to the Court. This is strengthened if there is a strong notion of the collegiality of chambers, not as commercial enterprises, but as mutually supportive individuals.

There are fundamental values underlying the notion of the independence of the Bar. Independence of mind is one of those values. Yet independence of mind does not mean being dogmatic. It involves the mind in its widest sense. It involves being human and recognising the human elements at play in a dispute. It involves recognition and appreciation of the whole. It involves bringing wisdom to resolution of the dispute. It involves wisdom in presentation of the case. It involves integrity, respect and civility. These involve and comprise decent human behaviour. They involve insight into one's self. The dispute is not about you. The case is not about you. Independence (and the degree of abstraction within it) involves the recognition of the significance of the dispute to the lives of the humans involved. Every advocate (and every judge) should be conscious that what might seem a routine or banal case may represent the most significant and potentially catastrophic event in the lives of the people involved. The judicial process ought impress this upon one on a daily basis.

The next reflection on the present concerns Australia's significant diversity, brought by reason of the realities of a Continental federation, and particular State and Territory histories. The reality of State and major capital city practice is to be recognised. There are differences and features of culture and approach that are impossible to define, but easy to sense and appreciate, at least for an Australian. This is not a matter for regret or for agonising. It should be embraced as enhancing the richness of our legal culture, as long as a national perspective is not lost. This is not a call to provincialism. Any such tendency should be objected to and firmly rejected. Rather, it is to recognise that it is important that there be a sound relationship between local Bench and local profession especially the Bar, in the administration of justice. But, we have a national judicature framed in the Constitution. There is an underpinning assumption in Ch III of the Constitution of an integrated national judicature. That informs the Constitutional responsibility of the Courts to cooperate and deal with each other in a way that supports that national judicature, not undermines it.[8]

This aspect of the federal structure of the

judicature is historical, framed in our Colonial past. But it is, if one thinks about it, an aspect of diversity of this country. While the differences between the characteristics and social milieus of the State and Territory Bars may seem imperceptible to the outsider, they are real and meaningful to Australians. Yet Australia's historical diversity, of a Colonial character, should be set alongside at least three other importance perspectives of diversity: that of Indigenous Australia; that of the international and multicultural society that we have become; and that of necessary gender diversity and equality. All of these defining characteristics of Australia are vital for the administration of justice (including, by that phrase, the Bar) to understand, reflect upon, and incorporate in their respective visions for the future, which are, in one sense, their respective senses of corporate self – of Bench and Bar.

Why are these perspectives of our society important for the Bar? The answer lies in why they are important for the Bench. Law and society must be intertwined and view each as part of the other, if both are to be healthy. If law, the legal system and justice are seen as abstracted from the values, societal expectations and deep notions of justice that inform human society, they will lose or have weakened their ultimate power and force – acceptance and consent. Law and the Rule of Law gain societal acceptance and consent by their reflecting underlying values of society and by how the law and the administration of justice serve society. To quote Holmes again in the same oration to those Boston students:[9]

> The law has the final title to respect that it exists, that it is not a Hegelian dream, but part of the lives of men.

The Bench and the profession, including especially the Bar, are entrusted with the task of maintaining the consent and trust of their community in the fair, equal and just exercise of judicial power. It is a heavy and daily responsibility which should never be undermined by a sense of entitlement or inappropriate self-interest. Those considerations should be carefully attended to if the profession or the Bar seeks to engage in what can be reasonably seen as partisan political debate, or the promotion of self-interest, beyond what is appropriate. (The same, in somewhat modified language, can be said about the Bench.)

Turning from the Australian community to Australia's place in the world. This is relevant to reflect upon because Australia is placed in one of the fastest developing regions in the world, a region of great human diversity in social, economic and legal systems, of many different stages of development. It is no exaggeration to say that the Asia-Pacific Region is an area with a developing justice system. I use the singular because the volume of trade and interconnected social interactions is creating both the need for and the reality of an international commercial justice system. This is comprised of national and international commercial Courts, arbitration institutions, arbitrators, related dispute resolution professional such as mediators, and the profession which engages in these tasks. The growth of this manifestation of the Rule of Law in the region in this respect, and its importance, cannot be exaggerated. It is an international social and economic development of the highest importance. I doubt whether it is fully appreciated by government, the public or the profession generally. Today is not the time to dwell on the detail of this interconnected network of judicial and arbitral dispute resolution centres: Hon Kong, Singapore, the Middle East, Malaysia, Korea, Japan, and Australia. I wish at this stage only to place it as an aspect of the present to reflect upon if one is lifting one's eyes to the future.

If the Bar is to flourish in the future, as I am sure it will, it needs to recognise the dangers to its proper functioning and mark itself out by an unwavering and consistent devotion to skill, scholarship, fiduciary trust, and the duty to the Court.

Let me look to the future then with these things in mind. I will commence with the core considerations to which I have referred. The maintenance and enhancement of the independent Bar's place in the administration of justice require a focus on building the natural and necessary features of a **national** independent Bar. I see the central role of the ABA in this, not to the exclusion of the State Bars, but *with* them to create a self-identifying Australian Bar that reflects and underpins the integrated national judicature. This is to be achieved as much by reflecting on the proper attitude of mind to a national profession as by anything else. It should not be seen as giving up local sovereignty, but developing a related and intertwined national sovereignty of the Bar, as an independent part of the profession, particularly related by its advocacy to the effective functioning of the Court system. The interrelationship of Bench and Bar is with Commonwealth Courts, not just State and Territory Courts, a feature and realisation often overlooked, if I may respectfully comment. There is often (except among practitioners who practise exclusively in federal Courts) a sense that the federal Courts are an outsider or foreign to, the relationship between (State) Bench and (State) Bar. This is not said critically, but observationally. If fault lies, it perhaps lies as much with the Bench as with the Bar.

But it is important, I think, in a federation not only for the Courts to work cooperatively, but for the Bar to engage with the Courts (State, Territory, and Commonwealth) to enhance a nationally focussed relationship. This relationship and its enhancement can be achieved by the Commonwealth Courts being drawn into the life of the Bar in the same way and with the same sense of 'ownership' as underpins the relationship between the Bars and respective State Courts.

The vibrancy, health and independence of the Bar must come from its social, legal and economic relevance. The Bar's relationship with the balance of the legal profession is crucial in this regard. This topic engages important considerations as to modes of practice and the relationship between professionalism and commercialism in the practice (or in the eyes of some, business) of the law. My comments now should not be seen as anti-solicitor or pro-barrister. My comments may also be open to the criticism as made from the other side of the glass window that separates us metaphorically. Also, my comments should not be seen as an atavistic pining for better days when the cheques were made out to me. There have always been issues of the kind upon which I wish to remark. My point is only that if the Bar is to flourish in the future, as I am sure it will, it needs to recognise the dangers to its proper functioning and mark itself out by an unwavering and consistent devotion to skill, scholarship, fiduciary trust, and the duty

to the Court. While these are motherhood statements, they are always under threat by the daily exigencies of practice.

The maintenance of the skill and scholarship of the Bar is a constant challenge. The sheer volume of law graduates and the proliferation of law schools presents a challenge for legal education and legal practice. It is a challenge not restricted to the Bar; but it is a challenge that extends to the Bar. The Bar's courses for entry and practice must be of the highest standard, not as a barrier to entry for the sake of keeping numbers low, but as a driver of expected skill and scholarship. In this the Courts have a role, which I think has not been fully recognised in the past. It should be. The Bench should be viewed as a partner with the Bar in the education not only of readers but of the Bar more generally, and vice versa. Judges often assist, but I do not perceive (perhaps I am wrong) that this is viewed as a standing partnership of responsibility. It should be. Judges cannot complain about perceived shortcomings in the profession's practice if they are not prepared to engage with the Bar to help advocates deliver what judges want to see.

The notion of fiduciary trust and its intertwining with the duty to the Court are at the heart of the efficient functioning of the administration of justice. They are therefore at the heart of the Rule of Law. These are not theoretical or abstract considerations. They lie at the heart of daily practice, especially with how litigation and dispute resolution is viewed, organised, approached and executed. We all know the over-arching principles 'just, quick and cheap'. (Care with punctuation required.)

Most disputes do not go to trial; i.e., because most should not, and do not, need to. The growth over the last few decades of so-called alternative dispute resolution (perhaps better called 'usual dispute resolution') has been very healthy. The structured skills of mediation, conciliation, facilitation, and arbitration have become essential aspects of someone who, in years gone by, would have been called a litigation or trial lawyer. There are real skills in this spectrum of processes. They are often very different skills from those of Court craft that marked out the great advocate of the past. The Bar should embrace and recognise these skills as part of practice and, very importantly, not just to be done by those who lack the desire or aptitude for the trial process. It is an impression, and no more than that, that the Bar has ceded these skills to others, which, if so, I think is a mistake. I am not intending to enter a debate as to whether someone whose only practice is mediation is an advocate. My point is that the modern advocate should have the skills to participate fully in this broad range of dispute resolution processes.

Ceding work to other parts of the profession leads me back to Cardozo's punctilio of an honour the most sensitive, back to a world in which the relationship between the professional and the client is the 'undivided loyalty [that] is relentless and supreme'.[10] Let me take an example away from the law. How could a trustee justify painting a house for $100 when he could have had the house painted (to equal standard) for $50 by a sub-contractor? The answer: only by fully and openly disclosing to the beneficiary, with no false distinctions or embellishments, the relevant circumstances. The sub-contractor knows what is going on. Perhaps the sub-contractor or its trade association might educate the market about how houses can be painted and for what price. This aspect of the fiduciary duty can be seen in a pointed but valid paragraphs in the judgment of White J in the New South Wales Supreme Court.[11]

Too often, case management becomes process-driven in its character, feeding the monster of phalanx preparation. Case management should be the guidance of intelligent problem-solving between the Bench and the profession.

It is essential to the Bar's future that its cost structure for the value it gives makes it necessary for others with a higher cost structure for the same work to brief the Bar in order to conform with the rigours of fiduciary service. This is vital, especially for the junior Bar.

It is also vital for the future of the independent Bar, and indeed for the proper administration of justice and the Rule of Law, that the Bar exercises its constructive skill in developing leaner and more cost-effective modalities and structures of running litigation. What do I mean? I mean that most litigation can be run on the model of a stick skeleton; but more often than not one sees litigation run on the model of a phalanx. I do not propose to elaborate on the metaphors of the stick skeleton and phalanx. The meaning is, I hope, sufficiently clear. More thought, and more public debate, should be given to how litigation is run, and that question not being disguised by budgets. Instead of cost per person, the discussion should be about how many, who, and who is doing what. If a budget is to be prepared for litigation, it should be accompanied by an organisational chart, with necessary justifications. The Bar should be at the forefront of that discussion. It should be a central consideration of the Law Council. The cost of justice is not analysed just by looking at charge out rates; more fundamentally it is analysed by looking at what is being done, by whom, in what organisational structure and at what cost. The prudential controls in running litigation are often absent. Advices on liability and on evidence by counsel responsible for the conduct of litigation should not be seen as relics of the past. They were, and are, important methods of prudential control of issues and cost.

The Courts have a role to play here. Too often, case management becomes process-driven in its character, feeding the monster of phalanx preparation. Case management should be the guidance of intelligent problem-solving between the Bench and the profession. If the Bar is to be the most skilled group of dispute resolution problem-solvers and not just trial mechanics, it will lead to this process of problem-solving, which I might add can only be done by people intimately familiar with the dispute. Problems are not solved by phalanxes of troops.

Thus, the Bar's future should be not only in developing the practical skill and scholarship that gives it a lean cost structure for advice, mediation, conciliation, facilitation, arbitration and trial practice, but also it must exercise its corporate influence in the community, including but not limited to the commercial community, to bring about a better appreciation of viewing dispute resolution as problem-solving, not process-driven warfare, and an appreciation in the community as to how litigation can be, and should be, organised and run, maximising skilled application of intellectual talent and minimising unnecessary leveraged costs.

Let me put it this way. Dispute resolution

should be organised in a professional model by the minimum, but adequate, application of the most appropriately skilled people to the task, driven by (and only by) a recognition of the fiduciary duty to the client. The discussion in any particular case should be about the professional fiduciary model or modality of running the litigation and solving the problem, not the business model of running the litigation. The Bar's future lies in vindicating these issues.

Within these notions there lies a necessary recognition of the appropriate culture of dispute resolution. An adversarial system requires, ultimately, a process of advocacy by parties putting their own cases. Modern case management has not ended that reality, but it has modified it. Problem-solving and adherence to the over-arching principles embedded in modern Court statutes require a culture of appropriate cooperation. I have elsewhere used the expression 'good faith litigation' to stimulate discussion. By the phrase I do not mean the sacrifice of the client's interests. I mean the running of cases, and especially the identification of issues, i.e., honest, reasonable and proportionate to the nature of the dispute. Such an approach facilitates the client's interests in a spirit of problem-solving in the most cost-effective way. It also requires, as far as possible, the end of aggressive confrontational style presentation of self and of the client's case. The Courtroom is no longer, if it ever was, the place for aggression, rudeness, bombast and bullying. It is the place for the civil presentation, economically and efficiently, of the true issues in dispute. Judges should recognise their responsibility in this as well. But the day of the Bar table being the preserve of the Alpha male should be seen as over, if it ever existed. For many, often women, it very much seems that it did or does exist from time to time.

Further, there is the challenge of AI. This is a topic in itself. But once again there is considerable room for cooperation between Courts and the profession in using artificial intelligence and technology generally to enhance dispute resolution outcomes, and not to be an engine of increasing cost and complexity.

Perhaps there should be considered a judicial chapter or section of the ABA as there is in the American Bar Association. That section has been the driver of significant reform in the United States.

Let me turn to diversity. It is a topic often used as a synonym for gender diversity. It is broader than that. It is a word (in its adjectival form) which describes the nature and character of our society. It is the feature that gives this society energy, richness and depth of human character. Australia was built on, and its modern character is to be explained by, its relationship first with Indigenous Australia. That must be honestly confronted. A useful starting point for contemplation is a regular reading and re-reading of the judgments of the High Court of 1991 and 1992 in *Mabo (No 2)*.[12] The importance of that judgment is epitomised in the literary power of the reasons of Justices Deane and Gaudron, especially the section on dispossession at p 104-109 of volume 175 of the Commonwealth Law Reports. The words there used should not be relegated to a discourse on the past, but should provide an honest foundation for a just, modern society. One can then begin to see and foster the gifts of the common law, representative democracy, and the social and cultural heritage we now have from all parts of the world, in the construction of a unique community and nation. The administration of justice, and so Bench and Bar, take their place in that national task.

Let me turn to diversity.

It is a topic often used as a

synonym for gender diversity.

It is broader than that.

May I once again suggest that you go to an admission ceremony and see the young men and women – many of whose parents and forbears come from all over the world – solemnly and meaningfully enter a noble profession. Their faces reflect an appreciation (perhaps not fully formed) of and pride in their place in their community's legal system.

The Bar must harness this. That harnessing begins with five words: low cost barriers to entry. It is vital that all Bars ensure that they can ensure this feature of practice. It is a greater challenge for some than others. But it would be a great mistake to view cost barriers to entry as just an economic reality about which nothing can be done.

In a diverse polity such as Australia, the law and the administration of justice face the challenge of acceptance and adherence out of loyalty by all in the community. In any worthwhile society, there must be a sense that the law and the system of justice are owned by all in the community. That is a challenge for Bench and Bar. It is a challenge for the development of legal principle in which the Bar plays a crucial role. I am not talking of political correctness. Development in legal principle that reflects and meets the deep expectations of a diverse society is a challenge. Law as simple rule, of command, as the mechanical application of assertion without the underlying bonds of deep societal values of fairness and justice, will be an inadequate mechanism to bind diverse groups, by loyalty, to a legal system and to an administration of justice i.e., so fundamental to our society. The Bar has a crucial responsibility in the growth, development and articulation of legal principle reflecting these qualities.

One area in which the Bar assists in that process is the willingness always shown for pro bono work, especially when requested by the Court for assistance. May I take this opportunity publicly to acknowledge the Australian Bar for its work in this regard. It is at the foundation of the service of the Bar to the community.

What of the place of the Australian Bar in the Asia-Pacific region? This is not just (though it includes) the participation in the burgeoning commercial arbitration life of the region. The strength and depth of the Singaporean and Hong Kong Courts and professions in dealing with vast bodies of commercial work in the region has not been appreciated by many Australian barristers. The reality may perhaps become that if you wish to be a commercial litigator, to paraphrase Paul Keating, 'In the future, if you are not engaged in international arbitration, you will be camping out'; even if that 'camping out' seems, at the moment, to involve reaping lucrative fees in a local lake. That lake will, however, over time, become shallower. The place of the Australian Bar in Asia in the future does not just lie in this commercial work. The region is one whose polities do not all reflect the dedication to freedom and justice that this country has, or should have. The Australian Bar should take a leadership role in the region. From a practical point of view, this may require the marshalling of capital to spend on entry

into, and development of, that professional market. I am not sure how this can be done in the sole practitioner model. It may require some thinking and imagination on professional structure for off-shore practice. It may carry with it the seeds of tension between professionalism and commercialism; but there is no reason to think that any such tension cannot be managed. The Bar must compete and take its place in an international legal environment dominated by global law firms with their models of practice.

Low cost barriers to entry. ... It is a greater challenge for some than others. But it would be a great mistake to view cost barriers to entry as just an economic reality about which nothing can be done.

May I conclude by paraphrasing Holmes yet again? Since the most far-reaching form of power is the command of ideas, the Bar, if it is to be the pre-eminent leader of the profession, should be the home of ideas about law, about legal principle, and especially about the remoter and more general aspects of the law which give it its universal interest. The joy of being at the Bar does not come from the comfort of material success, which, of its own, if a single goal, can only drain the soul. In the end, it is not the appetite, but the opinion, which has to be satisfied. This is not done through fortune, but through the command of ideas, and through that, the shaping of the world around you.

The Bar has the privilege to serve the law. In a speech to Harvard undergraduates in 1886, Holmes asked the question:[13] How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflict over often sordid interest, make out a life? He answered eloquently over a page. If I may seek to capture his answer by a short paraphrase from that page: If you have the soul and insight of ideas and ideals, you will see ideas and ideals in your daily life. The law is a calling of thinkers. Your business as thinkers at the Bar is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe.

The Bar's skill and scholarship and service can be seen in the faces of the graduates at admission and readers signing the rolls. They may not have read any Holmes, but most can feel an unarticulated truth that he expressed so well in 'The Path of the Law'.[14] Your calling is practical and human and real, but it is through thinking about the law in its most general aspects of theory and the relationship of those general aspects of theory with the daily tasks of life that give the law its universal interest. From that appreciation of the human and the thoughtful, you become a master of your calling. You connect your subject to the universe and glimpse its worth and enduring importance, and human value.

That is why the future of the independent Bar is its skill, scholarship, and unremitting recognition of fiduciary service to the client and duty to the Court, as part of the exercise of the protective judicial power. These are not aspirations. They are features of survival.

ENDNOTES

1 *Kable v The Director of Public Prosecutions for New South Wales* [1996] HCA 24; 189 CLR 51; *Nicholas v The Queen* [1998] HCA 9; 193 CLR 173. See also *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* [1992] HCA 64; 176 CLR 1 at 27; *Polyukhovich v Commonwealth* [1991] HCA 32; 172 CLR 501 at 607 and 703-704; *Lowe v The Queen* [1984] HCA 46; 154 CLR 606 at 610-611, 613 and 623-624; *Postiglione v The Queen* [1997] HCA 26; 189 CLR 295 at 301-302; *R v Green* [2010] NSWCCA 315; 207 A Crim R 148 at [3]; *Green v The Queen* [2011] HCA 49; 244 CLR 463 at 472-473 [28]; and *Kioa v West* [1985] HCA 81; 159 CLR 550 at 584-586, 601 and 612-615.

2 [1991] HCA 29; 172 CLR 460.

3 Ibid at 496-497.

4 *Re Nolan* 172 CLR 460 at 496; *Polyukhovich* 172 CLR 501 at 703-704; *Leeth* 174 CLR 455 at 502; *Hindmarsh Island Case* 189 CLR 1 at 22; *Kable* 189 CLR 51 at 103-104; *Nicholas* 193 CLR 173.

5 193 CLR 173 at 208-209 [74].

6 *Meinhard v Salmon* 249 NY 458 (1928) at 464.

7 O W Holmes, 'The Path of the Law' in *Collected Legal Papers* (Constable & Co London 1920) at 201-202.

8 *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143.

9 Holmes, *Collected Legal Papers* at 194.

10 *Meinhard v Salmon* 249 NY 458 (1928) at 468.

11 *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* [2009] NSWSC 867; 75 NSWLR 619 at 625 [26] where his Honour said: 'In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early. Where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor's duty to his or her client is to ensure that the work is done at the lower cost. That general statement is, of course, subject to the ability of the individual legal practitioners involved. But very often one sees work done by a solicitor in a firm which could be done equally well or better at a fraction of the cost by junior counsel with considerably more experience as a litigation solicitor and with more expertise.'

12 *Mabo v Queensland* (No 2) [1992] HCA 23; 175 CLR 1.

13 Holmes, *Collected Legal Papers* at 29.

14 Holmes, *Collected Legal Papers* at 201-202.

A PAPER PRESENTED AT THE ABA/NSWBA rise2018 NATIONAL CONFERENCE 15 & 16 NOVEMBER, SYDNEY

Tax – Where Laws Intersect

The Hon Robert French AC, 16 November 2018, Sydney

This paper broadly concerns the intersection between tax law and the general law, particularly in the context of judicial review. It directs attention to the question – are tax laws special to the extent that they should attract particular approaches to their interpretation and their interaction with the general law? That question and the general issue of judicial oversight of the administration of taxation laws is posed in the context of their effects on the lives and wellbeing of millions of Australians. Tax laws are not just about raising revenue. They are used to influence economic priorities and societal behaviours through incentives for some activities and disincentives for others. For the success of their objectives they require public trust founded on the belief that the executive authorities administering them are accountable for the ways in which they discharge their duties and that they do so within the law.

Tax exceptionalism

The primary question – are tax laws special – has been agitated in more than one jurisdiction, but particularly in the United States. It has centred on the term 'tax exceptionalism'. That term describes the belief that 'tax law is somehow deeply different from other law with the result that many of the rules that apply … across the rest of the legal landscape do not, or should not, apply to tax.'[1] Professor Kristin Hickman, in a paper published in 2006, spoke critically of it:

> The view that tax is different or special creates, among other problems, a cloistering effect that too often leads practitioners, scholars, and Courts considering tax issues to misconstrue or disregard otherwise interesting and relevant developments in non-tax areas, even when the questions involved are not particularly unique to tax.[2]

Former Justice Michael Kirby, speaking to the Institute of Chartered Accountants on this theme in 2011 began his address with what he described as 'the most upsetting, objectionable and insulting thing' he could say to the audience. He found it in his dissenting judgment in *Federal Commissioner of Taxation v Ryan*[3] in which he had written:

Tax laws are not just about raising revenue. They are used to influence economic priorities and societal behaviours ...

> It is hubris on the part of special[ists] … to consider that 'their Act' is special and distinct from general movements in statutory construction which have been such a marked feature of our legal system in recent decades.[4]

He softened the blow by conceding the high intelligence of his audience, acknowledging that:

> Tax is hard because it is detailed, complicated and imports precise notions of commercial and property law, in part ancient and, in part, constantly evolving. Because tax law is hard, it needs, and attracts, fine minds and precise ways of thinking.[5]

Exceptionalism is not unique to tax law. There are many areas of the law which are regarded by one constituency or another, including specialist legal practitioners, as exceptional by virtue of their perceived complexity or the need for them to be administered in a way is sympathetic to some societal goal. In Australia there have been a number of examples of stakeholder constituencies asserting the need, in particular subject areas, for specialist or accredited practitioners, specialist judges, and specialist Courts and tribunals.[6] Those areas have included, from time to time, workplace relations law, family law, human rights, native title, intellectual property, competition law, drug crime, environmental law, town planning law, veterans' affairs[7] and the sentencing of Indigenous offenders.[8]

Justice Tony Pagone raised the idea of a specialist tax Court in a paper which he delivered in 2010[9] and which was quoted by Justice Kirby in his paper. Such Courts offer obvious efficiencies. However, they also attract the obvious risks of becoming jurisprudential silos, accessible only to a narrow band of narrowly focussed cognoscenti. A further difficulty common to all specialist Courts in Australia is that the final appeal on important questions about the laws they administer lies to a generalist Court, the High Court of Australia which, from the perspective of the specialist, gets things wrong on occasion. An institutional compromise which avoids the establishment of special Courts is the creation of special lists, streams, or national practice areas within generalist Courts. It can allow for the deployment of appropriate expertise within a generalist Court and with appropriate rotations can help protect against the growth of subject matter exceptionalism.

On a comparative note, tax exceptionalism has had a considerable history in the United States including different approaches to the same taxation laws being taken by

the specialist Article I Tax Court and the Article III Federal District Circuit Courts. It suffered a reverse with the decision of the Supreme Court in 2010 in *Mayo Foundation for Medical Education and Research v United States*[10] although not for the benefit of taxpayers. The Court rejected an argument that a less deferential standard of review should be applied to Treasury Department tax regulations than that applied to the rules of other agencies under the principle enunciated in *Chevron USA, Inc v Natural Resources Defense Council, Inc*.[11] In *Chevron*, the Supreme Court had held that where there is ambiguity in a statute, Courts, in reviewing regulations made under it, should apply the interpretation adopted by the regulatory agency if it were reasonably open. The Court said:

> In the absence of … justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action'.[12]

In the United Kingdom there do not appear to be any special principles of public law that apply to the administration of the taxation laws. In a paper published in the *Journal of Tax Administration* in 2017, Stephen Daly of Kings College, London cited Lord Woolf's statement in 2001 in *R v North & East Devon Health Authority, Ex parte Coughlan* that '[i]t cannot be suggested that special principles of public law apply to the Inland Revenue or to taxpayers.'[13] That said, the application of general principles of public law in a particular area of the law may generate a class of outcomes which have distinctive characteristics simply because of the subject matter upon which the general law operates.

As Daly pointed out, an historical inclination to literal interpretation of taxation laws in the United Kingdom was for a long time a kind of tax exceptionalism. That literalism coupled with a degree of hostility to the revenue, was encapsulated in Lord Cairns' observation in *Partington v Attorney-General* in 1869 that if the Crown 'cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.'[14] The spirit of literalism endured well into the 20th century. Lord Tomlin said in 1936 in *Inland Revenue Commissioners v Duke of Westminster* that:

> [e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.[15]

Literalism yielded only to the need to avoid the absurdities that its application sometimes produced.[16]

Exceptionalist literalism along similar lines informed the Australian approach to the interpretation of tax laws for many years. The late Justice Graham Hill once observed:

> In the good old days, some think, judges interpreted the law having regard to the language used by Parliament and gave the benefit of the doubt to the taxpayer. If Parliament wanted to tax, it was up to Parliament to make its intentions clear; if Parliament wanted to hit the target, it had to do so cleanly.[17]

Literalism was adopted early in the life of the High Court as an appropriate approach to statutory interpretation generally and that of taxation statutes in particular. Barton J in 1917 quoted Viscount Haldane LC for the proposition that:

> The duty of judges in construing Statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of Statutes which impose taxation.[18]

Australia followed the Westminster line in *Anderson v Commissioner of Taxes (Vic)*.[19] The Court held that accrual by survivorship of a beneficial interest in land held jointly was not chargeable with probate duty under a Victorian statute.[20] Latham CJ quoted Lord Cairns from *Partington*.[21] Rich and Dixon JJ found in the English cases something like an interpretive principle of legality against the imposition of tax absent clear language. They quoted Lord Buckmaster in *Ormond Investment Co Ltd v Betts* where he referred to 'a cardinal principle … well known to the common law [which] has not been and ought not to be weakened – namely, that the imposition of tax must be in plain terms.'[22]

Literalism continued into the 1980s. Chief Justice Sir Garfield Barwick was characterised as its judicial flag bearer. In *Commissioner of Taxation v Westraders Property Pty Ltd*,[23] decided in 1981, he said:

> It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax.[24]

The tide was beginning to ebb. Mason J did not echo the Chief Justice's sentiments but adopted a purposive approach by reference to the legislative history of the relevant provisions. Murphy J dissented having regard to the character of the relevant transaction as 'a major tax avoidance scheme'[25] and observed presciently:

> It is an error to think that the only acceptable method of interpretation is strict literalism. On the contrary, legal history suggests that strict literal interpretation is an extreme, which has generally been rejected as unworkable and a less than ideal performance of the judicial function.[26]

He lamented that in tax cases the prevailing trend in Australia had become so absolutely literalistic that it had become a disquieting phenomenon. He said, in words informed by a consciousness of the importance of our tax laws, albeit *against* an exceptionalist approach to their interpretation:

> If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.[27]

A purposive approach applicable to statutory interpretation generally overtook UK tax jurisprudence as evidenced in such cases as *Ramsay v Internal Revenue Commissioner*[28] and *Internal Revenue Commissioners v McGuckian*.[29] The High Court's move away from literalism was evidenced in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*.[30] Mason CJ and Wilson J said in their joint judgment '[t]he fact that the Act is a taxing statute does not make it immune to the general principle governing the interpretation of statutes.'[31] The approach to interpretation of taxing statutes began to be assimilated with the interpretation of statutes generally. Moreover, exceptionalist or not, the tax laws of the Commonwealth, like all Commonwealth statutes, were always subject to the rules set out in the *Acts Interpretation Act 1901* (Cth). One of those related to purpose, i.e., s 15AA which required that:

> In interpreting a provision of an Act, the interpretation that would best

> achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act), is to be preferred to each other interpretation.

A relevant purpose or object may be discerned by reference to extrinsic material as authorised by s 15AB.

The discernment of purpose is not necessarily congruent with the discovery of the elusive phantom known as legislative intention. A joint judgment of six Justices of the High Court in *Lacey v Attorney-General (Qld)* in 2011[32] observed, in relation to the general principles governing statutory interpretation, that:

> The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.[33]

That said, ascertainment of purpose can be a challenge. This is particularly so in statutory provisions which are reflective of underlying political compromises. In some cases purpose can only be identified at a level of generality which is not of any assistance in making the constructional choices which are in contest and which are open on the text of the provision. As McHugh J observed in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*[34] much modern legislation regulating industry reflects compromises reached between or forced upon competing groups whose interests may be enhanced or impaired by legislation. He said:

> In such cases, what emerges from the legislative process … reflects wholly or partly a compromise i.e., the product of intensive lobbying, directly or indirectly, of Ministers and parliamentarians by groups in the industry seeking to achieve the maximum protection or advancement of their respective interests. The only purpose of the legislation or its particular provisions is to give effect to the compromise. To attempt to construe the meaning of particular provisions of such legislation not solely by reference to its text but by reference to some supposed purpose of the legislation invites error.[35]

That observation is readily applicable to taxation laws.

The contemporary approach to statutory interpretation directs attention to text, context and purpose.[36] Legislative intention which can be distinguished from purpose is imputed to the preferred construction of the statutory text rather than determined as an anterior fact which informs construction. So much appears from the oft quoted passage in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> The duty of a Court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.[37]

The application of the general rules of interpretation to taxing statutes was restated in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.[38] Four Justices of the High Court in a joint judgment made two important points:

1. Tax statutes do not form a class of their own to which different rules of construction apply.
2. The fact that a statute is a taxing Act or contains penal provisions is part of the context and is therefore relevant to the task of construing the Act in accordance with those settled principles.[39]

Pearce and Geddes in the 8th edition of their work *Statutory Interpretation in Australia* commented on general statements that appear to minimise the distinction between taxation and other laws and said nevertheless 'it seems likely that the Courts will maintain the view that 'it is for the Crown to show that a taxing statute imposes a charge on the person sought to be taxed'.'[40] If that observation suggests a tax specific approach to interpretation it should be treated with some caution. It may be, however, that it does no more than reflect a particular case of a more general proposition about statutes imposing duties or creating liabilities.

A generalist's legal landscape

The application of the general rules of interpretation to tax laws requires legal skills but it is questionable whether it requires skills particular to those laws. Indeed generalist skills are often called for. Taxation law does not occupy an island entire unto itself. It embraces much of the general law. The liabilities, duties and powers to which tax laws give rise more often than not result from their interaction with the law relating to contracts, torts, property, equity and trusts, corporations and partnerships, and the law as set out in the array of Acts and Regulations, Commonwealth, State and Territory, which create, regulate, modify and destroy rights, powers, privileges and obligations including those which arise at common law.

The contemporary approach to statutory interpretation directs attention to text, context and purpose.

There are many examples of such interactions. I will mention two from my time on the High Court. In 2010 in *Aid/Watch Inc v Federal Commissioner of Taxation*[41] the Court was concerned with the question whether the provisions of income tax, fringe benefits tax and goods and services tax legislation exempting charitable institutions from taxation extended to Aid/Watch which promoted the more efficient use of Australian and multi-national foreign aid directed to the relief of poverty. The answer depended upon the understanding of that term in the law of trusts and, in particular, the classification of charitable trusts derived from Lord Macnaghten's speech in *Commissioners for Special Purposes of the Income Tax v Pemsel*,[42] classifying charitable trusts into their four principal divisions. The exempting provisions each picked up as a criterion for its operation the general law relating to equitable principles with respect to charitable trusts. The Court observed that in the absence of a contrary indication in the statute, the statute speaks continuously to the present and picks up the case law as it stands from time to time. Importantly, the development of the general law doctrine through case law was not to be directed or controlled 'by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.'[43] That is to say, the development of the general law was

not to be informed by the statutory context in which it was applied. Thus the term 'charitable institution' in s 50–5, Item 1.1 of the *Income Tax Assessment Act 1997* (Cth) and the corresponding provisions of the *Fringe Benefits Tax Assessment Act 1986* (Cth) and the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) was to be understood by reference to its force in the general law as developed in Australia from time to time.[44]

The second case was *Federal Commissioner of Taxation v Bamford*.[45] The relevant section of the *Income Tax Assessment Act 1936* (Cth) (ITAA) provided for a beneficiary of a trust estate presently entitled to a share of its income to be taxed on its share. The Court held that a capital gain, treated by a trustee as income available for distribution, was assessable. The concept of the 'income of a trust estate' in the Act was to be understood according to the general law of trusts. Those cases are fairly straightforward examples of the way in which taxation law ranges across the landscape of the general law, both judge-made and statutory.

An intersection of particular importance to taxation law is with the general principles underpinning what can be described as 'the rule of law' in Australia. Here the legislative scheme providing for challenges to taxation assessments coupled with the statutory validity accorded to assessments outside review under Part IVC of the *Taxation Administration Act* might seem to place tax laws in a special light. If it does so however, it is, in a formal sense, a consequence of the substantive law being interpreted according to general rules.

Taxation law and the rule of law

Decisions made under taxing statutes are made in a constitutional and legislative framework which gives content to the rule of law. In Australia, that concept includes some specific propositions relevant to the exercise of official powers:

1. All official power derives from rules of law found in the Commonwealth and State Constitutions or in laws made under those Constitutions.
2. There is no such thing as unlimited official power, be it legislative, executive or judicial.
3. The powers conferred by law must be exercised lawfully, rationally, consistently, fairly and in good faith.
4. The Courts have the ultimate responsibility of resolving disputes about the limits of official power.

Section 75(v) of the *Commonwealth Constitution*, described by Gleeson CJ as 'a basic guarantee of the rule of law' confers jurisdiction on the High Court:

> In all matters:
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The provision confers authority on the Court to judicially review decisions of Commonwealth Ministers and officers for jurisdictional error which, broadly speaking, covers conduct in excess of power. The jurisdiction cannot be removed by anything other than a constitutional amendment. It is thus proof against attempts to place Commonwealth executive action beyond legal scrutiny and challenge where jurisdictional error is asserted. A statutory equivalent of that jurisdiction is conferred on the Federal Court by s 39B(1) of the *Judiciary Act 1903* (Cth).

In *Plaintiff S157/2002 v Commonwealth*,[46] decided in 2003, Gleeson CJ observed in relation to s 75(v) that:

> The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.[47]

Importantly for present purposes however, the Chief Justice pointed out that the legislative powers given to the Parliament by the *Commonwealth Constitution* enable Parliament to determine the content of the law to be enforced by the Court.[48] It is in that area that particular provisions of the ITAA confining challenges to assessments, for the most part to processes under Pt IVC of the *Taxation Administration Act*, operate.

The importance of judicial review to the rule of law was emphasised in a statement by Denning LJ dating back to 1957 and quoted by Gleeson CJ in *Plaintiff S157* that '[i]f tribunals were to be at liberty to exceed their jurisdiction without any check by the Courts, the rule of law would be at an end.'[49] Similar concerns have no doubt informed occasional observations in the United Kingdom about the possibility of common law limitations on the legislative powers of the Parliament. In 2006, in *R (Jackson) v Attorney General*[50] Baroness Hale, now the President of the Supreme Court of the United Kingdom, said:

> The Courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny … In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.[51]

Observations to like effect were made by Lord Steyn[52] and by Lord Hope.[53] Lord Hope revisited the general proposition in 2012 in *Axa General Insurance Ltd v HM Advocate*[54] when speaking of legislation to abolish judicial review or to diminish the role of the Courts in protecting the interests of the individual. He said '[t]he rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the Courts will recognise.'[55]

Resort to the elusive principles of common law constitutionalism is not necessary in the Australian federal context because, as Gleeson CJ said in *Plaintiff S157*:

> In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, … It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power.[56]

Plaintiff S157 concerned the validity and application of s 474 of the *Migration Act 1958* (Cth) which provided 'that a privative clause decision' was final and conclusive and that it must not be challenged, appealed against, reviewed, quashed or called in question in any Court and that it was not subject to prohibition, mandamus, injunction, declaration or certiorari in any Court on any account. The term 'privative clause decision' referred to a decision of an administrative character made, proposed to be made, or required to be made under the *Migration Act*, save for certain exclusions. The Court in *Plaintiff S157* held that s 474 properly construed did not prevent the judicial review of decisions that involve jurisdictional error because they were not decisions made 'under' the Act. Taxation law had its moment on the stage in that case. The Chief Justice referred to *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*,[57] which concerned the interaction of s 39B(1)

of the *Judiciary Act* with ss 175 and 177 of the ITAA. Section 175 provides:

> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Section 177(1) provides:

> The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

The provisions have a considerable ancestry in earlier Commonwealth tax legislation and precursor legislation in the States and colonies.

Four of the Justices in *Richard Walter* held that s 177 did not purport to deprive the Federal Court of the jurisdiction conferred by s 39B(1) of the *Judiciary Act*. Deane and Gaudron JJ were of the opinion that s 39B(1) overrode or amended s 177(1) to the extent that it would apply to certificates produced in proceedings in the Federal Court under s 39B(1) where the applicant's case was that an assessment was invalid on the ground that it was not bona fide.

In *Plaintiff S157* Gleeson CJ referred to an observation by Mason CJ in *Richard Walter* that privative provisions were effective to protect an award or order from challenge on the ground of a mere defect or irregularity which did not deprive the tribunal of the power to make the award or order. That qualification protected review on the basis of jurisdictional error. But it begged the question – what would amount to jurisdictional error in relation to assessments made and issued by the Commissioner of Taxation?

That question was considered in 2008 in *Commissioner of Taxation (Cth) v Futuris Corporation Ltd*.[58] The case that came to the High Court concerned a *Judiciary Act* action in which Futuris argued that the assessment processes to which it had been subjected were flawed because, in the second of two amended assessments, the Commissioner had deliberately double-counted a significant amount of its taxable income. Futuris sought an order quashing the second amended assessment and a declaration of its invalidity. The Full Court of the Federal Court found in favour of Futuris that the second amended assessment was not a bona fide exercise of the Commissioner's power of assessment.

A majority of the High Court allowed the Commissioner's appeal and set aside the Full Court's orders. The central issue was whether the Commissioner had made a jurisdictional error in relation to the second amended assessment. The majority held that the Commissioner had double-counted but that the double-counting did not amount to jurisdictional error:

> In the process of the making of the second amended assessment errors by the Commissioner of this nature … fell within the scope of s 175 as explained earlier in these reasons. They could not found a complaint of jurisdictional error attracting the exercise of jurisdiction to issue constitutional writs … If there were errors they occurred within, not beyond, the exercise of the powers of assessment given by the [ITA Act 1936] to the Commissioner and would be for consideration in the Pt IVC proceedings.[59]

The majority identified two situations where a purported assessment would not be an assessment protected by s 175. First, tentative or provisional assessments were not assessments for the purposes of s 175. Second, conscious maladministration in the assessment process would deprive its product of the character of an assessment for the purposes of s 175. These have been described as historically 'the only two recognised grounds for jurisdictional error in respect of the Commissioner's assessment'.[60] The majority in their reasoning drew on s 13 of the *Public Service Act 1999* (Cth) which requires public servants to 'behave with honesty and integrity' and to 'act with care and diligence' in connection with their employment.[61] They held that this provision 'points decisively' against construing s 175 as protecting decision-makers who deliberately fail to act within the limits of their powers.[62]

On the facts, the second amended assessment was not tentative or provisional. The Commissioner had not engaged in conscious maladministration in making it. The majority attached weight to the Commissioner's intention to correct double-counting through the exercise of his discretion under s 177F(3).

This approach to judicial review of taxation assessment decisions might be thought to be confining and perhaps indicate that tax law is given special treatment. On the other hand, it might be thought simply to reflect the width of the legal powers conferred on the Commissioner by the operation of the noinvalidity provision, s 175. If non-compliance or misconstruction of a taxation law in making an assessment would vitiate that assessment absent s 175, then the addition of s 175 may be seen simply as going to the legal effect of the Commissioner's assessment notwithstanding error. That is a legal effect which is mitigated by Part IVC albeit not in relation to jurisdictional error.

The majority in *Futuris* also held that s 177 is not a privative clause.[63] In their joint judgment, Gummow, Hayne, Heydon and Crennan JJ, held that s 177(1) gave evidentiary effect to s 175 and that there was no conflict requiring any reconciliation between them and the requirements of the Act governing assessments. Significantly, towards the end of their judgment they spoke of the observation in *Richard Walter* that s 177(1) did not limit the jurisdiction conferred by s 39B of the *Judiciary Act*. That view had not been challenged in *Futuris*. However reference had been made in some of the judgments in *Richard Walter* to the distinction, extant in 1995, between mandatory and directory provisions and to what 'seems to have been some doctrinal status then afforded to *R v Hickman; Ex parte Fox*.'[64] Their Honours said:

> As to the first matter, *Project Blue Sky* has changed the landscape and as to the second, *Plaintiff S157/2002* has placed 'the *Hickman* principle' in perspective[65].

Futuris was to be decided on the basis of the path set out in the joint reasons and not by any course assumed to be mandated by what was said in any one or more of the several sets of reasons in *Richard Walter*. Although in recovery proceedings s 177 operated to change what otherwise would be the operation of the relevant laws of evidence, the presence of Part IVC meant that it did not operate to impose an incontestable tax or otherwise involve usurpation of the federal judicial power by the deeming of an ultimate fact.

The implications of no-invalidity clauses such as s 175 for judicial review, were described by Leighton McDonald and Peter Cane in their book on *Principles of Administrative Law* published in 2013.[66] The authors said:

> to the extent that, in general, judicial remedies are issued only on the basis

> of jurisdictional errors, no-invalidity clauses may be read as converting errors that would otherwise be jurisdictional in nature into errors which are made within the decision maker's power and will not justify a remedy. In this way, no-invalidity clauses expand the decision maker's powers to make legally valid decisions.

There are questions about the consequence of wide no-invalidity clauses coupled with privative clauses when it comes to the maintenance of the rule of law.

Post-*Futuris* it seems that in a formal sense, the rule of law in connection with the administration of the taxation laws, so far as they relate to assessments, is intact. There is no scope for unreviewable official action beyond statutory power, even though statutory power is widened by s 175. Judicial review is available for jurisdictional error which might deprive a purported assessment of the character of an assessment because of its tentative or provisional nature or because of corruption or deliberate maladministration.

Lisa Burton Crawford of the University of New South Wales in a paper published last year[67] raises a question about the interaction between no-invalidity clauses and the implied separation of the judicial power. She argues that such clauses should not be treated as conclusively determining the validity of executive action and that it is wrong to say that such a clause puts the issue 'beyond argument'. A no-invalidity clause having such an effect might amount to a legislative usurpation of the judicial power of the Commonwealth. In this connection Kirby J in his judgment in *Futuris* said:

> it is questionable whether the Federal Parliament could lawfully provide that the 'validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.'
>
> The validity of an assessment (like any other legislative, executive or judicial act of a Commonwealth officer) can only be finally determined by a Court, not by parliamentary *fiat* nor by administrative action. Moreover, the effect of non-compliance with a provision of the Act must surely depend upon the particular terms of that provision; the nature, extent and purpose of any non-compliance; and whether in law the non-compliance affects (or does not affect) the validity of what has been done or omitted.[68]

Burton Crawford offers a loosely analogical argument by reference to observations in recent judgments, which some might use to support the proposition that Parliament cannot statutorily declare that what is black in a statute is actually white. One example offered is the observation by Kiefel J in *CPCF v Minister for Immigration and Border Protection*, that statutory statements of parliamentary intention only have effect if the intention is one which the substantive provisions of the Act are capable of supporting.[69] And in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail*[70] a statutory assertion that an authority given a separate legal personality was 'not a body corporate' did not conclude the question whether the authority was nevertheless 'a corporation' within the meaning of s 51(xx) of the *Commonwealth Constitution*.

Burton Crawford also refers to the principle of legality as applicable to the construction of no-invalidity clauses to protect rights of judicial review on grounds such as breach of procedural fairness and rules against fraud and bad faith. She argues that the Courts will not conclude that Parliament has authorised the executive action contrary to those principles unless it does so by express and unambiguous words.

Whether or not one agrees with those observations, they provide food for thought and indicate that more remains to be said about the operation of no-invalidity clauses and the extent to which they may be allowed to thin out the effective protection derived from the rule of law and the extent to which they legislatively undermine the judicial power.

There is a kind of 'tax is special' argument about the implications of *Futuris* advanced by Professors McDonald and Cane in their book *Principles of Administrative Law*. They consider that *Futuris* is unlikely to have the consequence that all no-invalidity clauses will be read according to their terms. They consider that it may be confined to the tax context because Pt IVC of the *Tax Administration Act* is an alternative to judicial review which can satisfy an entrenched minimum requirement of legal accountability. On that basis, it is suggested, Courts might be more willing in the tax context than in other contexts to hold that judicial review is limited. They argue that although the joint judgment in *Futuris* did not make this explicit, the Justices referenced Part IVC procedures a number of times in ways which might suggest that they considered them as a 'fall back accountability' mechanism. They suggest that Courts may limit the effect of no-invalidity clauses in other cases where there is no alternative accountability mechanism by pointing to the 'internal contradiction' between such clauses and the limits on the decision-maker's powers.

In reflecting upon these observations I am drawn back to a joint judgment I wrote in 1991 with Justice Trevor Morling in a case called *David Jones Finance and Investments Pty Ltd v Commissioner of Taxation*,[71] which concerned the interaction between s 39B(1) of the *Judiciary Act*, s 175 and s 177. In that judgment we held that s 177 operated upon jurisdiction but did not displace the jurisdiction subsequently conferred on the Federal Court by s 39B of the Judiciary Act. The purpose of s 39B was to confer on the Federal Court the full amplitude of the like jurisdiction conferred on the High Court by s 75(v) of the *Constitution*, albeit not a constitutionally entrenched jurisdiction. Section 177 did not protect the Commissioner from inquiry into the bona fides of the exercise of his statutory powers. The decision, however, was disapproved by the majority judgment in the High Court in *Richard Walter* and is now lost in the mists of history.

This paper has focussed upon judicial review of taxation decisions particularly in the area of operation of the no-invalidity provision in connection with assessments, which is central to the enforcement of the law. There are of course other aspects of taxation administration outside the assessment powers which attract general judicial review jurisdictions including those created by s 39B(1) of the *Judiciary Act* and by the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). A number of these were usefully set out in the 2016 Review by the Inspector General of Taxation into the Taxpayers Charter and Taxpayer Protections.

Non-judicial accountability

It would be a mistake to leave this topic without referring to the administrative mechanisms in place which provide for scrutiny and accountability in relation to the administration of taxation laws in ways which are indicative of their national significance.

There are the generic mechanisms of parliamentary scrutiny particularly through the work of parliamentary committees. However, given the complexity of the law the ability of such committees to give finely detailed consideration to its administration may be lim-

ited. The Australian Taxation Office (ATO) is also subject to scrutiny by the Australian National Audit Office in the same way as other government agencies. Indeed, the Australian National Audit Office undertook performance audits of the Taxpayers Charter in 2004-05, 2005-06 and 2007.

A tax specific mechanism for complaints about the administration of the ATO was created in 1995 with the establishment of a Tax Ombudsman. This was a recommendation of the Joint Committee of Public Accounts, which had also recommended the establishment of the Taxpayers Charter. An important development was the subsequent establishment of the Office of the Inspector General of Taxation. The Inspector General of Taxation (IGT) is an independent statutory officer whose function is to review systemic tax administration issues and to report to Government with recommendations for improving tax administration. From 1 May 2015, the IGT took over the handling of tax complaints from the Ombudsman. Its scrutinising function was extended to include the Tax Practitioners' Board. The IGT describes his functions as follows:

> In the context of taxpayer rights and protection, the IGT, as an independent agency, assists taxpayers in several ways. First, the IGT facilitates discussion between taxpayers and the ATO or TPB to address or resolve matters in dispute. Secondly, the IGT makes determinations which are persuasive but not binding on the ATO or TPB. It should be noted that the IGT is not empowered to consider the merits of ATO decisions as this is the jurisdiction of the Administrative Appeals Tribunal and the Courts.[72]

The expectations by taxpayers of fair and reasonable treatment by the Commissioner of Taxation and his office, the availability of judicial and non-judicial appeal and review processes and complaint mechanisms, are of particular importance to the field of taxation law. As the IGT has stated, and the ATO has acknowledged, the way in which the ATO treats taxpayers is a major factor in influencing their compliance.

In one sense there is nothing special about that aspect of tax administration. Public trust is indispensable to the effectiveness of all our institutions, public and private. Taxation administration however, is special in the sense that its effectiveness is central to the functioning of government generally and the wellbeing of our society and its members.

ENDNOTES

1 Laurence Zelenak, 'Maybe Just a Little Bit Special, After All?' (2014) 63 *Duke Law Journal* 1897, 1901. See also James M Pucket, 'Structural Tax Exceptionalism' (2015) *Georgia Law Review* 1067, 1069.
2 Kristin E Hickman, 'The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference' (2006) 90 *Minnesota Law Review* 1537, 1541.
3 (2001) 201 CLR 109.
4 The Hon M Kirby, 'Down With *Hubris*! A Message on Tax Reform for Australian Tax Specialists', Speech delivered to The Institute of Chartered Accountants in Australia, National Tax Conference 2011, Melbourne, 7 April 2011, 1 citing *Federal Commissioner of Taxation v Ryan* (2001) 201 CLR 109, 146 [84].
5 Ibid 2.
6 For a general discussion of the issues raised by the creation of specialist Courts with an emphasis on workplace relations see Justice Michael Moore, 'The Role of Specialist Courts – An Australian Perspective' (2000–2001) *Law Asia Journal* 139–54; (2001) *FedJSchol* 11. See also The Hon TF Bathurst, 'Specialist Courts/Court Tracks – The Way to Go?', Paper delivered at the Pacific Judicial Conference, Papua New Guinea, 14 September 2016.
7 See e.g., Melissa Davey, 'Australia should consider specialist war veterans' Courts, says law researcher', *The Guardian* (online), 24 April 2015 <http://www.theguardian.com/australia.../2015/apr/24/australia-should-consider-specialist-war-veterans-Courts-says-law-researcher.
8 Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders* (Federation Press, 2015).
9 T Pagone, 'Some Problems in Legislative Economic Concepts – A Judicial Perspective', Unpublished paper delivered to the Federal Treasury, 2 December 2010 in a Revenue Group Seminar Series.
10 562 US 44 (2010).
11 467 US 837 (1984).
12 562 US 44, 51 (2010) citing *Dickinson v Zurko* 527 US 150, 154 (1999).
13 Stephen Daly, 'Tax Exceptionalism: A UK Perspective' (2017) 3(1) *Journal of Tax Administration* 95 citing [2001] QB 213, 243 [61].
14 (1869) LR 4 HL 100, 122.
15 [1936] AC 1, 19.
16 See generally N Preston, 'The Interpretation of Taxing Statutes: The English Perspectives' (1990) 7 *Akron Tax Journal* Art 2.
17 Justice Graham Hill, 'How is Tax to be Understood by the Courts?', Paper presented at the Taxation Institute of Australia SA State Convention, 4 May 2001, 1 cited in J Tretola, 'The Interpretation of Taxation Legislation by the Courts – A Reflection on the Views of Justice Graham Hill' (2006) 16 *Revenue Law Journal* 74–5.
18 *Lumsden v Internal Revenue Commissioners* [1914] AC 877, 896 cited by Barton J in *Commissioner of Stamp Duties (NSW) v Simpson* (1917) 24 CLR 209, 216 (emphasis in original).
19 (1937) 57 CLR 233.
20 *Administration and Probate Act* 1928 (Vic).
21 Ibid 239 quoting *Partington v Attorney-General* (1869) LR 4 HL 100, 122.
22 Ibid 243 quoting *Ormond Investment Co Ltd v Betts* [1928] AC 143, 151.
23 (1981) 144 CLR 55.
24 Ibid 59.
25 Ibid 79.
26 Ibid.
27 Ibid 80.
28 [1982] AC 300, 323 (Lord Wilberforce).
29 [1997] 1 WLR 991, 999 (Lord Steyn).
30 (1981) 147 CLR 297.
31 Ibid 323.
32 (2011) 242 CLR 573.
33 Ibid 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
34 (2005) 224 CLR 193.
35 Ibid 231 [126].
36 A recent restatement of that proposition in relation to taxation appears in the judgment of the High Court delivered on 14 November 2018 in *SAS Trustee Corporation v Miles* [2018] HCA 55; 92 ALJR 1064; 361 ALR 194.
37 (1998) 194 CLR 355, 384 [78].
38 (2009) 239 CLR 27.
39 Ibid 49 [57] (Hayne, Heydon, Crennan and Kiefel JJ).
40 Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [9.36] quoting *C & J Clark Ltd v Inland Revenue Commissioners* [1975] 1 WLR 413, 419 (Scarman LJ).
41 (2010) 241 CLR 539.
42 [1891] AC 531, 583.
43 (2010) 241 CLR 539, 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
44 Ibid 550 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
45 (2010) 240 CLR 481.
46 (2003) 211 CLR 476.
47 Ibid 483 [6].
48 Ibid.
49 Ibid 483 [8] citing *R v Medical Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 586.
50 [2006] 1 AC 202.
51 Ibid 318 [159].
52 Ibid 302–3 [102].
53 Ibid 308 [120].
54 [2012] 1 AC 868.
55 Ibid 913 [51].
56 (2003) 211 CLR 476, 484 [9].
57 (1995) 183 CLR 168.
58 (2008) 237 CLR 146.
59 Ibid 161–2 [45].
60 Sue Milne, 'The Bottom Line for Review of an Assessment – A Case Note on *Commissioner of Taxation v Futuris Corporation Ltd*' (2010) 36(2) *Monash University Law Review* 181, 182.
61 *Commissioner of Taxation (Cth) v Futuris Corporation Ltd* (2008) 237 CLR 146, 164 [55] and see *Public Service Act 1999* (Cth) s 13(1)–(2).
62 Ibid.
63 Ibid 166 [64].
64 (1945) 70 CLR 598.
65 (2008) 237 CLR 146, 168 [70].
66 Leighton McDonald and Peter Cane, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2013) 201.
67 Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No–invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81.
68 (2008) 237 CLR 146, [124]–[125].
69 CPCF v *Minister for Immigration and Border Protection* (2015) 255 CLR 514, [281]–[284] (Kiefel J). See also *Monicilovic v The Queen* (2011) 245 CLR 1, [112], [208] and [316].
70 (2015) 256 CLR 171.
71 (1991) 28 FCR 484.
72 Inspector General of Taxation, 'Review into the Taxpayers' Charter and Taxpayer Protections', December 2016, par 2.12.

One year of early appropriate guilty pleas?

Perspectives on the early appropriate guilty pleas amendments

By Belinda Baker

In 2014, the New South Wales Law Reform Commission observed that while most criminal matters in the District Court were resolved by a guilty plea (83% in 2013), the vast majority of those (66% in 2012/ 2013) occurred on the day of trial. The Commission noted that such late pleas caused considerable inefficiency and delay.

The Early Appropriate Guilty Plea (EAGP) reforms were enacted as a response to these concerns. The legislation – the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* and the *Criminal Procedure Amendment (Committals and Guilty Pleas) Regulation 2018* – amend the *Criminal Procedure Act 1986*, the *Children (Criminal Proceedings) Act 1987*, the *Crimes (Sentencing Procedure) Act 1999* and other Acts. The legislative reforms are supplemented by the relevant Practice Notes of the Local Court and Children's Court.

The reforms include:

- Early disclosure of a 'simplified' brief of prosecution evidence;
- prosecutors with delegation being briefed at an early stage for the purpose of charge certification, and with the intent that that prosecutor remain in the matter to finalisation;
- Mandatory case conferencing in the Local Court, to enable the prosecutor and the defence lawyer to discuss the case at a formal meeting to enable early dispute resolution;
- Fixed sentence discounts for the utilitarian value of guilty pleas (25% discount where the plea is entered in the Local Court; 10% discount for a plea entered up to four days before the first day of the trial; and a maximum of 5% in other circumstances); and
- The abolition of a Local Court magistrate's power to discharge an accused person upon assessment of the evidence, with the power to direct witnesses to give evidence retained.

> *'From the evidence we believe that it is not an overstatement to say that indictable proceedings have major systemic issues and are presently in, or approaching, a state of crisis',*
>
> *New South Wales Law Reform Commission, Encouraging Early Guilty Pleas, Report 141 (2014).*

The reforms, which apply to all strictly indictable charges and those charges which the prosecution has elected to deal with on indictment, commenced on 30 April 2018.

The reforms have resulted in significant changes to the New South Wales criminal justice system. It is essential that all counsel practising in criminal law in New South Wales are aware of the reforms, and the practical operation of the regime.

In this article, Chief Judge Price provides an overview of the EAGP reforms from the perspective of the District Court. The Director of Public Prosecutions, a Deputy Senior Public Defender and experienced counsel in private practice provide their perspectives on the practical operation of the scheme, as well as providing advice to practitioners in conducting criminal cases under the new regime.

Justice D Price AM

Chief Judge of the District Court of New South Wales

President of the Dust Disease Tribunal of New South Wales

An overview of early guilty pleas from the perspective of the District Court

The early involvement of Crown prosecutors in serious criminal offences by the introduction of the Early Appropriate Guilty Plea Reform package ('EAGP') is a significant improvement in the criminal justice system for State offences. There have been too many occasions in the past when neither a Crown prosecutor nor counsel for an accused has been briefed until shortly before the commencement of a trial. The consequences of late briefing include last minute plea negotiations, amendments to indictments, non-compliance with notice requirements under the *Evidence Act 1995* (NSW), service of additional evidence and lack of agreement as to issues in dispute at trial.

Delay in finalising criminal charges adds to the distress of victims, witnesses, accused persons, particularly those in custody, and creates additional public and private costs in trial preparation and the assembly of jury panels. Delayed plea negotiations disadvantage accused persons as the discount for the utilitarian value of the plea has been determined largely by the timing of the plea: see *R v Borkowski* (2009) 195 A Crim R 152; [2009] NSWCCA 102.

The EAGP scheme places an obligation on the Director of Public Prosecutions (which will usually be exercised by senior prosecutors) to specify the offences that are to be the subject of proceedings against the accused. The charge certification process in the Local Court undertaken under Ch 3, Part 2, Division 4 of the *Criminal Procedure Act 1986* (NSW) ('the CPA') will do much to ensure that accused persons are appropriately charged and 'not overcharged' by NSW Police. It will also give case ownership

and responsibility to a senior prosecutor and solicitors from the Office of the Director of Public Prosecutions ('ODPP').

The Director's intent to give a senior prosecutor ownership of a serious criminal case from 'cradle to grave' is laudable, but I apprehend it will be difficult to achieve given the large criminal caseload.

Charge certification, the mandatory utilitarian discount of 25% for a guilty plea entered in the Local Court and the maximum cap of 10% in the District Court should focus the parties on fully understanding and identifying the issues in proceedings. With that understanding, the accused's legal representative is expected to fulfil the mandatory obligation under s 72 of the CPA to obtain instructions concerning the matters to be dealt with in the case conference held under Ch 3, Part 2, Division 5 of the CPA.

Fundamental to the success of the case conference are the adequacy and timeliness of the briefs of evidence. The requirements for prosecution disclosure are found in Ch 3, Part 2, Division 3 of the CPA. I understand that the ODPP is working closely with NSW Police to ensure compliance with the disclosure requirements and in particular towards the production of short form expert certificates in areas where delays are being experienced.

Initial results from case conferences are promising. They disclose an increase in guilty pleas and summary finalisations in the Local Court. However, it is too early to draw any definite conclusions about the success of the principal objective of the case conference, which is to determine whether there are any offences to which the accused is willing to plead guilty.

A case conference has other objectives. In particular, s 70(3)(b) provides:

> (3) A case conference may also be used to achieve the following objectives:
>
> (b) to facilitate the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts.

It is evident from the enquiries made during readiness hearings in the District Court that the opportunity to resolve issues in the proceedings during the case conference is often overlooked.

The identification of issues in dispute is consistent with a barrister's obligation under r 58 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) to:

(a) confine the case to identified issues which are genuinely in dispute,

(b) have the case ready to be heard as soon as practicable,

(c) present the identified issues in dispute clearly and succinctly,

(d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case, and

(e) occupy as short a time in Court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

Counsel for an accused should be mindful that the identification of key issues in the trial and agreement as to facts might be of assistance on sentence should the outcome of the trial be adverse to an accused. Lesser penalties may be imposed for facilitating the administration of justice pursuant to s 22A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

As to difficulties being experienced by the hours available for an accused in custody to attend a case conference by audio visual link ('AVL'), Corrective Services have been asked to extend their hours so that AVL may be available from 8am (and possibly earlier).

The EAGP scheme may provide a 'springboard' for further reform of the criminal justice system. There is both a public and private interest in reducing delays in the finalisation of serious criminal offences.

Lloyd Babb SC

Director of Public Prosecutions (NSW)

The prosecution perspective

Background

When the Early Appropriate Guilty Plea reform package came into effect on 30 April 2018, it introduced the most significant changes to the criminal justice system in New South Wales since the creation of the Office of the Director of Public Prosecutions (ODPP) in 1987. Since that time, and in preparation for those changes, my Office has undergone a period of unprecedented transformation both in terms of internal processes and organisational structure.

Under EAGP, the committal process begins with an assessment of whether the originating charges as laid by police are correct.

The EAGP reform, which aims to encourage the entering of guilty pleas in committal matters at an earlier stage, features several key activities which are to be undertaken while the matter is still in the Local Court. Each of these activities requires the significant involvement of Crown prosecutors and solicitors within my Office.

These include:

1. the service and screening of a simplified brief of evidence;
2. charge certification by a senior prosecutor; and
3. attendance at a mandatory case conference.

In the higher Courts, the EAGP reform introduces a statutory sentence discount scheme. The changes also aim to achieve greater continuity of representation throughout the life of a prosecution.

Given my Office's position at the cornerstone of each of these elements, the impact of the EAGP suite of reforms on the operations of my Office has been substantial. Most notably, the abolition of the committal decision by a magistrate has required the Crown to take on the important role of gatekeeper in determining what charges are to be committed.

Benefits of the early involvement of a senior prosecutor at charge certification, case conference and beyond.

As part of the EAGP changes, Crown prosecutors from all over the State have been taking ownership of serious criminal cases at the Local Court stage. When the EAGP brief arrives at the ODPP, a solicitor and senior

prosecutor (which may include a Crown prosecutor) are assigned to the case and from that time forward, the senior prosecutor remains briefed to run the trial (should the matter not resolve by way of a guilty plea). The prosecution team will then maintain ownership of that case until completion. In order to achieve continuity, the cooperation and support of the judiciary in taking into account the Crown's availability (where appropriate) in the higher Courts will be required.

Under EAGP, the committal process begins with an assessment of whether the originating charges as laid by police are correct. The senior prosecutor will consider what the most appropriate charges are and inform the police, the defence and the Court of their decision through the filing of a charge certificate in the Local Court. Charge certification is not the end of the consideration about what charge (or charges) adequately reflects the criminality of the alleged offending, it is merely the start of that process.

Once a charge certificate has been filed, the senior prosecutor will then engage with defence counsel at a mandatory case conference to explore options for resolving the matter by way of an early appropriate guilty plea or, if the matter is to be contested, to narrow the issues for trial. The difference between an EAGP mandatory case conference and its previous iteration, commonly referred to as the Criminal Case Conferencing Pilot, is that defence counsel must ensure their client is available to give instructions if necessary during the period in which the meeting takes place. While the defendant does not attend the conference itself, they must be accessible throughout.

Early ownership of serious criminal cases by a senior prosecutor who will run the trial holds many benefits for the criminal justice system. For defence counsel, it means the prosecutor will be briefed to consider the matter in Local Court and the charges to be proceeded on will be settled in advance. Further, the attendance of both the senior prosecutor and defence counsel at a formal face to face case conference provides greater opportunities for more meaningful discussions about the future direction of a matter.

Early involvement of a senior prosecutor also removes the risk of a perception by a defendant that closer to trial another prosecutor will bring a different or more pragmatic approach to the running of the case. For victims of crime, it provides them with continuity of the same prosecutor team who is responsible for handling of the case from beginning to end.

The feedback I have received from prosecutors involved in case conferences is that the discussions that are occurring are very similar to the discussions that have often occurred in the weeks leading up to the listed trial date. Participants on both sides are coming to the case conference with a real understanding of the strengths and weaknesses of the case and are trying to resolve the matter (if it is appropriate to do so).

The only issue that has been experienced with case conferences to date (and which may have some impact on its success) is the limitation in the hours available to conduct conferences where the defendant is in custody. In those cases, the case conference can only be held between the hours of 9am and 3pm. This presents a challenge to all trial lawyers. Unless the senior prosecutor is excused from Court to attend the conference while their trial is running, or unless the conference can be rescheduled, then the solicitor allocated to the matter may be required to attend the conference in his or her absence. This is particularly problematic for the Crown in matters that involve multiple defendants who are in custody. In the majority of such cases, a separate conference will need to take place for each individual defendant, all of which will require the attendance of same senior prosecutor.

Positive early signs

I have long advocated in favour of a criminal justice system that facilitates early charge certainty, ongoing case management and lifelong continuity. I am therefore pleased to note that the preliminary results for EAGP matters provided thus far demonstrate an increase in Local Court resolution and committals for sentence, and a decrease in matters being committed for trial. While the reform is still in its infancy, this indicates the expected impact of the changes is moving in the right direction.

I am buoyed by these early positive signs and remain confident that the changes brought about as a result of EAGP will continue to reap benefits for all participants and stakeholders in the criminal justice system in the months and years to come.

Sharyn Hall, Rose Khalilizadeh and Phillip Boulten

The EAGP experience for defence practitioners at the private bar

Some of the positive aspects of the scheme include the earlier service of the brief; early conversations between parties; a Crown prosecutor being briefed early; and the prosecution being able to discuss fair and appropriate pleas, encouraging early pleas. Unfortunately, the transition to the scheme has not been seamless. Some common issues are emerging:

- Lack of flexibility in timing of case conferences, where, e.g., a barrister blocks out time for a case conference, but where the prosecutors can only conduct the case conference outside of Court hours and hence outside of AVL hours. As many members of the private Bar book conferences on days when they are not in a trial, prosecutors should be permitted to apply the same level of flexibility in scheduling;
- The prosecution not seeking the views of victims, stakeholders or Director's chambers prior to case conference (even preliminary views);
- The prosecution not considering appropriate disposition of the matter and relying on the accused to propose options, not being willing to discuss the prosecution's views during the conference and asking the accused to reduce their plea offers to writing for later consideration;
- The prosecution not being briefed with flexible options as to plea arrangements so as to encourage the entering of a plea deal, but rather forcing the accused into inflexible or unnecessarily harsh plea

arrangements, which are not in the spirit of negotiation;

- Corrective Services not facilitating AVL or phone link-ups outside of a narrow window of hours, limiting the scope of availability for the parties to participate in a case conference i.e., compliant with the regulations; and
- The discount scheme (and s 72 obligations upon practitioners) being difficult to explain to an accused who is cognitively impaired or otherwise mentally affected.

Like most things, much depends on who is appearing for the Crown. Defence lawyers have run the whole gamut of very positive to less than impressive experiences. The first thing to note is that it is still possible to do things the old-fashioned way. Early representations can still be made before the case conference, so each party knows the other's 'final' position by that time.

Some Crowns have been very proactive in conferencing the complainant and getting instructions from the police before the case conference. Sometimes this still needs to be finalised after the case conference, but the groundwork has been laid.

But, some case conferences occur without prosecutors thinking about the likely disposition of charges, requiring written representations afterwards. In some cases, charges are seemingly certified simply on the basis that they were charged by the police in the first place and without giving due consideration to the evidence in the brief.

The first thing to note is that it is still possible to do things the old-fashioned way.

Early representations can still be made before the case conference ...

Even where the client is determined to plead not guilty, it is still important to use the process to establish the matters in dispute and to liaise with the Crown about further material to be served and any notices that might be relied on; tendency, for example.

It is important to go to each case conference with instructions and if those instructions are to negotiate the charges, to be clear about what those charges are.

You need to be in a position to state what you want in order to protect your client's ultimate position. Some Crowns have been very willing to consider all options and it has been possible to keep some matters in the Local Court even if the client has not accepted the charge disposition offered by the Crown.

Defence lawyers do, though, find inflexibility in the Court timetable frustrating. For example, when issues of fitness or a possible defence of mental illness are raised, magistrates ought to allow time for these issues to be resolved in the Local Court in order to protect the client's options – and importantly, their discount should the client decide to plead guilty.

Consistency is the key to the scheme's effectiveness; in the approach taken by the prosecution, in the practice of serving of the brief, and in case management.

Encouraging efficiency in a complex justice system is no easy task. Inevitably, there will be teething problems and the need for revision.

Addressing these concerns would not only result in greater effectiveness of the scheme, but also reduce the costs to the criminal accused (whether privately funded or funded by Legal Aid or the Aboriginal Legal Service).

Richard Wilson

Deputy Senior Public Defender

The EAGP scheme – the public defenders' perspective

The public defenders appear for legally aided accused persons in serious criminal matters in the higher Courts across the State. This includes clients of the Aboriginal Legal Service and community legal centres. public defenders provide telephone advice to defence barristers and solicitors in relation to legally aided criminal matters and have exposure, directly or indirectly, to a wide range of criminal cases.

The Early Appropriate Guilty Scheme, or EAGP, commenced on 30 April last year. It is a complex and multi-faceted scheme which includes the abolition of contested committal hearings. It is assumed that the reader has a basic knowledge of its workings. Links to relevant articles and information are available on the public defenders' website (see breakout within this article).

The goal of the scheme, as is apparent from the name, is to encourage early pleas of guilty in appropriate cases. Broadly speaking (and there are important exceptions), the scheme is designed to encourage accused persons to plead guilty early by providing:

> a 'carrot': a guaranteed 25% discount for a plea entered before committal;
>
> and
>
> a 'stick': a cap of a 10% discount thereafter, further reducing to 5% after four days out from the first day of trial.

It is also intended to encourage the prosecution, before committal, to make any appropriate decisions to discontinue proceedings and to accept pleas to appropriate charges (not just the most serious possible charges which fit the alleged facts at their highest). There is, however, nothing in the scheme which provides any particular incentive for the prosecution to do so.

The scheme is not designed to increase the overall number of pleas of guilty nor, therefore, to reduce the number of trials which actually run. It is designed to minimise the number of matters which are listed for trial, and which occupy a position in the trial diaries of the District and Supreme Court, but which result in a late plea or no bill.

The public defenders, from the outset, were concerned about some practical aspects of the scheme. The main concerns were about the adequacy of briefs served at the committal stage, the timeliness and continuity of the briefing of Crown prosecutors and about the standard timetable in the Local Court.

Adequacy of briefs

Overall there appear to have been somewhat mixed results, especially in matters which are for committal to the District Court. We are aware of significant numbers of cases where police briefs are served which are inadequate for providing proper advice about the strength of the Crown case and the appropriate charges. In many such cases, the DPP have been making requisitions (very often of their own motion) to obtain what is needed. However in others, including at least one murder, the provision of further material has been resisted. This appears to be a false

economy on behalf of police, who will need to prepare a full brief in any event if the matter cannot be resolved by a plea.

As any criminal lawyer knows, every accused person – from those who are stridently asserting their innocence to those who are admitting their guilt – requires a meaningful answer to all three of the following obvious questions (distilled to their crudest and most basic form):

1. 'What are my chances?'
2. 'What will I get if I lose?'
3. 'What will I get if I plead guilty?'

There are some other questions - slightly less obvious but equally important – which often need to be answered even if not directly asked:

4. 'Based on my account of what happened, do I have a defence? Does it mean I'm guilty of something else?'
5. 'What are my chances of being found guilty of something else (other than the most serious offence charged)?'
6. 'What will I get if I'm found guilty of something else?'
7. 'What will I get if I plead guilty to something else?'

Usually, no useful answer can be given to all of these questions without an adequate police brief. These questions are of great significance to the EAGP scheme, where there are both ethical and legal obligations to provide advice (see s 72 of the *Criminal Procedure Act 1986*).

The briefing of Crown prosecutors

One of the features of the scheme (although in no way enshrined in the legislation) is that the Crown prosecutor (or trial advocate) who certifies the charge is meant to be the same person who ultimately appears for the Crown at trial, thus taking 'ownership' of decisions. We understand that Crown prosecutors and trial advocates are not always briefed, or adequately briefed, in time to allow meaningful negotiations at case conferences.

It is too early to make any definitive comment on continuity of briefing, but we suspect that it will be quite difficult to achieve. Things seem to be a little more hopeful in the regions where continuity has historically been much better than in Sydney.

However, one issue is concerning. We are aware of a number of cases in which charges have been certified where the evidence contained in the brief does not support a *prima facie* case in relation to at least some charges. Under the old committal scheme, this would have resulted in discharge at a 'paper committal'.

In at least one of these cases, it appears that charges may have been certified when neither the Crown prosecutor nor the ODPP solicitor had read the brief. A fundamental aspect of the scheme is the requirement for a prosecutor to certify that 'the evidence available to the prosecutor is capable of establishing each element of the offences that are to be the subject of the proceedings against the accused person' (s 66(2)(a) of the *Criminal Procedure Act 1986*). It may be that, given their case load, some prosecution lawyers have insufficient time to read and analyse the brief in the timeframe set by the Court under the scheme. Whatever the cause, any such failures to comply with the requirements of the scheme are both unfair to defendants and detrimental to the success of the scheme itself.

Despite these troubling cases, the general impression overall is that there has been a noticeable change in the availability of Crown prosecutors and DPP trial advocates before committal and that fruitful discussions are being had in a large number of cases where that would not have been possible prior to the introduction of the scheme.

The standard timetable in the Local Court and necessary adjournments

The 'one size fits all' timetable of the EAGP scheme in relation to service of briefs, charge certification and case conferencing appears to be too long for some simple matters and too short for long and complex matters. This is particularly the case in matters such as murders where, commonly, the defence will need to obtain expert reports or conduct other investigations prior to being in a position to give the required advice. The feedback which we are receiving is that magistrates are usually granting necessary adjournments but are not uncommonly threatening to refuse to do so. In some cases, the prosecution is resistant to adjournments sought by the defence for the purposes of obtaining evidence.

Overall observations

In general, we understand that the practical aspects of the scheme appear to be working tolerably well in a reasonable proportion of cases – with some significant exceptions. Not surprisingly, the more serious the offence, the more likely that an adequate brief will be prepared and that a Crown prosecutor will be briefed early and appropriately.

When considering the various issues which arise about the adequacy of police briefs, the proper briefing of Crown prosecutors and the granting of adjournments, it needs to be kept firmly in mind that, if a matter is prematurely committed for trial, it is the accused alone who suffers the penalty of having any discount capped at a maximum of 10%.

In the long term there are some important questions which need to be answered in order to measure the true value of the scheme. Hopefully BOCSAR will be able to answer them when their analysis of the EAGP case data is complete:

1. Has the scheme resulted in a significant increase in the proportion of accused persons who plead guilty before, rather than after, a trial date has been fixed in the District and Supreme Courts?
2. Has the scheme increased the proportion of accused persons who actually go to trial because capped discounts have encouraged those who have missed out on the 'carrot', and who might otherwise have considered a late plea, to take their chances at trial?
3. Has it had any effect upon the backlog of trials – in particular in the District Court?

The public defenders, along with all of the other 'stakeholders' in the criminal justice system in this State, await the answer to those questions with great interest.

EAGP: resources for practitioners on both sides of criminal matters

The public defenders have prepared a number of resources to assist practitioners to comply with their legal and ethical obligations under the scheme in the best interests of their clients.

These may be found on the public defenders website https://www.publicdefenders.nsw.gov.au/ and include:

- 'Early Guilty Pleas, A New Ballgame' - A comprehensive explanation of the scheme by former Senior Public Defender Ierace J
- Model explanations to clients designed to comply with s 72 of the Criminal Procedure Act 1986
- A Table of Common Charge options – a 'ready reckoner' of hundreds of statutory and common law offences including maximum penalties, standard non-parole periods, indictable/summary options, time limits and whether they are possible, index offences for child protection registration or future applications under the Crimes (High Risk Offenders) Act 2006
- Links to other important information

MEETING THE CHALLENGES OF THE MODERN BAR

A Clerk's View

Anthony Cheshire SC and Penny Thew, interviewing
Jeh Coutinho (clerk at Banco Chambers), Tobias O'Hehir (of O'Hehir Consulting and former clerk at Greenway Chambers) and Kristine Massih (clerk at Alinea Chambers).

At the request of the Bar Association, two clerks and one former clerk were asked to describe what they perceived to be current and future challenges facing the modern Bar, some implications of those challenges and the steps that can be taken by those charged with the invaluable role of supporting the Bar to assist in managing those challenges. The views expressed herein are those solely of the interviewees and are not considered applicable to, nor as a standardised benchmark for, all chambers. Barristers' chambers have differing priorities, resources and requirements and the responses below were given in recognition of that.

1. When did you commence your career as a clerk?

Jeh: I started as a junior to Nick Tiffen at 7 Selborne. It was a good education in chambers life and I've been working for barristers for 12 years now.

Tobias: I commenced my career at the Bar in 2010.

Kristine: I became a clerk three years ago but my experience in chambers goes back over 10 years.

2. How has the Bar changed since you started your career as a clerk? For instance, have you observed a greater number of women, people from a wider variety of racial, ethnic or cultural backgrounds and/or people from a wider variety of backgrounds generally coming to the Bar?

Jeh: In 2006 I started on a floor with 25 barristers and two of them were women. Recent readership intakes have more evenly proportioned gender splits so at the junior Bar there is an increased level of diversity. My experience is that more women than men leave the Bar in the first 10 years. While ethnic and cultural diversity is on the rise, it is happening at a slower rate than gender diversity. It's an issue that gets less attention as well.

The paperless practice has become an accepted option of the modern barrister, and it is commonplace to use file-sharing services to brief barristers.

Tobias: The Bar is still not reflective of the wider community, however, there has been a small increase of members from different backgrounds.

Kristine: In the 3 years I have been a clerk the Bar has not changed much. There have been a number of changes over the time I have been in chambers across the last decade though. The percentage of women practising at the Bar has risen slightly, although I have noticed women at the Bar are gaining prominence. The 'gay bar' is something that now exists in a more open way than it did 10 years ago.

Technology has played a huge part in the changes that have occurred over the last 10 years. The Supreme Court had by then commenced publishing Court lists online but it was not extensively used by barristers. Before that I was cutting the lists from the *Sydney Morning Herald* and pinning them to the noticeboard in chambers. E-filing was emerging as an innovative new way to file documents when I first started and is now the ordinary way to file. These advances have, for me, improved efficiency in chambers and as a clerk. Barristers are also now more able to work remotely and do not need to spend as much time in chambers. Finally, barristers' awareness of the need for self-care and the Bar's schemes in support of barristers' wellbeing are issues that have become more prominent at the Bar in the past few years.

3. In your experience, has the nature of the work performed by barristers changed over time? Have the opportunities for new barristers changed over time?

Jeh: Court filing statistics show that there is less litigation than previously.[1] Barristers are increasingly being briefed to provide strategic or commercial advice to complement their legal advice. I think this trend will continue as the regulatory climate evolves. Barristers should be ready for this and look to build upon their existing skill sets (e.g., by enrolling in a company director's course). However, complex legal problems will continue to arise and the solutions will continue to be found at the Bar.

The opportunities for new barristers are changing. Solicitors retain more work for themselves and online Court systems will continue to take away traditional avenues for building advocacy skills. It is harder for barristers to get into Court and that could be problematic for developing the next generation of advocates. Every junior wants to be in Court more and senior barristers should give careful consideration to finding advocacy opportunities for juniors within their cases.

Tobias: The opportunities open to new bar-

Kristine Massih and Jeh Coutinho

Photography by: Michele Mossop

risters can depend on their initial decisions; e.g., a new barrister's choice of chambers, as well as the barrister's tutor and clerk, can all have a significant impact on the development of that barrister, as can the barrister's pre-existing professional networks.

It is well known that lower numbers of matters are proceeding to hearing, which means less time for barristers in Court on their feet, making it difficult to gain a profile. This lack of exposure can limit the opportunities for new barristers. It also means barristers need to work harder at marketing and business development strategies to ensure they are creating pathways and relationships to improve their practice.

Kristine: It depends on the barrister, their practice and the stage of their career progression. Speaking generally, I have observed that clients are moving increasingly to try to keep matters out of Courts where possible, and alternative dispute resolution is often an attractive option to clients due to its efficiency, flexibility and cost effectiveness. This has meant less Court-based work for barristers, especially juniors. However, in my experience there will always be a need for litigation of high-level, complex matters.

4. Have you observed that the needs or briefing patterns of solicitors have changed over time?

Jeh: I have not perceived briefing patterns to have shifted dramatically, but some needs have changed. There is a preference to brief electronically where possible, and having a chambers Dropbox account certainly helps, as does having tech savvy barristers. Banco recently started conducting an annual in-house CPD on the latest technology trends for managing documents electronically to make sure we're across what's available and how to make use of it.

Solicitors still require barristers to be reliable and meet deadlines, respond to emails, manage expectations, and be clear communicators in project managing a piece of legal work. We are in a competitive service industry and having a pleasant experience is as important as the quality of the legal work.

Tobias: The main changes are solicitors briefing later in the litigation process and not as many cold calls from solicitors to the clerk. Solicitors rely heavily on their professional networks for barrister recommendations as well as whether a barrister is known as having expertise and a profile in a particular area of law. The research for, and selection of, a barrister occurs many steps before a solicitor contacts either the chambers or the clerk. Solicitors also make decisions based on whether they can work successfully and harmoniously with counsel which can influence their briefing decisions. These factors combined mean barristers ought to communicate clearly their specialities, expertise and practice areas.

Kristine: I have observed that there has often been a push to curb or control litigation costs. Solicitors are becoming in-

creasingly cautious about briefing counsel. Direct briefing by in-house counsel has been increasing as a result of corporate clients looking for a time efficient and cost-effective alternative. Consequently, this indicates an increased awareness that barristers are available to provide advice and not solely called upon for litigation work.

The paperless practice has become an accepted option of the modern barrister, and it is commonplace to use file-sharing services to brief barristers. Some of these applications have real-time alerts to let the barrister know when a file has been uploaded or updated.

5. Do you see it as part of the role of a clerk to provide particular assistance to support the varying needs of barristers? For instance, do you give more support in developing the skills and practice of newer barristers or those returning from parental leave?

Jeh: Yes. Barristers will have different needs across the trajectory of their careers. For new barristers, I try to have them work with as many different barristers and solicitors as possible to help build up their network. Feedback is rare at the Bar, so I try and facilitate that to assist new barristers in improving. For new barristers, running their own business, managing commitments, being reliable and working out the value of their work are common issues. I try to ensure that junior barristers feel comfortable discussing issues with me so that we can work out these early challenges together.

For more senior barristers it's about giving strategic advice to position them for increased amounts of unled or specialised work to prepare them for a silk application in future years. Having a plan for a future silk application is critical and it needs to be put in place years before the application is made. For barristers returning from parental leave a clerk can play an important role in the return to work phase. The barrister can be working from home or part-time and may not be as visible, and this can make it hard to re-establish a practice. Having a clerk as an advocate in chambers to make sure you stay front of mind in briefing and other chambers decisions can make a difference.

Tobias: I see the primary function of a clerk as providing frameworks and support for barristers to operate their businesses successfully. Effective support means understanding that each level of practitioner has different requirements, especially any practice in a transitionary phase. The legal industry is changing rapidly, and barristers can be expected to engage with social media, speak on their expertise, and network and build strategic relationships. The clerk can provide valuable insight in to how this can be achieved while balancing the functions of a busy practice.

... barristers can be expected to engage with social media, speak on their expertise, and network and build strategic relationships. The clerk can provide valuable insight in to how this can be achieved ...

Kristine: In my experience, I find that a clerk will strive to be sensitive to the needs of her or his barristers, but a clerk's role in chambers is directed by the needs of the set, and no two sets are alike. The structure of chambers, resources they have available and the mechanisms they have in place to support new or returning barristers, varies a lot between chambers, so it is the responsibility of the chambers and the clerk to provide such support and development. Much of the support that new and returning barristers receive is also provided by the broader legal community and the connections they maintain with their colleagues and clients.

6. Barristers are self-employed and therefore generally do not enjoy the statutory protections or benefits that employees receive. Does this pose particular challenges for barristers, and some more than others?

Jeh: Income is variable but overheads are constant. Without the protections or benefits that employees have, barristers can find themselves in precarious situations. Women are affected more than men because they are more likely to take career breaks and to thereafter bear the greater burden of parental responsibilities. For barristers returning from parental leave I'm proud to be part of a floor like Banco that has implemented a parental leave policy which we think is among the most comprehensive.

I've worked at a number of chambers and my experience of each is that they have been supportive of barristers taking parental leave, but the structure of it has been informal and it has required the barrister to ask for assistance. The Banco policy offers clear certainty and commitment about what is going to happen, allowing barristers to plan and meaning they don't have to ask a chambers board for help. It has a value i.e., of comparable weight to that of an employee who has the certainty of statutory benefits. In addition barristers whose practices are winding down before they are ready to leave the Bar can require support. Often it is only the clerk who knows how busy a barrister is.

Bullying and sexual harassment is another significant issue. The hierarchy and dynamics of chambers make it difficult for victims to come forward. There is an obvious need for more research in this area so that there is data to base a proper response upon.

Tobias: Chambers is a shared services company, a model which is growing at an astronomical rate in the wider commercial landscape, which enables small businesses to obtain the benefits that shared workspaces provide. The shared structure of chambers serves the unique requirements of barristers well; however, there are downsides. Barristers suffer more from social and commercial isolation than other professions.

While barristers operate as solo businesses, in truth they are part of a broader, collegiate profession. This broader inclusion is often overlooked. It is important that chambers encourage events to enhance the culture and collaboration among members. The clerk and the administrative staff are an active hub of chambers and should be included in organising and suggesting events throughout the year.

There are in addition some legislative obligations (such as under anti-discrimination, anti-bullying and work health and safety legislation) that may apply to some in chambers, and there are obligations on barristers under the Bar Rules not to bully, harass or discriminate. Chambers and the clerk should make reporting of incidents straightforward and easy to access. Adoption of the Bar Association's Model Best Practice Guidelines can assist with this.

Kristine: As sole traders, barristers do not receive benefits like sick pay, but the nature of barristers' work is that they can benefit from flexible working hours/working from home to suit their own circumstances. This may also mean that, because it is not a 9 to 5 job, some barristers find it difficult to 'clock off'. Barristers do not get paid overtime if they work longer than the standard working day but can charge an hourly rate.

The other obvious challenge barristers face is inconsistent and unpredictable payment for the work they do. This can put barristers under more pressure at various times.

Photography by: Michele Mossop

Tobias O'Hehir

7. Have you observed that women barristers face different hurdles and challenges from those faced by men barristers?

Jeh: Yes. First, my observation is that some women charge less for their work than men at the same level, which is not appropriate. I have adopted mechanisms to attempt to combat this. For instance, I encourage female barristers to keep a spreadsheet of the hours they discount when doing their billing. It's a good way of putting the issue in perspective for them and knowing and asserting your value is an important point of principle to learn. Barristers are likely to attract more work by reason of appearing more successful if they are able to resist pressure to reduce their rates.

Second, as a generality government work makes up a larger percentage of the work of women than of men, which further exacerbates the gender pay gap since government work tends to pay less. In planning discussions we discuss whether better rates can be negotiated or whether it is appropriate to reduce the number of government briefs the barrister holds at a particular time to reduce the impact on income.

Third, from time to time I am asked to recommend an 'aggressive' barrister to appear in a difficult case that involves a robust cross examination or a hard submission. My observation in these situations is that the expected response is to recommend a male barrister. This is because there may be a perception that female barristers are not ordinarily associated with those characteristics. However, my experience is that female barristers are as capable as male barristers in those types of cases.

Fourth, women are more likely to take career breaks than men. That may slow down their career trajectory, inhibit their capacity to buy chambers, or place them further back in the pecking order for membership. Having robust parental leave policies will help.

Tobias: Women at the Bar often charge less than men at the same level, both in rate and by reducing actual time spent on a matter. Women should be conscious of market rates and not charge less. In my experience higher rates do not lead to less work – if anything the opposite. I have also observed that women are asked by solicitors for discounts for work done. When I have been told of this, I have stepped in and prevented it because it is unacceptable. My advice to barristers is to generally not agree to this. These factors provide additional hurdles for women, especially when a career at the Bar presents numerous other challenges for both women and men without adding additional barriers to success. Women at the Bar are empowered to charge and recover fees just as men do.

Kristine: The main difference that can be observed between men and women barristers is that women have conventionally taken time away from the Bar to have children. Women generally undertake the greater share of family responsibilities, which impacts upon their careers.

However, differences also depend on the chambers and a barrister's core practice areas. For example, a five year male barrister with a commercial practice may not be as busy in a public law chambers as a five year female barrister with a commercial practice in a commercial chambers. At Alinea Chambers, which is a commercial chambers, I have not noticed any particular difference between the amount of work of the men and women barristers of about the same seniority.

8. Firms and barristers are increasingly signing up to the Law Council of Australia's Equitable Briefing Policy. How can clerks contribute to its successful implementation?

Jeh: Clerks are called upon to make suggestions or recommendations of suitable counsel for matters. They have an opportunity to influence briefing decisions and should take into account gender outcomes in making their recommendations. A number of Silks have adopted the policy and we should encourage more to do so. Clerks can be aware of who in their chambers is a signatory (and who their preferred women juniors are) and advise prospective solicitors of that fact in advance to set expectations about who will complete the counsel team.

Tobias: From my experience clerks are getting fewer cold calls from solicitors, which means less opportunity to put any particular barrister (including women) forward. Solicitors develop relationships with individual counsel and unsurprisingly use similar barristers each time, unless they have asked their professional network for a recommendation for a new brief or matter. Therefore, the clerk's role is advocacy for individual barristers and of the equitable briefing policy, while promoting the benefits of briefing counsel.

Clerks can develop and implement strategies to facilitate networking and professional events for solicitors and barristers to raise the profile of individuals. Both individual clerks

and the NSW Barristers' Clerks' Association can advocate for chambers to adopt the policy as a whole, thereby sending a clear message to firms and corporates that barristers and chambers support the policy. I think more work needs to be done with advocacy of the policy on the client side.

Kristine: The number of men at the Bar is significantly greater than the number of women. The Equitable Briefing Policy aims for a briefing percentage of at least 30% of all briefs to go to women barristers by 2020, and that women barristers receive at least 30% of the value of all brief fees. While the policy aims to inspire change, from a practical perspective, most chambers, and the Bar as a whole, do not have enough women barristers to meet these targets.

In my observation and experience, the clerk will always prioritise the interest of the client to find suitable counsel with the skills, experience and relevant practice areas to brief, rather than aim to meet any target. The most important thing that a clerk can do in an effort to support equitable briefing is to always ensure that women barristers who are suitable for a brief are put forward for it.

9. In your experience, why do barristers leave the Bar (other than to retire or when appointed)?

Jeh: There are three primary reasons. The first is not having enough work for it to be financially viable. Second, although on the face of it working for yourself seems like it would be flexible, often it's not, especially when you're in Court. Some barristers learn that the ebbs and flows of the job are incompatible with the work/life balance they want to have.

Last, being a barrister is emotionally demanding. The burden of responsibility is significant, particularly in Court, and it

... a clerk will strive to be sensitive to the needs of her or his barristers, but a clerk's role in chambers is directed by the needs of the set, and no two sets are alike.

can cause untold levels of stress and anxiety. Some find that the unique demands of the Bar are unsuited to them.

Tobias: Barristers leave the profession for all manner of reasons and a contributing factor could be the unexpected nature of a solo practice and the lack of support and structure that comes with running a small business. Women tend to leave around the seven-year mark, which is said to coincide with having children, but women without children leave the Bar too. Some barristers, after practising for a few years, do not achieve their commercial objectives and think being a salaried employee would be better. Others leave because the Bar is at times an inhospitable environment.

Kristine: Without elaborating too much, the few reasons I have observed over my 10 years in chambers are burnout from overwork; inertia (or lack of motivation i.e., needed to succeed when you are self-employed); opportunities arising elsewhere; personal issues exacerbated by a barrister's experience at the bar.

10. What do you see as being the future of the Bar?

Jeh: The Bar has always been a source of specialised advocacy and legal advice and I think it will continue to be that way in the future. We will need to respond to changing demands on the profession, including by embracing technology and innovation in the legal sector to maintain a high level of service, and to be a source of commercial and related strategic advice.

Tobias: The future of the Bar is a continuation of barristers being perceived as expert advocates and 'trusted strategic advisors', assisting businesses, organisations, and individuals to navigate dispute resolution. To stay relevant in the changing legal sector, barristers (and therefore the face of the Bar generally), need to be more diverse and representative of the broader community. The Bar should adapt, change and be flexible where required. The profession may need to make efforts to understand the changing demands and requirements of legal services, whether this is with alternative business structures or adopting technology and innovative practice solutions. By engaging with change, barristers will remain relevant.

Kristine: The traditional model of chambers is evolving. Bricks and mortar establishments can never be replaced, but technology is allowing barristers to work outside of chambers more readily. This might be seen as facilitating work-life balance but can also be seen as making work inescapable. Some chambers have set up a hot desk or 'virtual chambers' for a fee, so that associate members or interstate barristers have a Sydney number, the use of staff to receive calls and a temporary place to put down their robes if they have the need for it.

The future of the bar, as with most other professional services, will be facilitated increasingly with the use of technology to aid the efficiency of how and how long matters progress. Some Courts have been integrating some processes, e.g., as paperless, and virtual hearings are being used where possible, and matters are trackable online. These are steps that can potentially make legal access more affordable and available in the future to people who have limited access.

Achieving true gender and cultural diversity is an ever present issue and I believe that we will see the gender and gender pay gaps close. I think it is certain that the Bar will eventually, over a longer time span, become a more inclusive and multicultural profession.

11. What in your experience are some of the greatest challenges that the Bar is currently facing and will face going into the future?

Jeh: Diversity is a current challenge. The Bar strives to attract the best lawyers and in order to do so it needs to attract them from all backgrounds. I think this will change organically over time but we should still be making every effort to demonstrate to prospective barristers that coming to the Bar is a viable and attractive option for them. Robust parental leave policies are an important part of that effort.

Getting enough work for all barristers will continue to be a challenge going forward. Barristers will need to think strategically about how they offer their services in order to remain competitive. If the number of opportunities to engage in advocacy decreases we will need to consider how that craft can be honed and developed in future barristers to maintain that specialised skill at the Bar.

Tobias: The greatest challenge will be staying relevant and maintaining visibility within

a rapidly changing legal landscape, coupled with the ability to adapt to new technology and different practices; especially when consumers demand change. One mechanism for making use of existing technology is for barristers to better develop a defined digital presence that clearly sets out practice areas with specific reference to the work that they have done and continue to do.

Kristine: The nature of the barrister being self-employed/a sole trader necessitates that the structure of the Bar is not centralised, so shifts in behaviour, gender equality and advances in technology have been slower than in many other professions. As a result, the Bar can be resistant to change. How the Bar responds to innovation now can set the stage of the future Bar. The need for innovation and change is necessary to solve many of the challenges the Bar is currently facing. 'Business as usual' may not be an option. Universities will continue to produce law graduates, and competition at the Bar will continue. Social media is not just a trend and barristers face the challenge of optimising platforms such as LinkedIn to get an edge over their colleagues.

12. If chambers were provided with short, free or inexpensive education and training for clerks tailored to the specific needs of the Bar and barristers, for instance by the NSW Bar Association in tandem with the NSW Barristers' Clerks' Association, would that assist clerks in supporting barristers to prepare for the future?

Jeh: My own experience and that of my mentors and contemporaries is that we weren't trained but learned as much as we could from those around us. Having a structured framework of education would help establish a pathway to clerking and help raise the skills and professional standards of clerks as a profession. This would undoubtedly enhance the work i.e., done in chambers.

The role of a clerk is highly variable so I don't know what form such a training course could take, but something that provides an introduction to book-keeping, corporate governance, legal foundations, and marketing would be a good building block.

Tobias: I would highly recommend the NSW Bar provide training and education similar to the practice management course provided by the College of Law. A short syllabus relevant to chambers would be beneficial and could include components relating to HR; IT systems; business, accounting, book-keeping and financial reporting; business development and marketing; organisational change, system design and delivery; and, leadership and management.

Kristine: Although such education and training could be provided, in my view the best training I have received is through hands-on experience. Any more formalised training would preferably be tailored to the common needs of chambers, as different sets have different needs.

I think that the NSW Bar Association may like to consider inviting clerks to future focussed CPD training that they provide for barristers, such as the recent seminar on 'Blockchain and Cryptocurrency for Barristers'. It would assist clerks to have a better understanding of the challenges that lie ahead for barristers in staying relevant in the ever-changing modern world.

The NSW Barrister's Clerks annual conference will be held on Friday 18 October 2019, with an opening dinner on 17 October 2019 at which Chief Justice Bathurst is the guest speaker.

Clerks are encouraged to bring at least three barristers from their floor to the opening dinner which will be held at the Manly Greenhouse in Manly.

Barristers interested in attending should speak to their clerk.

ENDNOTES

1 Filings in the Equity Division (all lists) of the Supreme Court of NSW have trended down from 6,254 in 2005 to 5,526 in 2009 and then to 4,147 in 2017 (Supreme Court of New South Wales 2009 Annual Review p58 for 2005 to 2009; and 2017 Annual Review p51). Filings in the Common Law Division – Civil (all lists) of the Supreme Court of New South Wales have trended down from 6,674 in 2005 to 6,313 in 2009 and then to 3,163 in 2017 (Supreme Court of New South Wales Annual Review, p57 for 2005 to 2009; and 2017 Annual Review, p48). Registrations of civil matters in the District Court have also trended down from 6,129 in 2005 to 5,297 in 2009 and then to 4,875 in 2017 (District Court of New South Wales Annual Review 2005, p14, Annual Review 2009, p14 and 2017 Annual Review, p23). In the Local Court civil actions have generally trended down from 144,881 civil actions commenced in 2005 down to 68,103 in 2009 and then back up somewhat to 76,468 in 2017 (Local Court of NSW Annual Review 2005, p12; Annual Review 2009, p22; and Annual Review 2017, p14). By contrast, the Federal Court actions commenced in the original and appellate jurisdiction have trended up from 3,642 in 2009 to 5,921 in 2017 (Federal Court of Australia Annual Review 2009, p15; and Annual Review 2017/18, appendix 5). Similarly to the Federal Court, actions commenced in the Federal Circuit Court have trended up from 85,984 in 2008-9 to 95,716 in 2017-8 (both family and general federal law) (Federal Magistrates Court of Australia Annual Report 2008-9, p16; Federal Circuit Court of Australia Annual Report 2017-18, Part 3).

Workers Compensation Commission of New South Wales

Past Presidents honoured

By Rodney Parsons, Registrar, Workers Compensation Commission

The Hon Paul Keating, Simon Feildhouse (artist) and Judge Greg Keating, the past President of the Workers Compensation Commission

Judge Greg Keating and family

The Workers Compensation Commission of New South Wales first sat as a specialist tribunal to resolve workers compensation disputes on 3 August 1926. Its members have, for almost 100 years since, dispensed justice to injured workers, their families and employers in disputed compensation claims.

Workers compensation dispute resolution underwent a major overhaul in 2001. A newly formed Commission, which commenced operation on 1 January 2002, introduced alternative dispute resolution strategies to resolve disputes. The new Commission processes were a marked departure from the strict pleadings and legalism of the system it replaced. The informal dispute resolution model continues to successfully operate today.

A main feature of the Commission's dispute resolution model is early access to conciliation conferences at which Commission-appointed

The Hon. Mark Speakman SC MP, Justice Terry Sheahan AO,
Judge Gerard Phillips, President of the Workers Compensation Commission

arbitrators assist the parties to narrow the issues in dispute and explore settlement options. Indeed, arbitrators have a legislative mandate to use their best endeavours to bring the parties to a resolution acceptable to them. Getting the parties together early is complemented by the requirement for upfront lodgment and exchange of evidence and restrictions on the introduction of new evidence, new claims and new defences. Setting the parameters in this way enables the parties to focus attention on resolving, rather than enlarging, the dispute.

Disputes are initially listed before arbitrators for a telephone conciliation conference, which is held 28 days from the date the dispute is lodged. Disputes that are not resolved at the telephone conference are fast-tracked to a concurrent listing comprising of a face-to-face conciliation conference and, if necessary, an arbitration hearing. The conciliation conference/arbitration hearing is usually held three weeks after the telephone conference.

An expedited assessment process is also available to resolve disputes for closed periods of weekly compensation (up to 12 weeks) and medical expenses compensation (up to $9,389). Expedited assessment conferences are held 1four days from lodgment of the dispute. The Commission may also refer a medical dispute to an independent medical specialist for assessment, which usually takes place 35 days from lodgment of the dispute.

Proceedings in the Commission are conducted with as little formality and technicality as the proper consideration of each matter permits. If a dispute cannot be resolved by agreement, an arbitrator will determine liability for the claim. Less than ten per cent of disputes are determined. An internal appeals process against decisions of arbitrators lies to a Presidential member for error of fact, law or discretion. An appeal from a Presidential member is to the Court of Appeal in point of law.

The Commission is widely acknowledged for its progressive approach to dispute resolution. The 2001 reforms were led by then Commission President, Justice Terry Sheahan AO. His vision of early intervention, document exchange and informal conferencing were significant shifts in longstanding practice and procedure. It challenged legal professionals practising in the jurisdiction at that time.

The early foundations laid by Justice Sheahan were built on by Judge Greg Keating, who was President of the Commission from 2007 to 2018. By the conclusion of Judge Keating's appointment, the Commission had established a reputation for efficiency and durability in resolving disputes, with the majority of disputes resolved within three months of lodgment.

Under new President, Judge Gerard Phillips, the Commission is embarking on the next stage of its service delivery program, by incorporating greater use of digital technology. The centrepiece of the Commission's digital service delivery platform is an online portal, which was launched in May 2019. The new platform will provide significant benefits, including:

- 24/7 access to lodge and view applications from any device;
- Access to, and exchange of, information online;
- Electronic access to documents produced by third parties;
- Real time access to the progress of matters, including future allocations such as medical appointments and hearings;
- Opportunities to further reduce timeframes to resolve disputes;
- SMS technology for notification of listings and medical assessments;
- Ability to brief Counsel electronically.

The Commission is committed to full implementation of the online portal by year's end. Support services for practitioners transitioning to the new portal are available from the Commission.

The Commission honoured retiring judges and past Presidents, Justice Sheahan and Judge Keating, at a portrait unveiling of the former Presidents, hosted by Judge Phillips on 23 May 2019. The portraits were unveiled by the Attorney General, the Hon Mark Speakman SC MP before a well-attended gathering of family, friends and colleagues.

The portraits of the former Presidents continue the tradition of honouring past heads of the jurisdiction. Like those before them, the portraits join the historical record of judicial officers in New South Wales and are a fitting acknowledgement of their Honours' service to the State of New South Wales and their stewardship of a jurisdiction tasked with the important function of dispensing justice to injured workers, their families and employers.

The portraits are on public display at the Commission's premises at 1 Oxford Street, Darlinghurst.


HIS HONOUR JUDGE GREG KEATING
PRESIDENT NSW WORKERS COMPENSATION COMMISSION
5 NOV 2007 ~ 7 DEC 2018


THE HONOURABLE JUSTICE TERRY SHEAHAN A.O.
PRESIDENT NSW WORKERS COMPENSATION COMMISSION
1 JAN 2002–4 NOV 2007

Amending a 'surprising and unwelcome result'

Natasha Laing reports on how the *Justice Legislation Amendment Act (no. 3) 2018* restored the long assumed commercial jurisdiction of the District Court

District Court jurisdiction prior to 28 November 2018

Prior to the entry into force, on 28 November 2018, of the *Justice Legislation Amendment Act (no. 3) 2018 (NSW)*, s 44 of the *District Court Act 1973 (NSW)* provided, relevantly, as follows:

(1) Subject to this Act, the Court has jurisdiction to hear and dispose of the following actions:

(a) any action of a kind:

(i) which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court, and

(ii) in which the amount (if any) claimed does not exceed the Court's jurisdictional limit, whether on a balance of account or after an admitted set-off or otherwise,

In *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531, the High Court held that, for the purposes of s 44(1)(a)(i), jurisdiction of the District Court depended upon whether the action would have been assigned to the Common Law Division of the Supreme Court according to the assignment rules as at 2 February 1998.

At that time, in addition to the Court of Appeal, the Supreme Court had seven divisions comprising, the Admiralty Division, the Family Law Division, the Administrative Law Division, the Criminal Division, the Commercial Division, the Equity Division and the Common Law Division. As at 1998, s 53 (Assignment of business) of the *Supreme Court Act 1970 (NSW)* relevantly provided that:

(3E) Subject to the rules, there shall be assigned to the Commercial Division all proceedings of a commercial nature which are required by or under any Act, or by or in accordance with the rules … to be commenced, heard or determined in that Division …

(4) Subject to the rules, there shall be assigned to the Common Law Division all proceedings not assigned to another Division by the foregoing provisions of this section.

Further in relation to s 53(3E), Part 14 of the then *Supreme Court Rules 1970 (NSW)* relevantly provided that:

2.(1) …there shall be assigned to the Commercial Division proceedings in the Court:

(a) arising out of commercial transactions; or

(b) in which there is an issue that has importance in trade or commerce.

Thus, as at 1998, the legislation and rules provided for the residual allocation of matters to the Common Law Division which were not assigned elsewhere. Relevantly, the Commercial Division was allocated matters which arose 'out of commercial transactions' or where there was an issue with 'importance in trade or commerce'.

For decades, it was widely assumed that commercial matters may fall within the District Court's jurisdiction if quantum was within relevant limits. This was supported by decisions such as *Mega-top Cargo Pty Ltd v Moneytech Services Pty Ltd* [2015] NSWCA 402 (*Mega-top*) and *New South Wales Land and Housing Corporation v Quinn* [2016] NSWCA 338 (*Quinn*), which had taken a broad view of the Court's jurisdiction. Thus, in the latter case, Ward JA (Beazley P and Davies J agreeing) said as follows (at [71]):

> 'Mr Quinn's focus is on the source of the debt claimed – whether one arising under statute as a consequence of a decision of a public body (the s 57(5) *Housing Act* claim) or one imposed by the Tribunal'

(which he described, incorrectly, as a 'statutory fee' under the *Residential Tenancies Act* – T 14.9). That is not warranted by the terms of the *Supreme Court Act* or rules. Housing NSW's 'action', for the purposes of s 44, is an action to recover monetary sums. That is the kind of action i.e., typically, and was at the relevant time, assigned to the Common Law Division. There is no reason to think that the underlying source of the debt should make any difference to that result.

District Court's commercial jurisdiction questioned

In late 2017 the District Court's commercial jurisdiction was called into question. In *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* [2017] NSWSC 1194 (*NTF Group*), Parker J observed (at [42]), as noted above, by reference to *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531, that for the purposes of s 44(1)(a)(i) of the *District Court Act 1973* (NSW), jurisdiction depended upon whether the action would have been assigned to the Common Law Division according to the assignment rules as at 2 February 1998. Although his Honour accepted (at [45]) that the claim in *NTF Group* was a 'simple contractual claim in debt', Parker J found that it would not have been assigned to the Common Law Division in 1998. This was because the principal claim in the proceeding 'was between two corporate entities' and the goods in question 'were leased for business purposes'. Accordingly, 'the proceedings fall within the description of proceedings 'arising out of commercial transactions' ... and would have been assigned to the Commercial Division' and the District Court would not have had jurisdiction (at [45]-[46]). Justice Parker termed this a 'surprising and unwelcome result' (at [46]).

This 'surprising and unwelcome result'

was followed in a number of subsequent cases in which the District Court's jurisdiction was found to be absent or sufficiently doubtful that transfer to the Supreme Court was warranted. Such cases included *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWDC 160; *Parramatta Operations TC Pty Ltd trading as APX Parramatta v Consulting Professional Engineers Pty Ltd trading as Consulting Professional Engineers Pty Ltd* [2018] NSWDC 202 (*Parramatta Operations*); *Nova 96.9 Pty Ltd v Natvia Pty Ltd* [2018] NSWSC 1288; *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWSC 1366 (*Sapphire Suite*); *Commonwealth Bank of Australia v QBE Insurance (Australia) Ltd* [2018] NSWSC 1440; *Tzovaras v Williams* [2018] NSWDC 275; *Australian Wholesale Meats (Sydney) v S&R Cool Logistics Pty Ltd* [2018] NSWSC 1541; *Bendigo and Adelaide Bank v Gannon* [2018] NSWSC 1520. Presumably, a number of other cases were dealt with in a similar fashion by consent orders, or in the absence of written reasons for judgment.

The issue was often identified late in proceedings. In *Parramatta Operations*, e.g., the parties agreed that the Court lacked jurisdiction after becoming aware of the issue on the first day of hearing. In many cases, it took the Court by surprise. In *Sapphire Suite*, Harrison J commented at [13]: 'As Parker J said in [*NTF Group*], so in this case, a conclusion that the District Court does not have jurisdiction is both 'a surprising and unwelcome result'. Regrettably, however, it seems to me to follow as a simple matter of statutory construction, uninfluenced by what the primary judge perhaps somewhat wistfully described as 'judicial memory.' I would have come to a different view if my experience of appearing in claims against guarantors were thought to be a permissible indicator of the outcome.'

One case in which a different conclusion was reached was *Jefferis v Gells Pty Ltd trading as Gells Lawyers* [2018] NSWDC 288. In that case, Dicker SC DCJ declined to follow the various decisions following *NTF Group* after the issue was raised on the third day of a final hearing. Instead, his Honour considered that the judgments in *Quinn and Mega-top* were determinative. Those decisions, his Honour reasoned, were to the effect that the District Court had jurisdiction to deal with claims in contract, quasi-contract and other actions to recover monetary sums in debt: [76]-[83].

'any action determined by the Court on or after 2 February 1998 that would have been within the Court's jurisdiction to determine had s 44(1)(c1) been in force at the time is taken to have been within the jurisdiction of the Court'.

Another case of interest is *Bendigo and Adelaide Bank v Jaeger* [2018] NSWDC 244. In that case, Mr Jaeger sought that judgment be set aside on the basis that it was 'irregularly entered' by reason of the jurisdictional issue. Mr Jaeger's application was dismissed. The Court (Taylor SC DCJ) considered that jurisdiction was 'a question that must be found at the outset'. As the Court of Appeal had already dismissed an appeal by Mr Jaeger, Taylor SC DCJ considered that the Court of Appeal had 'implicitly found jurisdiction'. His Honour also considered (a) the principle of *stare decisis* meant that the application ought to be dismissed; and (b) the Court would have dismissed the application as a matter of discretion: [12]-[29].

Restoration of commercial jurisdiction

In any event, at the prospect of the decimation of the District Court's civil jurisdiction, re-litigation of earlier matters and much longer lines at the Supreme Court, calls were swiftly made for legislative amendment. Those calls were heard by parliament, resulting in the *Justice Legislation Amendment Act (no. 3) 2018*. The effect of that Act was to introduce into s 44(1) of the *District Court Act 1973 (NSW)* subs (c1). That section provides, relevantly, that the District Court has jurisdiction in respect of:

> …any action arising out of a commercial transaction in which the amount (if any) claimed does not exceed the Court's jurisdictional limit, whether on a balance of account or after an admitted set-off or otherwise,

The legislation is retrospective. Part 10 of Schedule 3 of the *District Court Act 1973 (NSW)*, which also was introduced by the *Justice Legislation Amendment Act (no. 3) 2018 (NSW)*, provides that it 'is taken to have applied on and after 2 February 1998 in respect of the jurisdiction of the Court' and that, accordingly, 'any action determined by the Court on or after 2 February 1998 that would have been within the Court's jurisdiction to determine had s 44(1)(c1) been in force at the time is taken to have been within the jurisdiction of the Court'.

Thus, the long assumed commercial jurisdiction of the District Court has been restored.

Proceedings in the Expedition List

By The Hon Justice J R Sackar

Practice Note SC 8 deals with urgent matters in the Equity Division. The original Practice note governing the Expedition List in the Equity Division (Practice Note 42) dates from 1987. Theoretically however all lists in the Division have some capacity to expedite matters where necessary and do so from time to time.

The Equity Division deals with urgent matters in two quite distinct ways. The Duty Judge is theoretically available at all times, all year as the first port of call. That judge however will usually only deal with short matters ranging from applications for short service of proposed proceedings which may take minutes, to contested applications for interlocutory relief which may take several hours.

The Duty Judge rarely if ever will hear matters on a final basis. The more common course is that after the interlocutory process is concluded and only if necessary the matter will be referred to the Expedition List for allocation of a date or dates for a final hearing.

However matters can, on application be brought directly into the Expedition List which is generally held each Friday. If application is made direct to the List, SC 8.8 sets out the required procedure.

In 2005 Campbell J (as he then was) in *Vaughan v Dawson* [2005] NSWSC 33, discussed the List and reviewed the authorities. He adopted what Young J (as he then was) had earlier said in *Greetings Oxford Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33 at 42–43 as follows:

> [8] …when considering whether to expedite proceedings in this Division there are at least six factors which are taken into account.

These are:

1. Is this the appropriate Court for the litigation, in particular:
   (a) does the litigation fall into the work normally done by this Court;

   and

   (b) is there a sufficient nexus with New South Wales.
2. Is there a special factor involved which warrants expedition. Usually these

factors will be:

(a) the loss of witnesses if the case is not fixed at an early date;

(b) matters of public importance;

(c) that the subject matter of the litigation will be lost if it is not heard quickly;

(d) that the litigation to date has been delayed through no fault of the applicant;

(e) that the applicant is suffering hardship not caused through his own fault;

(f) that there is self-induced hardship (including those cases where corporate bodies fix a meeting date in the near future and then expect the Court to displace all other matters to hear their dispute before that date);

(g) the nature of the case (e.g., ejectment, child custody); and

(h) that there are large sums of money involved.

There may, of course, be other matters which can count as special factors, but the list that I have given is what occurs in the usual case. The health or age of parties or witnesses may, of course, come under (a), (c) or (e) or all of those headings.

3. Have the parties proceeded up to the date of the hearing of the motion for expedition with due speed?
4. Are the parties willing if expedition is granted to do all in their power to abridge the hearing time including joining in an agreed bundle of documents, preparing statements of witnesses, filing lists of objections to affidavits, making admissions of matters not really in dispute and restraining wide-ranging cross-examination. Of course there will always be cases where one party's interests are to delay resolution of the dispute as much as possible. Such cases can usually be recognised and special procedures adopted.

Then there are two factors dealing with the exigencies of the list, viz:

5. Any application for expedition must be judged in the light of the number of other cases of equal or higher priority that also seek an expedited hearing.
6. Any 'right' to expedition is a right to have the case fixed on one occasion. If, after a date has been fixed, it has to be vacated, it is difficult indeed to justify again expediting the proceedings: *Ron Hodgson Cabramatta Pty Ltd v Wewoka Pty Ltd t/as B P Cabramatta Motors* (Waddell CJ in Equity, 30 March 1989, unreported).

The question here is whether there is a seventh guideline, namely, that one should not expedite a case where the chances of the applicant for expedition securing what it wants in the proceedings are not high. This point arises because the defendant submits that because of the matters I have already canvassed, the chances of the plaintiff obtaining equitable relief must, according to the defendant, be slim.

I do not think that the Court ought, in an application for expedition, to make an assessment of the applicant's chances of success. However, I do agree that there is a seventh guideline, namely, that the Court should not expedite a case if it considers that in all the circumstances the chances of the applicant obtaining what it seeks in the litigation cannot be put as higher than speculative.

In the balance of his judgment, Campbell J went on to discuss what he saw was needed to enable the principles of granting expedition to work in practice. To a very large extent what the judge said provides the basis of the current practice note.

Practitioners should keep in mind that as a rule of thumb matters which have an estimate of five days or more will generally not be heard in the Expedition List. For the List to provide a meaningful response where urgency is required, judgment must also necessarily be expedited. Cases over five days usually require more work from the judge's point of view which tends to slow the adjudication process. In addition it will frequently be the case that many proceedings which come into the List are initially commenced by summons. Practitioners should expect that it is highly likely orders will be made that the matter be pleaded in full. It is imperative, as always, where expedition is granted that the issues are as precisely identified as is practicable.

If a case is in urgent need of final hearing, (but where the practitioners are of the view the case might or will exceed five days) application should nonetheless be made to the List. The Division obviously stands ready to assist litigants. If a case has an estimate of more than five days the Chief Judge will normally be consulted to explore more general availability. Accommodation will be found for lengthier cases, if necessary.

At the hearing of the motion for expedition whatever length of hearing is estimated the Court will explore whether liability can be separated from quantum or whether the determination of a question or questions could or should be ordered. Where the only or principal reason for expedition is the age or ill health of one of the parties or their witnesses orders can readily be made for the taking of that person's evidence on commission usually before a person appointed under UCPR, 24.3 and 31.6. This will not necessarily be the trial judge as the Court may wish to retain flexibility over who eventually hears the matter. The evidence will usually be audio visually recorded. This procedure will often take the urgency out of the proceedings generally.

The Expedition List is run for the benefit of litigants. It is to be expected that consideration is given before application is made to the need if expedition is granted strictly to abide by the timetable fixed for procedural steps. Failure to do so may lead to the matter being removed from the List. As Pembroke J observed in *Smithson & Ors v National Australia Bank & Anor* [2011] NSWSC 312:

1. It is important for the profession to recognise that the expedition list is run for the benefit of all litigants in this Division of the Court who can justify the requirement for urgency. The conduct of the list necessarily requires the Court's constant re-assessment and re-balancing of the competing claims for urgent hearings by an ever-widening group of litigants. The necessity of taking that approach means that, depending upon the nature and number of competing urgent claims, it is sometimes necessary to take a strict approach to defaults by parties in complying with timetables set by the Court. It also means that, if through no fault of any particular party, time estimates prove to be inaccurate or optimistic, the parties may forfeit the preferential dates that have been allotted to them.
2. In this respect, the conduct of proceedings in the expedition list differs from the conduct of proceedings in the general list. The expedition judge takes a less generous, and more demanding, approach to delay or obfuscation, inaccurate estimates of hearing time, or incompetence in the preparation of the case for hearing. The consequence is that circumstances may all too frequently arise when expedition will be revoked, the hearing date vacated and the parties' priority forfeited.

In deciding whether or not to expedite a matter the Court plainly exercises a discretion. This involves a balancing process. On the one hand the Court must as an institution be placed to expedite or fast track cases requiring urgent determination. However the litigation can only proceed if no party is unreasonably denied an opportunity to put its case forward. Issues involving disclosure, and/or subpoenas, especially those directed to third parties, will require a somewhat pragmatic approach. Practice Note SC 11 also comes into focus. Expert evidence can be a particular problem and thought must always be given to the possibility of retaining a single expert.

Ss 56–60, of the Civil Procedure Act 2005 should be daily reminders for litigants and the clients, nevermore so than in the Expedition List.

Managing civil litigation – Federal Court style

By The Hon Justice Jacqueline Gleeson

National Court Framework

In 2015 the Federal Court established the National Court Framework (**NCF**). The key aim of the NCF is to reinvigorate the Court's approach to case management so that the Court is better placed to meet the demands of litigants and can operate as a truly national and international Court.

National Practice Areas

The Court's workload has been reorganised by reference to nine National Practice Areas (NPA) and, where applicable, sub-areas. Each NPA and sub-area has dedicated webpages on the Court's website.

These webpages contain a summary of the NPA and any related sub-area, as well as key NPA-specific resources, such as relevant

forms, rules, legislation, practice notes, latest judgments and speeches.

The judges assigned to the various NPAs and sub-areas are identified on the Court website.

The filing party nominates a relevant NPA, although that nomination is not determinative. When a matter is filed, the Court promptly identifies the appropriate NPA and the matter is then allocated to a judge in that NPA. In some cases, proceedings are provisionally allocated to the coordinating judge in a specific NPA for initial case management, where issues may be clarified and the matter timetabled, before being allocated to an individual judge's docket for further case management, if required, and substantive determination.

The NPAs are:

1. Administrative & Constitutional Law & Human Rights.
2. Admiralty & Maritime.
3. Commercial & Corporations.
4. Employment & Industrial Relations.
5. Federal Crime & Related Proceedings.
6. Intellectual Property.
7. Native Title.
8. Other Federal Jurisdiction.
9. Taxation.

'Other Federal Jurisdiction' includes defamation, common law claims, civil aviation and the Court of Disputed Returns.

The Commercial & Corporations NPA has the following six sub-areas:

1. Commercial Contracts, Banking, Finance and Insurance.
2. Corporations & Corporate Insolvency.
3. General & Personal Insolvency.
4. Economic Regulator, Competition & Access.
5. Regulator & Consumer Protection.
6 International Commercial Arbitration.

The Intellectual Property NPA has the following three sub-areas:

1. Patents & Associates Statutes.
2. Trade Marks.
3. Copyright & Industrial Design.

Insurance List for Short Matters

The Insurance List sits within the Commercial Contracts, Banking, Finance and Insurance sub-area. The list caters for the prompt and efficient resolution of legal issues affecting members of the insurance community, enabling the parties to resolve their disputes without the need for full-blown hearings where a crucial issue could be decided discretely and swiftly.

The list is not intended to deal with all insurance claims, but principally short matters, especially of policy interpretation and concerning the operation of insurance legislation. The list covers marine as well as non-marine insurance.

The list has been running successfully since March 2016, and has dealt with over 50 matters, including 10 since April 2019. The Chief Justice has typically conducted initial case management of all matters in the list and has heard many of the matters that have proceeded to a hearing. Two matters have also had separate questions heard by a Full Court.

Parties and practitioners are encouraged and expected to take a commonsense and cooperative approach to litigation to reduce its time and cost.

National Practice Notes

The Court has issued 27 national practice notes that set out the Court's case management principles and procedures. The practice notes are published on the Court's website.

Practitioners are expected to be familiar with the practices notes that apply to their cases. In general, practice notes are issued to:

1. complement particular legislative provisions or rules of Court;
2. set out procedures for particular types of proceedings; and
3. notify parties and their lawyers of particular matters that may require their attention.

The Court's practice notes fall into four categories:

1. The Central Practice Note (CPN-1).
2. NPA practice notes. Currently, each NPA, excluding the Other Federal Jurisdiction NPA, has an NPA practice note.
3. General Practice Notes (GPNs).
4. The Appeals Practice Note.

CPN-1 is the core practice note for Court users and addresses the guiding NCF case management principles applicable to all NPAs. One of its main aims is to ensure that case management is not process-driven or prescriptive, but flexible: parties and practitioners are encouraged and expected to take a commonsense and cooperative approach to litigation to reduce its time and cost.

The GPNs apply to all or many cases across NPAs, or otherwise address important administrative matters. They set out particular arrangements or information concerning a variety of key areas, such as class actions, expert evidence, survey evidence, costs, subpoenas and technology.

The Court is in the process of preparing comprehensive practice notes outlining the management of, and requirements relating to, appeals and related applications. In the interim, the Court has:

1. revoked the former Practice Note APP 1;
2. partially amended and reissued Practice Note APP 2 – Content of appeal books and preparation for hearing; and
3. set out further information regarding appeals on the Court's website, accessible from the appeals homepage.

Urgent (Duty) matters

The Court has adopted a nationally consistent approach to dealing with urgent matters by duty judges or a General Duty judge in the Commercial & Corporations NPA. A separate regime applies to urgent Admiralty & Maritime NPA matters.

The Court actively assists parties to bring on applications that may require an urgent listing at the earliest appropriate time, whether in a proceeding which has not yet been commenced or in a proceeding that has already been docketed to a judge.

The Court's website contains information about how to apply for urgent relief. The daily Court lists identify the Commercial & Corporations duty judge and the General Duty judge for each Registry.

Electronic Court File

Since 2014, all proceedings filed with the Court have an electronic Court file. All documents filed in those proceedings are filed electronically only. Original documents are retained by the instructing solicitor, or the self-represented litigant as applicable. Court orders are entered electronically.

Conclusion

The Bar plays a key role in enabling effective case management in the Federal Court, by understanding the Court's case management framework and deploying it to facilitate the just resolution of disputes, according to law and as quickly, inexpensively and efficiently as possible.

Postscript

The Bar's attention is drawn to *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284, where Allsop CJ recently set out expectations for case management in the context of alleged statutory unconscionability.

The Role of Commissioners in the NSW Land and Environment Court

By Ashley Stafford

Introduction

In the New South Wales Land and Environment Court approximately 73% of proceedings filed each year are in two of the merits decision-making jurisdictions of the Court: Class 1 (environmental planning and protection appeals) and Class 2 (local government and miscellaneous appeals and applications).[1] The work at first instance in these classes of the Court's jurisdiction is often undertaken by Commissioners. Commissioners also undertake work in some other classes.

Accordingly, it is not unusual for Counsel briefed to appear in that Court, whether at the conciliation or hearing of a merits appeal or at mediation, to come before a Commissioner.

Commissioners are appointed based on their knowledge or qualifications, and experience, across a number of prescribed fields of expertise.[2] These fields include law, town planning, local government administration, environmental science, natural resource management, land valuation, architecture, engineering, Indigenous land rights or heritage. Commissioners are intended to be appointed across the range of expertise required by the *Land and Environment Court Act 1979* (**Court Act**).[3]

Commissioners, who were called 'Assessors' or 'conciliation and technical assessors' until the nomenclature in the Court Act was changed in 1998,[4] can be appointed full-time or part-time, and there are a number of acting Commissioners. A Senior Commissioner is appointed, usually coming from a legal background.

While strictly speaking 'the Court' is composed of the Chief Judge and other judges of the Court,[5] in proceedings that Commissioners are authorised to hear, they exercise the jurisdiction of the Court,[6] the decisions of Commissioners are deemed to be the decisions of the Court[7] and Commissioners' hearing and disposing of proceedings can exercise the functions of the Court subject to the Court Act and the rules of the Court.[8]

In this sense, Commissioners are different from extra-curial tribunal members exercising administrative functions because Commissioners must operate within the Court, but their role nonetheless requires them to apply

their expertise in a way which is analogous to the role of members of specialist tribunals in that they are expected to have qualifications and experience that enables them to determine merits proceedings.[9] As for specialist tribunal members, Commissioners are able to bring their own knowledge and experience to bear on their decision-making,[10] provided that in doing so they afford procedural fairness.[11]

Also similar to the procedure of many tribunals is the fact that advocates remain seated in proceedings before a Commissioner.

Proceedings heard by Commissioners

There are a number of functions of the Court that Commissioners exercise.

The Chief Judge of the Land and Environment Court has discretion to direct that merits appeals or applications, in classes 1 and 2 of the Court's jurisdiction and Class 3 proceedings (land tenure, valuation, rating and compensation matters), be heard by one or more Commissioners.[12] A similar discretion applies for proceedings arising under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991* (Class 8 proceedings),[13] except that any Commissioners who hear those proceedings must be Australian lawyers.[14]

While judges may also hear such matters, Commissioners and not judges are required to preside over certain planning appeals or tree-related applications that the registrar requires to be heard on the site the subject of the appeal or application.[15]

Even where proceedings are to be heard by a judge, Commissioners may sit with the judge to give assistance and advice to the Court, but not to adjudicate, in classes 1, 2, 3 or 8 of the Court's jurisdiction or Class 4 proceedings (civil enforcement and judicial review).[16] In such cases, the Commissioner is prohibited from participating in the adjudication process, beyond giving assistance and advice.[17]

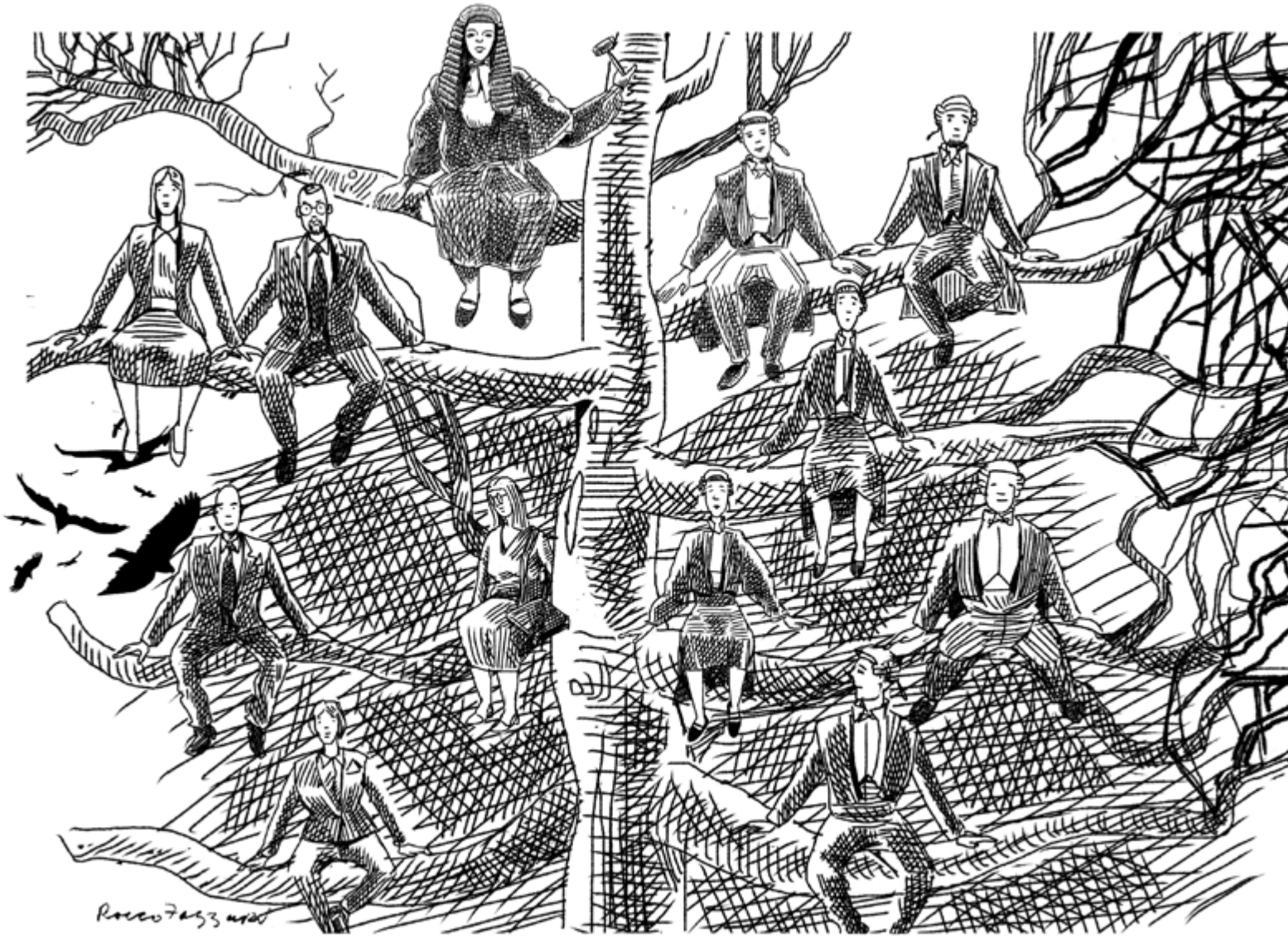
In allocating a specific Commissioner to a matter, the Chief Judge is required to have regard to the knowledge, experience and qualifications of the Commissioners and to the nature of the matters involved in the proceedings.[18] However, other factors such as the availability of particular Commissioners affect the arrangements made by the Court and it is possible for a Commissioner to be allocated to a matter without prior experience in the subject area. As the allocation of the decision maker is usually only made known to parties on the business day before the hearing, legal representatives must therefore prepare for hearing on the assumption that the decision-maker might not be familiar with the areas of expertise at issue in the dispute.

Merits appeals or applications in the Court of the types which Commissioners are able to determine usually commence with a site inspection (unless the same Commissioner has already viewed the site during a conciliation) and usually return to Court for any hearing. Expert witnesses are usually expected to attend site inspections. In appeals where members of the public are entitled to make submissions, their verbal evidence is usually given at the site inspection.

Alternative dispute resolution

In the Land and Environment Court, alternative dispute resolution is often expected, particularly in merits appeals or applications.[19]

A Commissioner presides over Court-directed conciliation conferences in Class 1, 2 or 3 proceedings.[20] Conciliations in classes 1 or 2 usually commence with a site inspection, after which the conciliation conference can be hosted on-site (if facilities are avail-



able) or more often move to a local venue such as a council chambers or to a nearby Courthouse. If the conciliation is held in a Courtroom, the Commissioner usually sits on the other side of the bar table from the parties, rather than on the bench. As for Court hearings, where residents are entitled to make submissions, their verbal evidence is usually taken on-site before the conciliation conference commences.

If the conciliation does not resolve the dispute, the Commissioner can proceed to hear the matter if the parties agree[21] and, in practice, if that Commissioner is allocated to hear the matter by the Chief Judge. Commissioners can also be required to proceed to hear a matter following a failed conciliation in the case of certain appeals involving smaller-scale residential development.[22] In either of these cases where the same Commissioner ultimately hears the matter, the parties often consent to resident evidence and the Commissioner's observations during the site inspection being taken as evidence at the hearing, avoiding the need to repeat the process.[23]

Where parties to a conciliation successfully reach agreement on the terms of a decision in the proceedings that *'the Court could have made in the proper exercise of its functions',* the Commissioner must dispose of the proceedings in accordance with the terms so agreed.[24] In doing so, the Commissioner is not required to consider the merits of the decision[25] but is required to be satisfied (which might include making findings of fact and/or law) that there is jurisdiction to make the decision in the terms sought.[26] The Commissioner is not required to look behind the purported authority of the parties to reach the agreement.[27]

While a Commissioner can adjourn the conciliation if satisfied that there is good reason to do so,[28] in practice this power is used sparingly. The Court's *Conciliation Conference Policy* indicates that adjournments will usually only be granted in circumstances where the parties have reached an agreement in principle and where a short adjournment is required for documents to be prepared to finalise the agreement.

In civil proceedings (classes 1, 2, 3, 4 and 8), Commissioners with appropriate qualifications are also sometimes appointed by the Court as mediators in Court-directed mediations under s 26 of the *Civil Procedure Act 2005*.

The Court can also refer these types of proceedings to Commissioners for neutral evaluation under rule 6.2(2) of the *Land and Environment Court Rules 2007*. However, neutral evaluation has fallen out of vogue, given that conciliation is routine in merits appeal matters and it is not unusual for mediation to be contemplated where suitable in enforcement proceedings.

A Commissioner can undertake an inquiry into any issued raised in, or other matter connected with, Class 3 proceedings if directed to do so by the Court with the consent of the parties. This appears to be rarely utilised, possibly given that the consent of the parties is required to adopt any finding or observation in the resulting report of the Commissioner – an unlikely prospect on any issue already in dispute before the Court.

Limitations on Commissioners exercising Court functions

The functions of the Court that Commissioners can exercise are limited in several ways. First, they can only exercise the Court's jurisdiction in the circumstances in which it is conferred on them by the Court Act and the rules of the Court, as outlined above.

Secondly, Commissioners are prevented from exercising a number of the Court's functions by rule 3.10 of the *Land and Environment Court Rules 2007*, including the power to make discretionary costs orders, the power to determine any question arising under the *Uniform Civil Procedure Rules 2005* and the Court's enforcement powers.

A notable exception to the prohibition on Commissioners making costs orders is that Commissioners are able to make orders under s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, for costs thrown away as a result of an amendment of an application for development consent other than minor amendments in certain appeals. Those costs orders are not discretionary and do not rely on the costs powers identified in rule 3.10. The mandatory nature of these orders means that parties are left to argue whether such amendments are minor[29] and whether amendments are in fact being made to the application for development consent.

Thirdly, there are other statutory or general law constraints on the powers of Commissioners that may be relevant in particular cases. The Court of Appeal has considered, in respect of the Land and Environment Court, that a *'Court exercising limited jurisdiction will be subject to constraints which may derive from differing sources'*, which sources in that case included the legislation that governed the subject matter of the appeal (which might also raise mandatory or prohibited considerations), the Court Act and the general law (including the requirement to afford procedural fairness, to act rationally and reasonably).[30]

Appeals

Appeals from orders or decisions of a Commissioner are made to a judge of the Court and may only be made on questions of law.[31] Any further appeal is made to the Court of Appeal[32] but only by leave of that Court.[33]

Nature of Commissioner decisions

Although decisions of Commissioners do not constitute precedent, Commissioners (and even judges) may have regard to the decisions of Commissioners when deciding proceedings, given the desirability of consistency of decision-making.[34]
Since 2003 Commissioners (often the Senior Commissioner) have sometimes included 'planning principles' in their decisions on matters of general application. Those principles are also not binding, but the Court of Appeal has considered that consistency in the application of planning principles is desirable.[35]

Principles are emerging to the effect that the Court Act does not establish a hierarchy binding Commissioners to follow the determination of a single judge sitting in the same class of proceedings, unless on a preliminary question in the same matter. However, the circumstances in which the Commissioner might depart from single judge decisions, having regard to principles of comity, is yet to be fully settled,[37] given that the Court of Appeal has drawn a distinction between principles associated with the desirability of consistency of decision-making in Class 1 appeals and those concerning comity.[38]

Just because Commissioners hear merits appeals or applications does not mean that Commissioners do not, or cannot, decide questions of the law in the course of those proceedings. To the contrary, the Court frequently entertains legal questions in merits appeals.[39]

As a consequence, Commissioner decisions are an important resource for barristers briefed to appear in merits appeals or applications in the Land and Environment Court.

ENDNOTES

1 Average of annual percentage of registrations (filings) from 2013 to 2017 in classes 1 and 2 excluding restored proceedings, using raw statistics from Department of Justice, *The Land and Environment Court of NSW: Annual Review 2017*, State of NSW, 2018 pp 31-32.
2 That a candidate has the required qualifications is a matter for the satisfaction of the Attorney General: *Land and Environment Court Act 1979* (Court Act) s 12(2).
3 Court Act s 12(2AB).
4 Courts *Legislation Further Amendment Act 1998* s 3 and Schedule 6.
5 Court Act s 7.
6 Court Act s 33(1) and (2A).
7 Court Act s 36(3).
8 Court Act s 36(4).
9 *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council* [2008] NSWLEC 318 at [51] per Pain J, which statement of principle was accepted in *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council and Another* [2009] NSWCA 300; (2009) 170 LGERA 162 at [45], [49] and [51] per Basten JA (Macfarlan JA agreeing at [85]) albeit that the appeal was allowed.
10 *Crown Atlantis Joint Venture v Ryde City Council* [2005] NSWLEC 303 at [43] per Lloyd J.
11 For example, *Castle Constructions Pty Ltd v North Sydney Council* [2008] NSWLEC 239 at [20] and [28] per Biscoe J.
12 Court Act s 36(1), noting that there is a specific provision in s 34C for proceedings to which s 34A(4) applies.
13 Court Act s 42.
14 Court Act ss 30(2C) and 33(2A).
15 Court Act ss 34A and 34B.
16 Court Act s 37 and 43.
17 *Carlewie Pty Ltd v Roads and Maritime Services (NSW)* [2018] NSWCA 181; (2018) 98 NSWLR 233 at [38] per Basten JA (Payne JA agreeing at [56] and White JA agreeing at [57]).
18 Court Act s 30(2).
19 For example, *Practice Note – Class 1 Development Appeals* at [32]-[33], *Practice Note – Miscellaneous Appeals* at [30]-[31], *Practice Note - Class 3 Compensation Claims* at [33] and [37], *Practice Note – Class 3 Valuation Objections* at [12], [16]-[17].
20 Court Act s 34(2).
21 Court Act s 34(4)(b).
22 Court Act s 34AA(2).
23 Court Act s 34(4)(b)(ii) and 34AA(2)(b)(ii).
24 Court Act s 34(3).
25 *Al Maha Pty Ltd v Huajun Investments Pty Ltd and Others* [2018] NSWCA 245; (2018) 233 LGERA 170 at [33] per Basten JA (Leeming JA agreeing at [41]).
26 [2018] NSWCA 245; (2018) 233 LGERA 170 at [16] and [29] per Basten JA (Leeming JA agreeing at [41]) and at [76] and [79] per Preston CJ of LEC (Leeming JA agreeing at [41]).
27 *Presrod Pty Ltd v Wollongong City Council* [2010] NSWLEC 192 at [61]-[63] per Craig J.
28 Court Act s 34(6).
29 For example, *Futurespace Pty Ltd v Ku-ring-gai Council* [2009] NSWLEC 153 at [42] per Pepper J.
30 [2018] NSWCA 245; (2018) 233 LGERA 170 at [14] per Basten JA (Leeming JA agreeing at [41]).
31 Court Act s 56A(1).
32 Noting s 48 of the *Supreme Court Act 1970.*
33 Court Act s 57(4)(c).
34 *Segal v Waverley Council* [2005] NSWCA 310; 64 NSWLR 177 at [56] per Tobias JA (Beazley JA agreeing at [1] and Basten JA agreeing at [102]).
35 [2005] NSWCA 310; 64 NSWLR 177 at [15]-[16] and [96] per Tobias JA (Beazley JA agreeing at [1] and Basten JA agreeing at [102]).
36 *Mac Services Group v Mid-Western Regional Council* [2014] NSWLEC 1072 at [54] per Cssr Dixon (as she was); *Challenger Listed Investments Limited v Valuer General (No 2)* [2015] NSWLEC 60 at [30] per Pepper J.
37 See [2014] NSWLEC 1072 at [67] and [2015] NSWLEC 60 at [31] per Pepper J.
38 [2005] NSWCA 310; (2005) 64 NSWLR 177 at [48] per Tobias JA (Beazley JA agreeing at [1] and Basten JA agreeing at [102]).
39 See e.g., *Helman v Byron Shire Council* (1995) 87 LGERA 349 at [360] per Handley JA at [360] (Kirby ACJ and Priestley JA agreeing) and *Australian International Academy of Education Inc v Hills Shire Council* [2013] NSWLEC 1; (2013) 196 LGERA 1 at [98]-[110] per Craig J.

Obtaining leave to appear - NSW Civil and Administrative Tribunal[1]

By Franco Corsaro SC and Penny Thew[2]

The Consumer and Commercial Division (the CCD) of the NSW Civil and Administrative Tribunal (the Tribunal) is the largest of the Tribunal's four divisions, receiving 53,722 of the total 65,549 claims received by the Tribunal in the 2017 to 2018 financial year.[3]

Having been established on 1 January 2014 for the purpose of consolidating approximately 22 previously existing New South Wales state tribunals (including the Consumer, Trader and Tenancy Tribunal, the Medical Tribunal and the Administrative Decisions Tribunal of NSW),[4] the Tribunal received 40,000 claims in the first six months of operation.[5]

Consistently receiving in excess of 50,000 claims per annum since it was established makes the CCD one of the busiest civil jurisdictions in NSW.[6]

The CCD has wide-ranging jurisdiction conferred by 24 enabling acts. It includes claims made under Australian consumer,[7] home building and strata schemes legislation, as well as in respect of social housing, residential tenancy, motor vehicle and retail lease claims.[8] There is no monetary limit to the orders that can be made under certain legislation.[9]

In line with the objects of the *Civil and Administrative Tribunal Act 2013 (NSW)* (the **NCAT Act**), which include ensuring that the Tribunal is accessible and able to resolve issues 'justly, quickly, cheaply and with as little formality as possible',[10] the presumption in proceedings before the Tribunal is that parties are not entitled to be represented by any person other than by leave.[11]

Significantly, however, notwithstanding this presumption, the CCD's Representation Guideline issued in August 2017 (the **CCD Representation Guideline**) sets out the circumstances under which the Tribunal 'will usually permit a party to be represented, especially by an Australian legal practitioner.'[12]

Importantly, these circumstances include if:

- the proceedings are in the Home Building List and involve a claim or dispute for more than $30,000;
- another party in the proceedings is, or is to be represented by, an Australian legal practitioner;
- another party in the proceedings is a government agency;
- the Tribunal is of the opinion that the party would be placed at a disadvantage if not represented at the hearing; and
- the Tribunal is of the opinion that representation should be permitted due to the likelihood that complex issues of law or fact will arise in the proceedings.

Representation by a legal practitioner is also as of right in the CCD in certain circumstances.[13]

Being cognisant of the complexities that can arise as a result of the presumption that parties are generally not entitled to be represented other than by leave is important. As was recently observed in respect of corporate entity parties, a company is an artificial person and cannot represent itself.[14] Given the curial rules that generally require proceedings by a corporation to be conducted through a solicitor or authorised director[15] do not apply in the Tribunal, the consequence of section 45 of the NCAT Act is therefore that, in every case in which a company is a party to proceedings in the Tribunal, leave must be obtained for someone (who may or may not be a legal practitioner) to represent it.[16]

A range of matters can be relevant to the exercise of the Tribunal's discretion as to representation by a legal practitioner. The Tribunal may have regard to whether the proposed representative has sufficient knowledge of the issues to enable effective representation, has the ability to deal fairly and honestly with the Tribunal and other persons and is vested with sufficient authority to bind the party.[17] While consideration of these matters is not mandatory in respect of leave being sought for representation by a legal practitioner,[18] each may be relevant.

In line in particular with the objects in section 3 of the NCAT Act and the procedural matters under section 38, further relevant considerations include the capacity of the individual seeking leave to be represented to understand and effectively participate in

the proceedings in a manner which allows them a reasonable opportunity to be heard; the need to ensure that there is no material imbalance between the parties; the need to ensure that the Tribunal is accessible and responsive to the needs of all of its users; and whether it is appropriate in all the circumstances to give leave to a particular person, including a legal practitioner.[19]

Significantly, the 'overriding objective' contained in section 36(1) of the NCAT Act (to facilitate the just, quick and cheap resolution of the real issues in the proceedings) has been observed to have no application to questions of representation, given such questions are 'incidental procedural questions' rather than 'the real [substantive] issues in dispute'.[20]

Evidence of each relevant matter can be adduced[21] and representation determined in the absence of the parties.[22]

Finally, from a practical perspective, an application to be represented can be made orally or in writing at any stage of the proceedings[23] and can be granted in respect of any Australian legal practitioner or a particular practitioner.[24] Importantly, in making an order granting leave, the Tribunal may impose such conditions on the leave as it deems fit, including that the estimated costs of the representation be disclosed.[25] An order that can be made in conjunction with such an order is that, where leave is granted to only one party to be legally represented, that party will not seek an order for costs if successful, costs otherwise being available in the CCD in the circumstances set out under rule 38 of the NCAT Rules and/or section 60 of the NCAT Act.

Overall, it is clear that the operation of the CCD Representation Guideline, in conjunction with rule 32 and the matters relevant as a result of sections 3 and 38 of the NCAT Act, provide a framework of the circumstances in which the Tribunal 'will usually permit a party to be represented, especially by an Australian legal practitioner.'[26]

ENDNOTES

1 This article is written with the approval of the Honourable Justice Lea Armstrong, President of the New South Wales Civil and Administrative Tribunal, as well as the approval of the Deputy President, Consumer and Commercial Division, Mr Stuart Westgarth. The authors would like in addition to express their gratitude to Andrew Coleman SC, part time member of the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal, for his feedback.

2 The authors are appointed as part-time members of the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal.

3 NCAT Annual Report 2017–2018, p31.

4 *Civil and Administrative Tribunal Bill 2013* (NSW), Explanatory note, p1-2; Robinson SC et al, *NCAT Practice and Procedure,* LBC, 2015, [1.10]-[1.20].

5 NCAT Annual Report 2014, p5.

6 Other than the Local Court of New South Wales, in which 76,468 civil actions were filed in the 2017 calendar year (Local Court of New South Wales Annual Review 2017, p14). By way of comparison, there were 5,921 filings in the original and appellate jurisdiction of the Federal Court of Australia in the 2017 year (Federal Court of Australia Annual Report 2017-2018, appendix 5); 4,147 filings in the Equity Division (all lists) and 3,163 filings in the Common Law Division – Civil (all lists) of the Supreme Court of New South Wales in the 2017 year (Supreme Court of New South Wales 2017 Annual Review, p51 and 48); and 4,875 civil matters registered in the District Court in the 2017 year (District Court of New South Wales Annual Review 2017, p23).

7 The Australian Consumer Law, schedule 2 of the *Competition and Consumer Act 2010* (Cth).

8 NCAT Act, Schedule 4, clause 3.

9 See for instance the *Retail Leases Act 1994* (NSW); *Property, Stock and Business Agents Act 2002* (NSW); *Strata Schemes Management Act 2015* (NSW), section 106(5); *Dividing Fences Act 1991* (NSW); *Residential (Land Lease) Communities Act 2013* (NSW).

10 Section 3(c) and (d) of the NCAT Act.

11 Section 45(1) of the NCAT Act.

12 Clause 11 of the CCD Representation Guideline.

13 In appeals from a decision of the Tribunal to the Appeal Panel where the party had leave below (section 45(2) of the NCAT Act); in claims under the *Retail Leases Act 1994* (NSW) and where the party has been granted legal assistance under the *Fair Trading Act 1987* (NSW) (Schedule 4, clause 7, NCAT Act).

14 *Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608* [2019] NSWSC 651 at [234] per Parker J.

15 *Uniform Civil Procedure Rules 2005*, Rule 7.1(2) and (3).

16 *Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608* [2019] NSWSC 651 at [234] per Parker J.

17 Rule 32 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the **NCAT Rules**); Clause 8 of the CCD Representation Guideline; *Rodny v Stricke* [2018] NSWCATAP 136 at [78]-[88]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].

18 *Rodny v Stricke* [2018] NSWCATAP 136 at [87]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].

19 *Rodny v Stricke* [2018] NSWCATAP 136 at [82], [83], [88]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].

20 *Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608* [2019] NSWSC 651 at [249] per Parker J, citing *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at [72]. Although cf *Rodny v Stricke* [2018] NSWCATAP 136 at [87]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].

21 Clause 9 of the CCD Representation Guideline.

22 By way of an order pursuant to section 50(2) of the NCAT Act.

23 Rule 31(1) of NCAT Rules; CCD Representation Guideline, clause 7.

24 Section 45(1)(b)(ii) of the NCAT Act.

25 Rule 31(2) and Rule 33 of the NCAT Rules (NSW).

26 Clause 11 of the CCD Representation Guideline.

Keeping Your Ex in the Dark

Applications without notice in Family Law

By Claire Cantrall, Waratah Chambers

As attractive as it may be to litigate in the absence of an opponent, applications without notice are sparingly used in family law, as in other jurisdictions. An ex parte application, by nature, represents the denial of natural justice to the absent party and is a rare and extraordinary remedy to be used only when the circumstances require.

The jurisprudence underpinning ex parte applications in family law is largely borrowed from the common body of case law, giving rise to settled and predictable principles. These can be broadly summarised as follows:

By nature, ex parte orders are made in very limited circumstances, where they are required to protect people or property, and would be limited in scope and time to the return of the matter before the Court with both parties present[1].

The onus is on the party seeking to move the Court to justify the making of the order. The applicant would have to show the making of the order is necessary, and other remedies would not be preferable or appropriate[2].

Of particular importance in any application seeking a hearing in the absence of the other party, is the duty of the applicant to provide full and frank disclosure to the Court of all the facts, including those that may be unfavourable to the applicant's case[3].

Ex parte applications are best made as soon as possible after the circumstances giving rise to the need to apply for the order (or as soon as possible after the applicant learns of the circumstances). The Court should provide the respondent an opportunity to be heard at the earliest possible time following the making of the ex parte order[4].

Should the ex parte application call for an injunction, the applicant may be required to give the usual undertaking as to damages, if the granting of the injunction may cause damage to the respondent.

Perhaps the most common ex parte application concerning parenting matters is an application for a recovery order (for return of a child).

The procedure in relation to applications without notice can be found within the Family Law Rules 2004, in particular at rule 5.12. Notably, such applications are limited to applications for interim or procedural

orders, in line with the general principles. The requirement for full and frank disclosure of all the facts relevant to the application is specifically articulated at rule 5.12(b). This provision requires the Court to consider family violence, previous cases and orders currently in force, any likely hardship to the respondent, a third party or a child if the application is made, whether the intention to make the application has been made known to the respondent, as well as capacity to give an undertaking as to damages, urgency of the application and harm that may result if the order is not made.

Rule 5.13 identifies the need for an ex parte order to operate until a specific time or until the date when the matter can be heard.

A recovery order is a remedy available pursuant to Section 67Q of the *Family Law Act 1975*. In short, the head of power permits the Court to make an order for a child to be returned to a parent or person identified in the section, authorising federal and state law enforcement to act to effect the order, including by use of force. In circumstances where a party to proceedings identifies imminent danger to a child whom they seek to have recovered to their care, it may logically follow that giving notice to the other party may heighten the danger. If this is so, the Court may make an order in the absence of the party who has retained the child, with regard to the procedure identified in rule 5.12, as well as the procedure applicable to recovery orders generally, articulated in Rule 21.12.

In practice, the evidence required to move the Court to make an ex parte recovery order would largely focus on urgency, family violence and the risks to the child or a parent, should the respondent have notice of the application. In particular, rule 5.12 (b) will be closely applied by the Court making the determination[5]. The Court is also mindful of the denial of natural justice that such an application brings, and should not be moved lightly when exercising this jurisdiction[6].

Another common ex parte application in parenting matters is an application for a family law watchlist order (restraining a person from removing a child from Australia).

A family law watchlist order is a type of restraint able to be made by the Court pursuant to the general restraints identified in section 114 of the *Family Law Act 1975*. In practice, for a successful ex parte application of this nature, the applicant would have to show a risk of one party leaving the jurisdiction with a child or children if they became aware of the application. The Court would need to be moved by evidence of risk in the particular circumstances, including ties to other jurisdictions and capacity of the other party to remove the child or children. The obvious risk is that one party is able to circumvent the jurisdiction of the Court by removing the children from Australia, and for this reason the Court can often be moved to make interim orders without notice on this discrete issue.

In summary, ex parte remedies are sparingly and carefully used by the Courts exercising family law jurisdiction. They require careful preparation on the part of the practitioner and candid presentation by counsel, with close regard to the relevant practice rules.

ENDNOTES

1 In the Marriage of Sieling (1979) 4 Fam LR 713.
2 In the Marriage of Lee (1977) 3 Fam LR 11, 609.
3 *Thomas A Edison Ltd v Bullock(1912)* 15 CLR 679.
4 In the Marriage of Sieling (1979) 4 Fam LR 713.
5 See generally Dickens & Dickens [2014] FamCA 1226 and Hurley & Lomu [2016] FamCA 774.
6 Moore & Evers (Summary Appeal) [2014] FamCA 947.

Work Health and Safety

By His Honour Judge A Scotting

This article seeks to address some practical issues arising from the conduct of prosecution of offences provided for by the *Work Health and Safety Act 2011* (the Act) and the *Work Health and Safety Regulations 2011*.

Pleas of Guilty

The judges are appreciative of the considerable effort that goes into the written submissions that we get particularly in pleas of guilty, but we would like to suggest some subtle changes in focus.

First, the facts in WH&S are long and on occasions unduly so. That results in the Court having to summarise the facts and that involves a risk of failing to identify an essential point, in aggravation or in mitigation. It would be of assistance if written submissions did identify the essential facts with references to the paragraph numbers of the Statement of Facts. It would be even better if the parties could agree on a simplified version of the facts that could appear in the judgment. As an aside, a comprehensive set of Agreed Facts should usually alleviate the need to tender investigation reports and other documentation.

Second, the most essential findings in a plea of guilty are the facts relevant to objective seriousness. It is surprising that many sets of submissions do not focus on this element. The principles relevant to objective seriousness are set out in a number of judgments.[1]

The most common aggravating factor is the causation of injury or death as a result of the offence. A section 32 offence does not require an injury to be sustained but only that an individual is exposed to a risk of serious injury or death. Accordingly, the causation of serious injury or death establishes the aggravating factor because the harm was greater or more deleterious than may ordinarily be expected for the offence in question.[2] The long term impact on the injured worker is useful information and could be aggravating or mitigating.

The most significant mitigating factor that can be established and has a demonstrable effect in mitigation of sentence is an early plea of guilty. The application of a 25% discount has a real bottom line impact when the most likely outcome is the imposition of a fine. Further, an early plea is likely to reduce the costs claimed by the prosecution.

There have been a few recent decisions of the CCA that shed some light on the penalties to be imposed for section 32 offences ... these decisions, together with other decisions of the Court of Criminal Appeal, have placed upward pressure on monetary penalties imposed for Category 2 offences.

Capacity to pay is also significant. There is always some utility in placing the defendant in a class of capacity. While an appropriate penalty for the offence is $100,000 and the defendant has the capacity to pay that fine, it is useful for the Court to know generally how that capacity relates to other PCBUs for whom capacity to pay is absolutely not an issue. Second, the evidence that needs to be gathered to establish a limited capacity to pay will vary. Third, if there is a limited capacity to pay then there may be the need to limit the costs awarded too. Finally, limited capacity to pay may not be relevant at all if the circumstances warrant the imposition of a substantial fine.[3]

Insufficient attention has been paid to date to the 'Other Orders' that the Court can make pursuant to Division 2 of Part 13 of the Act. A Court may make any of the other orders in addition to any other penalty imposed, if the Court finds a person guilty or convicts the person of an offence.[4] This clearly includes when an order is made pursuant to section 10 *Crimes (Sentencing Procedure) Act 1999*. Inherent in the New South Wales approach is that the entry of a conviction is considered to be punitive, or may lead to legal and social consequences that extend beyond any punishment imposed by a Court.[5] However, this is not the position in other jurisdictions, particularly Queensland.

An offender may voluntarily undertake such matters to be relied on in mitigation of the penalty to be imposed.[6] For any of the other orders to be successfully made, the Courts require the assistance of the representatives of the parties as to the cost and availability of suggested measures and methods to ensure compliance.[7]

Recent examples of other orders made by the District Court include adverse publicity orders[8], Work Health and Safety undertakings and training orders.[9]

Defended Hearings

The Practice Note (PN) applies to all prosecutions commenced after 5 November 2018. It was conceived because a number of defended hearings had to be adjourned to accommodate late evidence or changes of position in the prosecution case.[10] Notwithstanding that the PN applies to cases commenced after 5 November 2018, we are endeavouring to apply it as closely as possible to cases that were commenced before that date. This involves the prosecution justifying that their case is settled and appropriately disclosed and the parties have

Photograph: Fairfax Media

taken all reasonable steps to limit the matters in dispute and to proceed accordingly.

It should be noted that the requirements imposed on a defendant by the PN are voluntary, as it does not have the force of legislation requiring the defendant to impinge on the right to silence.[11]

The PN is consistent with counsels' duty to limit the matters in dispute and to run only the matters that are necessary to properly represent the legitimate interests of the client.

When *Investa* was run by two experienced Senior Counsel the matter completed within eight days of its 15 day estimate. Statements were tendered by consent without requiring deponents for cross-examination, expert reports were received and there was an extensive set of Agreed Facts. Each party presented one folder of 'Critical Documents' that prevented the need to go searching for documents in a large tender bundle.

The default order of the Court will be from now on that an expert's evidence-in-chief will be given by way of the tendering of their reports. In *Investa*, the parties consented to calling the experts simultaneously, which was also helpful in resolving the issues between them. While this process is encouraged, it will remain a matter for consent in appropriate cases.

A lot of photographic evidence is presented in these matters and often the photographs tendered are small, produced in black and white or are otherwise of poor quality. It is of considerable assistance to witnesses and the Court to have photographs, plans and maps presented in large scale and in high resolution, if possible.

Written Submissions after the Completion of the Evidence.

There have been a number of cases where the Court is being asked if the parties can be given time at the end of the evidence for the preparation of written submissions. While this will remain to be determined by the trial judge in the circumstances of the case, it raises two issues. First, the Court treats these matters as judge alone trials and the parties and the victims are entitled to a verdict as soon as possible. This means that in appropriate cases we will try to allocate writing time into our schedule to get judgments out. If a case runs over time or we do not know when a case will finish, these arrangements will be compromised, so it will be necessary to set out the dates in advance if this arrangement is to be entered into.

Recent Cases of Interest

There have been a few recent decisions of the CCA that shed some light on the penalties to be imposed for section 32 offences.[12] These cases highlighted the simplicity of the steps that could be taken in avoiding the risk as a very important factor in assessing the objective seriousness and thereby the appropriate penalty for an offence. It is relatively clear that these decisions, together with other decisions of the Court of Criminal Appeal, have placed upward pressure on monetary penalties imposed for Category 2 offences.

The High Court has also recently considered the scope of the operation of the Act[13] and has granted special leave in relation to whether prosecutions under the Act should be given priority to coronial proceedings.[14]

ENDNOTES

1 See e.g., *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 and the cases referred to in footnote 12.
2 *R v Youkhana* [2004] NSWCCA 412 at [26].
3 *Jahandideh v R* [2014] NSWCCA 178 at [16].
4 ss 234 and 235 of the Act.
5 *R v Mauger* [2012] NSWCCA 51 at [39] per Harrison J, quoting *R v Ingrassia* (1997) 41 NSWLR 447 at 449.
6 See e.g., remedial training for a class of workers; *SafeWork NSW v Wholesale Joinery Pty Ltd* [2018] NSWDC 91 at [41]-[42].
7 Toni Schofield and Belinda Reeve, 'The Role of the Judiciary in Occupational Health and Safety Prosecutions: Institutional Processes and the Production of Deterrence', (2012) 54(5) *Journal of Industrial Relations* 688 at 702.
8 *SafeWork NSW v KD & JT Westbrook (No2)* [2019] NSWDC 15 for the reasons at [59]-[67] and the orders are at [75]-[79].
9 *SafeWork NSW v Yan Huai Wu and Zenger (Aust) Pty Ltd* [2018] NSWDC 211.
10 *SafeWork NSW v Investa Asset Management Pty Ltd* [2018] NSWDC 173 (*Investa*).
11 Division 2A of Part 5 *Criminal Procedure Act 1986.*
12 *A-G (NSW) v Ceerose Pty Ltd* [2019] NSWCCA 35, A-G (NSW) v DSF Constructions Pty Ltd [2019] NSWCCA 33, *A-G (NSW) v Macmahon Mining Services Pty Ltd* [2019] NSWCCA 8 and *18 Morris McMahon & Co Pty Ltd v Safework NSW* [2018] NSWCCA 36.
13 *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2
14 *Helicopter Resources Pty Ltd v Commonwealth* [2019] FCFCA 25.

Dealing with cost and delay

Abridged version of a paper by Justice DJ Hammershlag[1] published in *Resolving Civil Disputes* (Lexis Nexis).

Prepared by Kon Stelios.[2]

Introduction

More effective case management is the modern practical, and perhaps only available, judicial response to counter the ever-increasing cost and delay pressures exerted by significant commercial civil litigation.

Active case management is a relatively modern phenomenon. Commercial transactions and the disputes to which they give rise are increasingly complex. One effect is that case management techniques to deal with such disputes are continually evolving. This article, which is an edited version of a paper first published in Michael Legg's comprehensive book *Resolving Civil Disputes*,[2] is concerned with such techniques and identifies examples in the commercial jurisdiction in New South Wales at trial level where case management may directly affect cost and delay.

Resolving Civil Disputes

The following are the general drivers of effective case management:

- a judicial officer skilled in the art who puts in the necessary effort;
- consistency (but with sufficient flexibility) in approach;
- procedural steps tailored to suit the particular case; and
- a culture of compliance, achieved by maintaining a system for monitoring compliance and applying appropriate sanctions for non-compliance.

Management of a trial cause can conveniently be divided into the following stages:

- ascertaining the issues;
- controlling the evidence-gathering process;
- conducting the final hearing;
- marshalling the material to produce a satisfactory judgment; and
- producing the judgment at the earliest reasonable time.

The final two stages are almost exclusively for the judge, although the configuration the evidentiary material takes and the quality of the argument may affect the Court's burden. The benefits of effective case management are lost unless there is speedy judgment and equivalent effective management at intermediate appellate level. Save for complex commercial causes, judgment should be given in weeks. Cases which warrant longer than three months for judgment should be rare.

The Foundations

Active case management and participation by the legal profession in the process has since 2005 been mandated in New South Wales.[3] This is reflected in Part 6 of the *Civil Procedure Act 2005* (NSW), which:

- confers power on the Court to facilitate active and effective case management, including the power to tailor procedural steps to suit the particular case; and
- imposes obligations on parties and their legal representatives to facilitate the just, quick and cheap resolution of the real issues in the proceeding.

The Specialist List System

A significant feature of the case management structure in the Supreme Court of New South Wales is the specialist list system.[4] Cases within the Commercial and Technology and Construction Lists are administered by the list judge in Court each Friday.

Ascertaining the Real Issues

The formal pleading process – which historically was left unsupervised to the parties unless a specific problem arose – can be time-consuming.

Practice Note SC Eq 3 makes provision for entry into the Commercial and Technology and Construction Lists by commencement of a matter by summons accompanied by a List Statement. SC Eq 3 makes corresponding provision for the filing of List Responses and cross-claims, which must include a response to the plaintiff's list statement. The contentions, responses and cross-claims should avoid formality, state, admit or deny the allegations with adequate particulars and identify the legal grounds relied upon.[5]

Practice Note SC Eq 9 provides for an even more truncated procedure for commercial arbitrations.

The directions hearing is the basic case management vehicle. This is an important opportunity for the Court to begin ascertaining the issues. Requiring parties to state their position early is an important time and cost saver. It may also be useful to require parties to provide a statement of the real issues for determination earlier than that provided for in the usual order for hearing.

Pleading arguments may cause delay and expense. SC Eq 3 provides that as a general rule, applications to strike out, or for summary judgment, will not be entertained.[6] Pleading arguments can usually be avoided by discussion with the parties where the adequacy of pleading is an issue. At an early stage of proceedings, leave to amend is usually generously given.

Directions hearings can be expensive. Good case management dictates that they be kept to a minimum, dealt with quickly and heard as close as possible to the time at which they are listed in Court lists. A time- and cost-saving measure is the provision in SC Eq 3 for consent orders to be made by the list judge in chambers before the lists close.[7]

The Court's response to non-compliance with timetables is important. Leaving aside the effects of unsanctioned and unjustified delay, a limp response where a strong one is needed is inimical to a culture of compliance.

A useful tool is the imposition of an immediately payable (say within seven days) lump sum costs order for costs thrown away by serious or serial non-compliance (which may be accompanied by a proviso that the assessment is provisional).[8] In other cases, an order that the costs thrown away are the opponent's costs in the cause may be sufficient.

The goal is to keep interlocutory contests to a minimum and to deal with them decisively including by requiring written argument in advance with limits on the length of submissions.

Evidence Gathering Process

Discovery

Discovery can be the single most costly and time-consuming process in a trial cause.

Traditionally, discovery takes place after close of pleadings, once the issues have supposedly been defined, and before parties serve any evidence.

A significant departure from this position

was brought about by Practice Note SC Eq 11. It applies to all proceedings in the Equity Division of the NSW Supreme Court, other than those in the Commercial Arbitration List. SC Eq 11 provides that orders for disclosure will not be made until after evidence has been served, unless there are exceptional circumstances.[9] All applications must be supported by an affidavit setting out why disclosure is necessary and the likely costs.[10] The Court may limit the amount of recoverable costs in respect of disclosure.[11]

SC Eq 11 has been the subject of extensive judicial comment, particularly as to whether 'exceptional circumstances' are present. Obviously, each case is to be assessed on its facts.

SC Eq 11 has proved to be effective in reducing cost and delay. In most cases, discovery before evidence is not needed as parties know enough about their position to put on their evidence. It has encouraged parties to examine the real issues early and engendered a more disciplined analysis of the need for disclosure. Few applications for early disclosure are ruled on because parties frequently agree and implement by consent.

A useful technique is to require a party seeking extensive or costly discovery to pay in advance, with the costs incurred by it to become costs in the cause. Imposing such a condition has the effect of encouraging a party to limit disclosure to what it considers necessary.

Appropriate search terms for electronically stored material are a regular source of controversy. This problem is usually solved by appointing an independent expert to report on appropriate search procedures.

Expert Evidence

The cost of garnering expert evidence is a perennial issue. In many cases, the expert evidence may be of little utility or does not meet the criteria for admissibility.

A useful device is to require the parties to engage a single expert before being given leave to adduce further expert evidence.[12] The process of producing an agreed brief focuses attention on the issues to which the proposed evidence is said to go.

There are some cases where it is feasible and appropriate to give rulings as to the admissibility of evidence, including expert evidence, in advance of the hearing.[13]

The trend is to hear expert evidence in concurrent session. This generally works well in encouraging experts to focus on the real issues. Handled correctly, this saves significant time, but does require advance preparation by the Court.

While it is preferable for objections to be dealt with before the evidence is admitted, this is frequently not practical. The only option to save cost and time may be to admit the evidence provisionally under s 57(1) of the *Evidence Act 1995* (NSW) on the condition that, unless before conclusion of the proceedings the Court rules otherwise, the material is admitted unconditionally (or rejected).

The Hearing

Proceedings are diarised for an appropriately early pre-trial directions hearing to monitor readiness.

In most cases, the usual order as to hearing (with or without some modification) is appropriate.[14] Effective trial management requires monitoring of compliance with these requirements and taking appropriate steps in the face of non-compliance.

The cost of garnering expert evidence is a perennial issue. In many cases, the expert evidence may be of little utility or does not meet the criteria for admissibility.

SC Eq 3 makes provision for 'stopwatch hearings'. This is rarely used but may be a useful management tool in some cases. There are pitfalls in being overly restrictive including that the hearing becomes too compressed and the task of decompressing the information in a judgment is made more difficult.

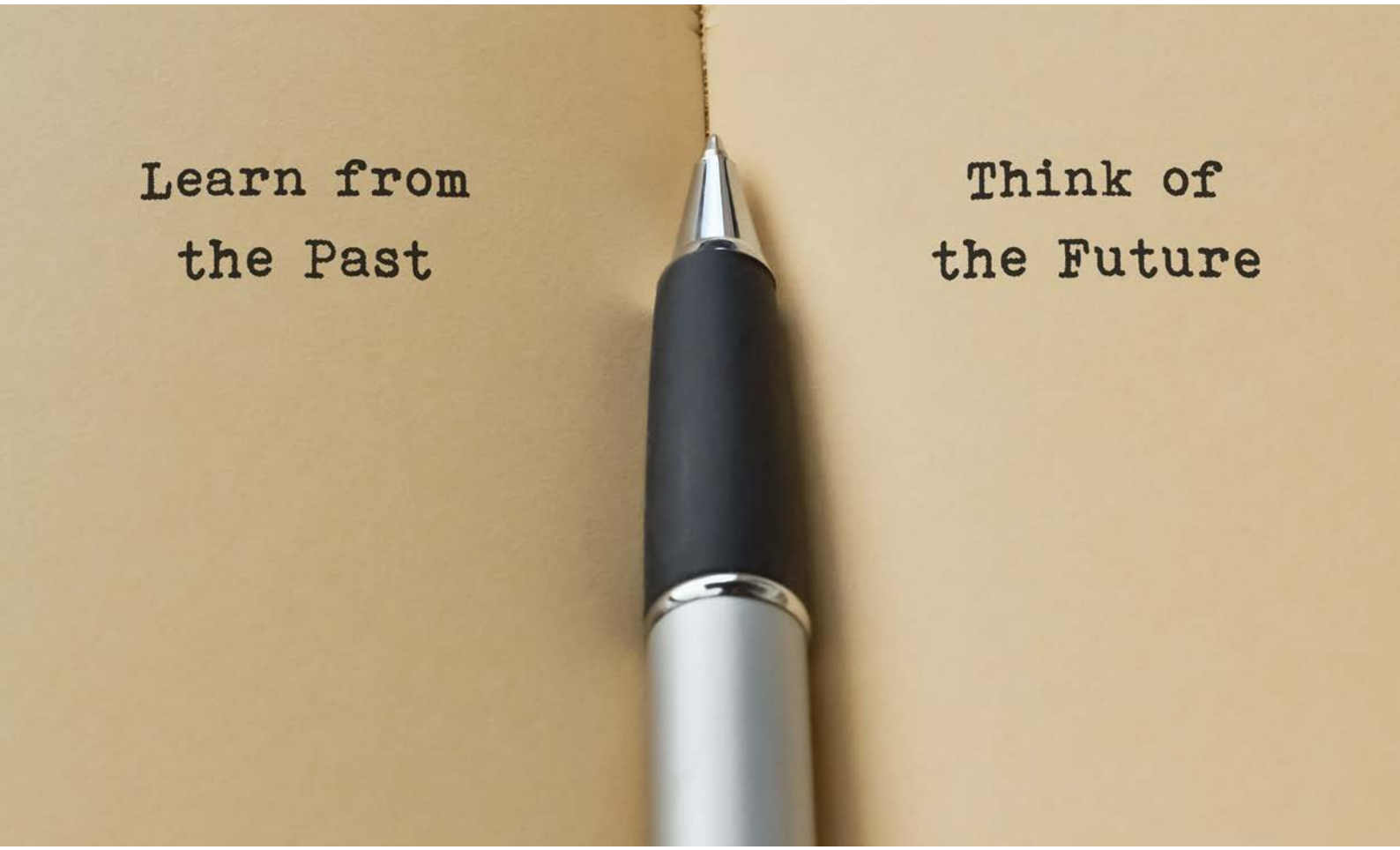
The Court may make orders for the decision of any question separately from any other question.[15] The most important practical benefit is that determination of a single issue may dispose of proceedings entirely. But there are potentially significant pitfalls including:

- the separate questions which the parties articulate may lack utility;
- the risk of delay while leave to appeal[16] is sought in relation to a separate question which does not entirely dispose of the proceedings;
- the separate questions are required to be answered on incomplete facts; and
- the ability of the judge who hears a separate question to hear the remainder of the proceedings.

Finally, most commercial causes are appropriate for mediation at some stage. An early referral may cap costs, while a later referral enables the parties to be better informed about the case. However, early mediation is generally preferred, because parties' positions frequently harden after they have incurred significant costs. Ultimately, each case depends on its own circumstances.

ENDNOTES

1 Judge in the Equity Division of the Supreme Court of New South Wales, Head of the Commercial, Technology and Construction and Commercial Arbitration Lists.
2 Sixth Floor Selborne Wentworth.
3 There are equivalent provisions in other states and territories, and the federal jurisdictions.
4 This system is to be contrasted with the 'docket system' used in some Courts.
5 SC Eq 3 at [9] and [11]. The plaintiff's statement and a defendant's response must still each disclose a reasonable cause of action and defence respectively: *Ucak v Avante Developments* [2007] NSWSC 367.
6 SC Eq 3 at [62].
7 At [23]-(24].
8 See *Uniform Civil Procedure Rules 2005* (NSW) r 42.7(2). See also SC Eq 3 at [57] which provides that, unless otherwise ordered, a party in whose favour a costs order is made may proceed to assessment.
9 At [4] and [5].
10 At [6].
11 At [7].
12 See also UCPR r 31.24.
13 Evidence Act s 192A.
14 SC Eq 3 Annexure 3.
15 UCPR r 28.2.
16 *Supreme Court Act 1970* (NSW) s 103.



Child abuse – liability of organisations

The Civil Liability Act 2002 (NSW) and the new Part 1B

By Jeremy L Harrison

Introduction

Part 1B of the *Civil Liability Act 2002* (NSW), entitled 'Child abuse–liability of organisations', commenced on 26 October 2018 and 1 January 2019. Part 1B introduces at least three fundamental changes which concern suing an unincorporated organisation, reversing the onus of proof in respect of breach of duty of care in a negligence claim and codifying vicarious liability.

Background to the introduction of Part 1B

In September 2015 the Royal Commission into Institutional Responses to Child Sexual Abuse released its Redress and Civil Litigation Report which addressed four issues: (a) limitation periods; (b) the duty of institutions; (c) identifying a proper defendant, and; (d) model litigant approaches. The Royal Commission recommended that a non-delegable duty be imposed on certain institutions rather than legislating in respect of vicarious liability at all.

On 17 March 2016, s 6A of the *Limitation Act 1969* (NSW) was amended to adopt the Royal Commission's recommendations with respect to limitation periods. Time limitation periods were abolished with retrospective effect in respect of personal injury cases for child abuse.

After the Royal Commission published its recommendations, the High Court handed down a unanimous decision concerning vicarious liability in *Prince Alfred College Incorporated v ADC* [2016] HCA 37. This decision set out 'the relevant approach' (at [80] – [81]) to be adopted when determining

whether vicarious liability is established in cases concerning the sexual abuse of children in educational, residential or care facilities by persons who were placed in special positions with respect to the children. 'The relevant approach' is evidently intended to be reflected in Division 3 of Part 1B, discussed below.

The Main Points of Part 1B

Division 2 concerns negligence claims. It sets out the scope of the duty of care owed by organisations and it reverses the onus of proof in respect of breach of duty of care – i.e., there is a presumption of a breach of duty unless the organisation proves otherwise.

Part 1B does not impose a non-delegable duty of care upon organisations in spite of the Royal Commission's recommendation that one be imposed. Instead, Division 3 concerns vicarious liability and effectively codifies 'the relevant approach' laid out in *Prince Alfred College v ADC*. Employee is defined broadly in s 6G to include an individual akin to an employee. The heart of Division 3 is in s 6H(1) which renders an organisation vicariously liable for child abuse perpetrated against a child by an employee of an organisation provided that two pre-conditions are satisfied – that the employment role supplied the occasion for the perpetration of the abuse and that the employee took advantage of that occasion to perpetrate the abuse. In this regard, a Court must take into account whether the organisation placed the perpetrator in a position in which the perpetrator had: authority, power or control over the child; the trust of the child; or, the ability to achieve intimacy with the child, as prescribed in s 6H(2). These are concepts directly derived from *Prince Alfred College v ADC*.

The objectives of Division 4 are to enable child abuse proceedings to be brought against unincorporated organisations and to enable an organisation to pay liabilities arising from child abuse proceedings from the assets of an associated trust in certain circumstances.

Finally, Schedule 1, Part 14 stipulates that the presumption of a breach of duty of care and the provision which imposes vicarious liability only apply in respect of child abuse that was perpetrated after the commencement of those sections on 26 October 2018. By contrast, all of the provisions in Division 4 concerning proceedings against unincorporated organisations also operate retrospectively even though they were not enacted until 1 January 2019.

What might be the consequences of Part 1B?

Proceedings against unincorporated organisations

Part 1B will assist a survivor where he or she can only identify an unincorporated organisation as a potential defendant. This benefit however might only be fruitful if that organisation, or a trust associated with it, holds assets to satisfy any judgment awarded.

The Second Reading Speech makes it clear that Division 4 is intended to abolish 'the *Ellis* defence.' All survivors of child abuse might now consider suing an unincorporated organisation or seeking to amend pleadings in existing proceedings to do so. Thereafter, such survivors might apply to the Court to appoint the trustee of an associated trust should the unincorporated organisation not appoint a proper defendant within 120 days.

The reversal of the onus of proof in negligence claims in respect of whether the duty was breached is a radical development.

Establishing liability of organisations

Part 1B will assist survivors to establish liability against an organisation in respect of abuse perpetrated after 26 October 2018 by firstly codifying the principles concerning vicarious liability set out in *Prince Alfred College v ADC* in favour of survivors and secondly reversing the onus of proof in respect of breach of duty in a negligence claim.

No decisions have yet considered any provision in Part 1B. During the Second Reading Speech on 26 September 2018 the Attorney-General described Part 1B as 'beneficial legislation' enacted in favour of survivors and stated that Part 1B should be interpreted as such by the Courts. Part 1B marks the beginning of a new era in which new terms and phrases will alter the legal analysis in child abuse proceedings against organisations such as *organisation, organisation responsible for a child, individual associated with an organisation, employee, akin to an employee, the occasion,* and *takes advantage of that occasion.*

Negligence

The reversal of the onus of proof in negligence claims in respect of whether the duty was breached is a radical development. Future contests might centre on whether or not the perpetrator was *associated* with the organisation for the purposes of s 6E. This may involve debate as to whether the perpetrator was an office holder, officer, employee, owner, volunteer, contractor, religious leader, priest, minister or authorised carer of the organisation. Otherwise, the contest might focus on whether or not the abuse occurred in connection with the organisation's *responsibility* for the child.

Vicarious liability v negligence

It is predicted that the advent of Division 3 will make vicarious liability the primary focus of suits brought by survivors. It may be expected that survivors will strive to prove that the perpetrator was an *employee* for the purposes of s 6G in order to obtain the benefit of the vicarious liability provisions in Division 3, rather than alleging that the perpetrator falls within the broader category of persons defined as an *individual associated with an organisation* for the purposes of s 6E which merely opens the gateway to the lesser benefit flowing from the rebuttable presumption of breach of duty in Division 2.

Vicarious liability provisions are more beneficial than claims in negligence to a survivor because the presumed breach of duty in negligence is rebuttable whereas there is no escape from vicarious liability once the three pre-conditions are met. Accordingly, the contest between the parties might focus on those three pre-conditions to vicarious liability which are:

- Whether the perpetrator was an employee as defined in s 6G.
- Whether the employment role supplied the occasion for the abuse for the purposes of s 6H(1)(a).
- Whether the perpetrator took advantage of that occasion to perpetrate the abuse for the purposes of s 6H(1)(b).

Part 1B will likely give rise to a new era of interpretation disputes especially in considering the meaning of *employee*, determining whether employment supplied the occasion for the abuse and determining whether the perpetrator took advantage of that occasion to perpetrate the abuse. These disputes might be resolved in part through a deeper appreciation of the issues and decisions discussed in *Prince Alfred College v ADC*.

Advocate for Change

Andrew Pickles SC discusses his new role on behalf of the LGBTQI community with Stephen Ryan

Stephen Ryan: *Could you firstly tell us about your journey into the legal profession and then on to the Bar?*

Andrew Pickles: It was fairly conventional really, although I am not from a legal background at all. I don't have any lawyers in my family whatsoever. I went to Sydney University studying economics-law – a combined degree. I was a summer clerk at Freehills and became a paralegal for my final year at law school. And then I went travelling overseas as everyone does. I came back and worked at Freehills for three years as a solicitor, firstly in their environmental group and then in their litigation team.

Then I moved to Mallesons because I wanted to do planning and environmental work.

Then I went to Phillips Fox.

I think it was one of my colleagues here (Martin Place Chambers) who I was against in a matter in the Land and Environment Court and I was doing my own advocacy as a solicitor and she said to me, 'Have you thought of coming to the Bar?' and I thought 'Well, I haven't,' and she said, 'Well you should because you're quite good'. And that planted the seed. Then about 18 months later I decided to make a break for it.

I had the support of the partners that I worked for who encouraged me to go to the Bar and the firm were very good. I gave them six months' notice. They were very happy with that. And then they sent me work when I got here, as did Mallesons.

SR: *How did you obtain the Advocate For Change role and why do you think you were selected?*

AP: Richard Weinstein SC had been in the role. He got appointed, just as it happens… it got announced on the same day that we were hosting 'Gay Bar' drinks. The Diversity and Equality Committee were looking for someone to replace Richard and it was suggested that I put my name forward. So I did. I don't know what moved them to think I'm suitable, but I've got a history I suppose of being involved in LGBTQI issues, not so much at the Bar, though I was on the Equal Opportunity Committee in 2005-2006.

Outside the Bar I was on the Gay and Lesbian Rights Lobby executive for several years, the secretary and then the co-convenor back in 2002-2003 and during that time I was involved in saving Mardi Gras and re-establishing the new company that could take it forward. I'm also an avid supporter of Queer Film. I'm a True Love Sponsor of Queer-Screen Inc.

SR: *What are some of the ideas you've had or issues you'd like to tackle during your time in the role?*

AP: One of the things that we've thought of doing is an open day for LGBTQI identifying students at the universities. And just as the women lawyers run an open day for women students we could try and do something like that for LGBTQI identifying students. There is already a queer officer at the University of Sydney Law School and through that contact Richard [Weinstein] had established a moot. So we might build on that. The moot might get opened up to a wider range of students from other universities as well.

The second thing is that I'd like to develop some partnerships with LGBT organisations. This has been tried in part before with Pride and Diversity with ACON [AIDS Council of NSW]. I think one of the problems has been that because we're an association and not an employer it's been difficult to structure a program that works at an association level rather than at an employer level. I'm trying to work with ACON to see whether we can structure a program that would work at an association level so that it would provide benefits to members, an ability for members to connect with whatever Pride and Diversity offer including… tickets to the annual conference and awards, member events throughout the year, that sort of thing. As well as training and development for the association.

One possibility is to engage with another provider to provide an annual CPD seminar for members of the Bar to promote understanding. There are two elements to it. One is to promote an understanding of LGBTQI issues among members of the Bar and the other is to promote inclusiveness. I think those are the two distinct strands to work on.

Another organisation that we're going to

Photography by: Michele Mossop

have some discussions with soon is the Gay and Lesbian Business Association. They invited me and some other members of the Diversity Committee to one of their functions, Fruits in Suits and they do another event called Lemons with a Twist. We'll see if we can work up a partnership which would allow barristers to attend… and it's a great networking opportunity.

SR: *Have you noticed changes in attitudes during your time as a solicitor and barrister and the difficulties members of the LGBTQI community can have?*

AP: It's interesting reflecting on my time at Freehills. Freehills is probably now regarded as one of the most inclusionary law firms to work at. They have an inclusion and diversity officer in their HR department who happened to be a summer clerk at one stage when I happened to be working there. They are also a sponsor of Queer Screen and a number of LGBTQI organisations. But at that time, back in the early 90s, it wasn't easy, actually, being gay.

I wasn't out at Freehills. I suppose I came out at the end when I was leaving, but that was perhaps a mark of how difficult it was in a sense. I hate to say it, but in pockets here and there, there was open homophobia. There were things said around the office, probably not intended to be hurtful, but that really made it impossible to be out. Even though the firm was in so many ways very open, it wasn't that easy to be out.

[At Mallesons] the environment there was very different. For me it was a fresh start where I didn't have a history. I felt there it was kind of almost easier to be out in a sense, but it was a very small and clandestine kind of LBGT community at Mallesons. There were a few of us who would go out for lunch from time to time, but it was a firm that was very much head-down-tail-up get on with your work, which in its own way was good because there wasn't intrusion into your personal life. Unlike Freehills, which was a bit more intrusive on your personal life. And so, you either had to be out or you had to keep it to yourself depending on how you felt. Whereas at Mallesons it just didn't matter because we were just there to get on with our work and that was fine.

[At Phillips Fox] I worked for a partner who was gay and it was a warm and embracing environment as well because it was a very inclusive firm.

I had good experiences really with the firms that I worked at, albeit perhaps a shaky start at Freehills. But I can't say I ever felt, apart from the experience at Freehills, that I felt a harsh wind of discrimination at all. But I think being out and being myself was an important part of that though.

My apprehension about coming to the Bar was a fear of how stuffy and conservative and straight-male dominated that it was. For me that really was a concern. I was comfortable. I could have stayed at Phillips Fox. I could have applied for partnership. And the very heavy nagging doubt was 'how comfortable will I feel at the Bar?'

Then when I came to the Bar all of a sudden I was joining a very small floor where they'd never had a woman member let alone

Photography by: Michele Mossop

an openly gay man. Of course, things have moved on an awful lot on that floor as well. They've now got several women members and, I know, another gay member.

Things then – 1999 – were still 'stuffy' I think at the Bar. And initially I went back into my shell in a sense. The only people who knew I was gay were the clerk, well, maybe not even the clerk initially, and my tutor and maybe one other reader who was on the floor knew because we were in the Bar Course together. But otherwise, the other members of the floor were limited to middle-aged and older white, straight men. So I felt very out of sorts and I … didn't feel comfortable about being out.

SR: *How did things change?*

AP: I think Chris McEwen encouraged me [to be out] because the partners got invited to floor dinners and things and my partner, Adrian, didn't come to the first one, but he came to the next one I think and nobody batted an eyelid. And it became a very warm and embracing environment in the end.

Then it was 2003 when we set up this floor which was a planning and environment specialist floor. I came across with Chris McEwen at that time and I think even when we started here we had three gay members at the outset, so we were already more diverse to begin with, and three women. And now we've got eight women and five gay members.

At our peak we had six gay men and together we form a majority. A clear majority. I think we leave the straight men as a minority.

SR: *Have you ever encountered homophobia in the Courtroom? Richard Weinstein spoke of two occasions he was verbally abused.*

AP: No. I was trying to think of anything, but I can't think of anything as strident as that at all and not even less strident than that. No experience that you would say that that was clear and blatant homophobia. I haven't experienced that in a Courtroom environment. I don't think I've experienced that from a judge or a colleague. That doesn't mean that it's not there in whispers or in whatever form it might be.

Certainly in very recent months on this floor there has been an example of a female member of this floor experiencing outrageous misogyny audibly stated in a Courtroom by a person in the gallery. And it was very pleasing to hear the response on the record from the judge. If that can happen for women I'm sure it can happen for others. And for gay women they have the dual effect of gender and sexuality.

SR: *What do we know about the sexuality and identity of the NSW Bar?*

AP: That's another area to look at and it's to understand or to see what we can do out of the data that has been collected by the Bar Association this year for the first time in the Practising Certificate questionnaire that asked the question.

We don't know a lot and that's what we really want to come to grips with. And I'll be very interested to know what the results are. And it may be that the question has to be asked more than once because it has been the experience of law firms asking those kinds of questions that the numbers prepared to identify has increased over time. So while in one year you might get a certain result, three years' hence you might get a different result and that doesn't necessarily reflect a massive increase in the number of people at the Bar or number of people who are [gay]. It's just a number of people who are prepared to identify.

SR: *What are some of the issues that stem from that?*

AP: It's actually difficult to know what the issues are except at a much more one-to-one level. We've only just taken the first step in

asking people to identify as LGBTQI. We haven't gone any further to find out what ramifications that has for people and their careers. And I'm not sure we're going to be able to readily get an understanding of that. For the reasons that: I think LGBTQI identifying is something that people do at different levels of comfort. They may or may not be out at work and the level of comfort they feel with that can vary very much from individual to individual.

I think it's going to be much harder to understand the data than simplistic issues such as how many of us are there? And to what extent are they prepared to identify and be out?

SR: *Could you share with us some of your other work over the years advocating on LGBTQI issues?*

AP: When I was on the Equal Opportunity Committee Kathy Sant and I put a paper together of some things we should look at. And, of course, the Bar Association has moved very much along those lines. The name of the committee itself reflects that. It's now called the Diversity and Equality committee.

The diversity is the point and that's reflective of the change in approach. It had been focussed very much on issues relating to women, equitable briefing and other issues relating to the challenges for women at the Bar in juggling family commitments and all of those things.

One of the things that we found very difficult to tackle [at the time] and couldn't resolve was that barristers as self-employed people don't have ready access, unless they pay for it themselves, to income protection insurance. One of the problems with income protection insurance policies at the time, earlier this century, was that they would either refuse or they would require you to go through significant hoops if you were a gay man regardless of HIV status. And there are significant discriminatory issues in relation to insurance policies for HIV positive men and women. I was experiencing and certainly some of my other colleagues were experiencing a great deal of difficulty in obtaining a policy. They ask the question, 'Do you sleep with other men?' And the answer is 'yes' and then, well, this whole series of questions is then expected to be answered.

I've ended up not ever bothering other than the one offered by [BarCover]. But the hoops [insurers] want you to go through and the intrusiveness of the questions. Now I'm an HIV-negative man, but I just found the questionnaire offensive. I thought, 'I'm not giving you that information. You wouldn't ask for that information of anybody else.'

In terms of other issues, there was, e.g., a sexual harassment policy at the Bar, but it was clearly directed at sexual harassment from men to women. It had no element considering any other aspect of sexual harassment and in fact funnily enough back in my Phillips Fox days I experienced some sexual harassment from a male secretary. I was conscious of the fact that we had to contemplate that these policies needed to be re-thought and reconsidered in a gender-neutral context. Secondly, while there were policies relating to discrimination against women, there were no policies relating to discrimination on the basis of sexuality.

And so of course the Bar has moved an awfully long way from that perspective and the model policies that the Bar has adopted and many floors have adopted essentially reflected a lot of work by other people that perhaps started with me and Kathy back then.

SR: *Have people reached out to you so far and who would you like to hear from during your time in the role?*

AP: I would encourage people, particularly younger members of the Bar, to reach out and contact me if there are issues or indeed just to have a chat and discuss their experiences because I'd like to know what it's like for other members in other parts of the Bar. I know what it's like for me. I've got a comfortable environment where I am because we've got a diverse floor, but I'd be interested to know if other people have a different experience and what their experiences are.

It would be good to know whether things have moved on or how it is for others and I suspect that it wasn't as easy for others as it was for me.

SR: *Is it getting easier for members of the LGBTQI community to connect and enjoy success at every level at the Bar and beyond?*

AP: It's only been in the past year that we've had, informally, Gay Bar drinks. And that was something that was started by a couple of barristers in a private home, but we seized the nettle and hosted it here at Martin Place [Chambers].

We had some great luminaries [at the last one at Sixth St James Hall] like Justice Kirby and we had some members of the Bench and the Bar and so that was terrific. I think we can carry on doing that independently of the Bar Association. It's got a life of its own now which is good. It's a good networking opportunity and it's an opportunity for other members of the Bar to understand what other issues other people have. And it's a social event at which everyone can feel comfortable and they know they're among like-minded people I suppose.

Things have changed a lot in my time at the Bar to say the least. I can't think of any judge who went to the Bench before I went to the Bar who at their swearing in had been out and proud. And that's changed dramatically. Richard [Weinstein] at his swearing in and other judges in recent times have had no fear or concern about identifying and acknowledging the support of their partners. That's a noticeable change.

Diversity

The Hon. Justice Kelly Rees, Supreme Court of NSW Equity Division

Profile Interview by Kevin Tang

What does the term Diversity mean for you?

I guess I am being asked this question because I am a female but I don't think that makes me diverse, it just makes me half of the population.

To me, 'diversity' means seeing

all levels of our profession accurately reflecting Australian society in 2019 in terms of differing social and economic advantage, whether you are from Sydney or come from regional or remote NSW, Indigenous Australians, multiculturalism, gender, disability, and the list goes on.

OK, well how do you think we are doing in terms of Diversity?

Not too flash. From the bench, I see more diversity than I think I did at the bar as I am seeing a lot more solicitors. But I still think we are travelling some decades behind the population in terms of diversity in the profession.

What are some of your life experiences which have marked you as perhaps unique and different?

Mmmm. Well, I guess the thing which makes me feel different from my colleagues more than any other reason is where I came from, in terms of a rural upbringing, attending the local public school and coming from a family where tertiary education, or finishing high school, was not necessarily part of my future.

I feel good about that though. It has always given me perspective about the intense, all-consuming world of the bar and the bench. I know there are plenty of people who have never been to Sydney or dealt with a lawyer who are living perfectly rewarding and complete lives. If this law malarkey doesn't work out, I reckon I will be just fine.

You grew up on a farm. Did that make you feel different when you started your legal studies?

Well, I didn't think there was anything different about where I came from. But I vividly recall when I first became aware that it was a bit unusual. I was in, basically, the first class at UNSW law school and the lecturer got us all to put our hands in the air, and then told us, 'Take down your hand if you went to private school.' Then, 'Take down your hand if your parents are tertiary educated' and 'Take down your hand if you are from the lower north shore or the eastern suburbs of Sydney'. Within three questions, there was only me and another person with our hands still in the air.

The point was that there was a lack of diversity in law students having regard to socio-economic background and geography. And the debate which followed was: how can the legal profession serve a diverse community when we are not ourselves diverse?

I guess it must have been an adjustment coming to Sydney to study?

It was! I don't think city people appreciate how much it is. After about three days in the city, a country person really wants to get the hell out of here. But you get used to it, after a year or three.

I do, however, have a semi-funny story. In my first week on campus – I was living in a residential college – I walked up the hill to the law school and said hello to everyone I passed on the way. Most people ignored me, some people looked at me like I was mad, and a few said hello back. I thought, 'These

Sydney people are so rude!!' A few years later, I saw that Crocodile Dundee film where Paul Hogan walks down Fifth Avenue, New York and did exactly the same thing. Well, I laughed for days.

The other thing that really was a big difference was the multicultural landscape of Sydney.

My rural community was almost completely Anglo plus Indigenous Australians of the Gumbaynggirr Nation. The variety of faces, language, food and culture in Sydney was initially confronting but became just plain marvellous.

Did your background affect getting a job or coming to the bar?

It didn't matter when getting a job in a big law firm. Those jobs seemed to go on academic achievement. The big firms didn't seem to care where you came from. Suited me fine.

But when I came to the bar, which is more than 20 years ago now, the pathways and entry points to the NSW Bar were not particularly clear. I think the NSW Bar Association has done quite a bit of work to de-mystify that with the information available on its website about Coming to the Bar.

But I do think people coming to the bar who come from legal families or the same socio-economic or geographic background as a 'traditional' barrister will navigate their way more easily. And I think there is a natural tendency for barristers to select applicants for readerships who look like them or remind them of themselves when they were young.

What can barristers do about that?

I think there is a place for chambers to be ambitious and adventurous in their choice of readers, licensees and members having regard to academic qualifications and work experience but also with an eye to diversity. Give someone a go who may not otherwise have a 'rail run'. Why not?

If I can just ask you about gender, though. Do you think we are making progress in having gender diversity at the bar?

There are people much more informed to talk about this, but I reckon there are two big problems.

The biggest one, I think, is making the bar a good option for women lawyers when mapping their career path. Half of law graduates and solicitors are, unsurprisingly, women. But only 23% of the bar are women. So we're just not attracting women to choose a career at the bar in the first place and a higher proportion leave the bar than men. I could talk about that for ages, so I will spare your readers and just leave that one there.

The second problem is women getting speaking roles in cases. I know this is a challenge for the junior bar as a whole, but it does seem to impact more acutely on women

barristers. I had a good look at the statistics which the NSW Bar Association pulled together recently from a review of Austlii judgments – in fact, I got the stats from them and drilled down further into women in the Commercial List of the Supreme Court with speaking roles.

Do you know that in the last six months of the data, only three women silk appeared in the Commercial List and only 6% of appearances were by women with a speaking role. I'll repeat that figure again: 6%. Now the data may have heaps of limitations, but I think there is still a real problem here.

Well, isn't that just about getting solicitors to brief women?

Actually, I think solicitors are now pretty aware of these issues and are changing their patterns. I think the real change-makers here now are our silks. Solicitors often ask silks for recommendations as to who a silk would like to work with, and this creates a powerful opportunity for change. Rather than recommend a 'mini-me', be outrageous and support change.

How about when asked for a list of names including women that you put the woman barrister at the top of the list as they are more likely to call her first than if you tag her name on the end of the list for 'equitable briefing policy' reasons. Otherwise they probably won't call her at all as someone above her in the list will be available.

How did you manage the challenges of being a woman at the bar?

Most of the challenges of the bar are gender-neutral: getting the work, getting through the work, getting paid for the work, getting on with your chambers colleagues and so on.

Juggling the bar with children is a big one though. Men have to do that too, but I guess it does tend to impact more on women. To my observation, the bar loses a lot of women at this point in their career, 'cause it is just so hard.

What makes us good barristers, I think, is that we want to do our job really well. This is also how we want to be parents – we want to do that really well too. I would say don't whinge about it, or at least not to your colleagues, and just get on with it. In my experience, your colleagues will do everything they can to quietly support you. And be kind to yourself: you're doing the best you can, you're putting in a huge amount of effort and commitment; and it would be tough if you were just trying to be a barrister or a parent, let alone both.

Any final words

I am confident that we will get there. Despite the conservative, traditional reputation of the law as a profession, I think that it has great capacity to embrace diversity. I can't wait!

Bench & Bar

Held on 17 May 2019 at the Grand Ballroom of the Hyatt Regency Sydney with a spectacular line up of speakers, the 2019 Bench and Bar dinner promised to be an unforgettable evening and it truly was.

With the Honourable Justice Julie Ward, Chief Judge in Equity of the Supreme Court of New South Wales as the guest of honour, Ruth Higgins SC as Ms Senior and Julia Roy as Ms Junior, the audience was mesmerised by the effortless, intelligent humour of the speeches, as well as the musical genius that was Ms Junior's ukulele playing.

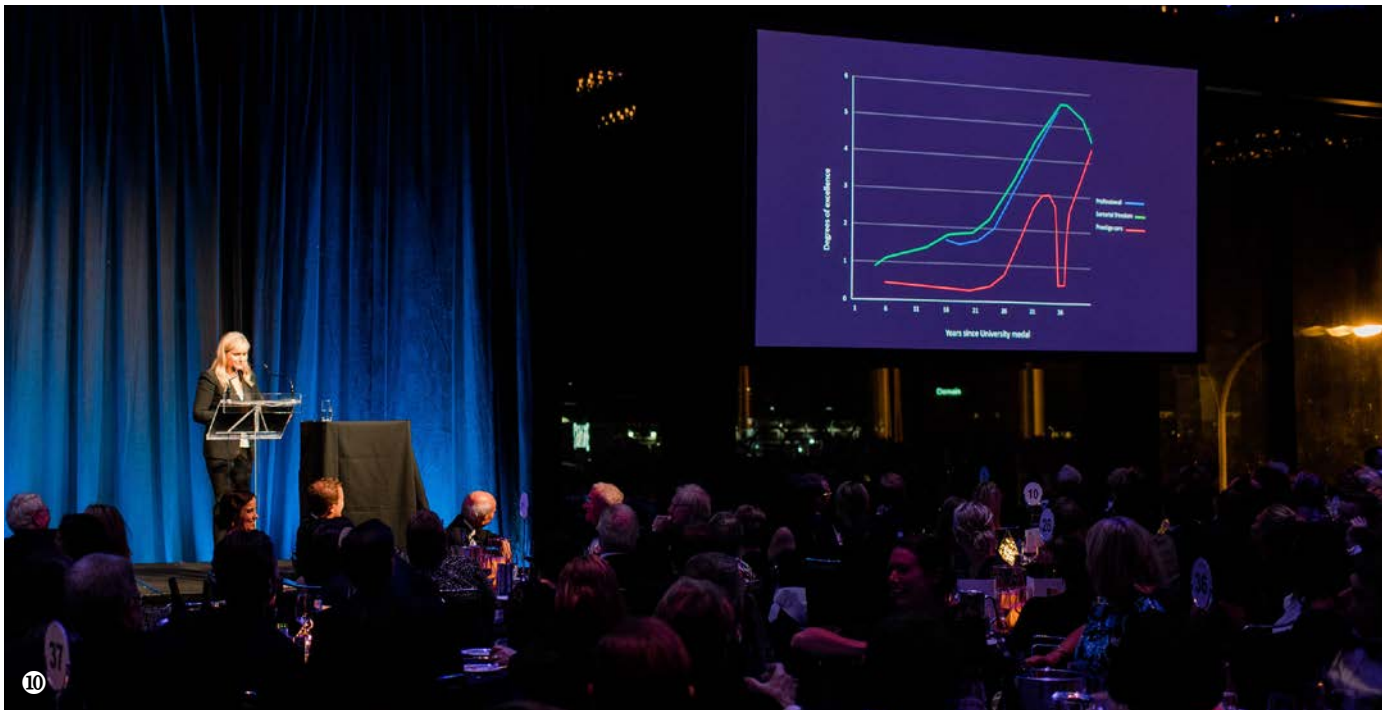
An all-woman cast of speakers made for a tremendous event.

1. The Hon Justice James Allsop AO, Chief Justice of the Federal Court, The Hon Andrew Bell, President of the Court of Appeal
2. Her Excellency The Hon Margaret Beazley AO QC, The Hon Justice Julie Ward
3. Prof Greg Tolhurst, Ruth Higgins SC, The Hon Justice Julie Ward, Julia Roy and Tim Game SC
4. The Hon Chief Justice Bathurst AC, The Hon Justice Julie Ward

5. Sophie Callan, Surya Palaniappan, Michelle Rabasch and Helen Roberts
6. Miss Junior, Julia Roy
7. Back row: Helen Roberts, Belinda Baker, Justice Natalie Adams, Jillian Caldwell

   Bottom row: Huw Baker SC, the Hon Judge Kara Sheed SC, Lloyd Babb SC, the Hon Judge Gina O'Rourke SC, Brett Hatfield.

8. President, Tim Game SC
9. Nipa Dewan, Stuart Bell, Justin Young, Christine Melis and Candice Pedersen
10. Miss Senior, Ruth Higgins SC



Alinea Chambers – a new line of thinking

Anthony McGrath SC, Her Excellency the Honourable Margaret Beazley AO QC and Melanie Cairns

The New Year brought with it a new floor just off Phillip Street when Alinea Chambers opened for business in 52 Martin Place. Led by silks Michael Henry SC and Anthony McGrath SC, Alinea has a focus on commercial law and has 15 barristers including two licensees and a reader.

Although he may be one of two silks on the floor, McGrath SC explained that the new name and new structure includes having no designated head of chambers.

'The most senior member has no more say than the most junior member and there is no head of floor,' he said.

'We have a flat management structure with all major decisions being put to the 12 members and most often those decisions are made by a simple majority.'

The name of the chambers comes from the Latin 'a linea', the mark at the end of text when a new paragraph is created. The name demonstrates the 'new line of thinking' that permeates the floor from how it operates to the type of service being provided to clients.

'We had as a central aim the desire to create diversity in all of its forms amongst our membership. Being more reflective of the wider Australian community is an aspiration we hold. In particular, during the formation of our chambers it became clear that a gender balance could be readily achieved despite the often suggested difficulty that there do not seem to be very many women barristers doing commercial work at the Bar,' McGrath SC said.

'There are many women barristers doing such work and they have been increasing in recent years. As it happens, there are seven women and five men comprising our members. We also have a woman licensee, a man licensee and a woman reader, so we were almost able to achieve the balance we were after and unexpectedly ended with a gender split that defies the traditional one in commercial and other chambers.'

They have also adopted a different approach to membership, which McGrath SC hopes will make the Bar more accessible to junior lawyers hoping to practice in the commercial sphere. It's an approach not dissimilar to Level 22 Chambers which opened in 2013 and 153 Phillip which opened in late 2017, each with a 'no key money' structure.

'It was very important to all of us that we address the significant barrier to entry for many coming into our profession, which is the eye-wateringly large amount of money that is often required to buy into chambers, particularly for those doing commercial work in the many longstanding locations,' McGrath SC continued.

'This financial hurdle is often a deterrent to those looking to come to the Bar, particularly if that timing also coincides with plans to start a family or to buy a house.'

'We have adopted a structure where a departing barrister relinquishes his or her share to the chambers company for a nominal value and is repaid any loan he or she has made to the company.'

'The establishment costs to become a member of the floor are relatively modest, comprising contribution to the lease requirements and the particular fitout of the chambers that are occupied.'

That fitout on Level 33 of 52 Martin Place includes minimal storage, no library and a strong use of technology to minimise waste.

'We hope it is [an environment] that those who brief us will find fresh, but also familiar to the ways in which they work in modern office space,' McGrath SC said.

'We were especially keen to avoid the common experience that if you create storage space you will simply fill it up and not take the hard decisions to return or dispose of materials in a timely fashion.'

'It has also driven the overwhelming use of online research tools by each of us and electronic briefs becoming the common way in which we receive materials from solicitors and clients. There is always a place for hard copy and it cannot be completely eliminated, but our desire is to make it the exception rather than the rule.'

Alinea recently held its official launch by her Excellency, the Honourable Margaret Beazley AO QC, Governor of New South Wales. Her Excellency spoke about the importance of addressing diversity in the profession and encouraged others to follow along that path.

Portrait of the late Katrina Dawson

Painted by Dr Peter Smeeth

Artist Dr Peter Smeeth

On Friday 28 June 2019, Katrina's family, friends and colleagues gathered in the Bar Common Room to witness the unveiling of the portrait of the late Katrina Dawson painted by Dr Peter Smeeth and commissioned by the Bar Association in 2018.

After welcoming attendees, President Tim Game SC spoke about the lasting impression that Katrina had left on him and all members of the New South Wales Bar in her brief but successful career. Her brother, Sandy Dawson SC, shared some of his memories of Katrina's life at the Bar – including an entertaining story about a miscommunication with a visiting overseas judge which lead to the judge donning Katrina's wig and robes for a photograph. The comments of both speakers and guests at the ceremony, stand as a testament to Katrina's truly remarkable qualities and her considerable success both at the Bar and in her many other pursuits.

The portrait depicts Katrina in her robes, without her wig. Her face is surrounded by a stunning teal colour - known by those closest to Katrina to be her favourite. Guests who knew Katrina personally commented that the portrait captures her likeness, joyous manner and spirit. The artist, Dr Peter Smeeth, shared with guests the humbling experience of painting the portrait of such an incredible woman and reminded us all that Katrina was truly exceptional.

The portrait is a special addition to the Bar Association Common Room art collection and is now on display for all to enjoy.

Sandy Dawson SC

Michelle Rabasch, Claire Palmer, Ashley Cameron, Sarah Danne

Bar FC narrowly defeats Factset FC

Bar FC narrowly defeats Factset FC In a close contest, Bar FC narrowly defeated Factset FC to take the silverware in a gripping 1-0 grand final of the Domain lunch time Soccer competition.

The first half saw the team start a little tentatively however the half time talk from Sir Alex (Stanton) seemed to work its magic. The only instruction was to do things more quickly and the goal soon followed with the ball being moved rapidly from defence to attack, with Di Michiel finishing the season with the winning goal and the Golden Boot award.

Solid performances across the pitch were the order of the day with Gaolkeeper Harris not really threatened as a result of the defensive efforts of the team.

The grand final team was as follows:

Simon Philips (C)
Shaun Mccarthy
Richard Di Michiel
Andy Munro
Jeh Coutinho
Timothy Boyle
Sebastian Hartford Davis
David Larish
Anais D'Arville
John Harris (Gk)
Stephen Dametto
Jon Tsang
Hayden Doria
Anthony Canceri

This completes the winter competition.

Sir Alex would also like to thank the eighty six members of Bar FC who have contributed throughout the year.

Bar FC now head north to meet the QLD and VIC Bars in the Tri State Championship on 20 September 2019.

Justice Angus Morkel Stewart

Ceremonial Sitting – Federal Court of Australia

Angus Morkel Stewart was appointed to the Federal Court of Australia on 25 February 2019 and a ceremonial sitting took place on 25 March 2019 in Court 1 of Level 21 in Queen's Square.

Justice Stewart practised at the Bar in Sydney from 2011 to February 2019 and was appointed Senior Counsel in 2014. His practice at the Bar included public law and private law specialising in Admiralty/shipping and international trade, commercial disputes and arbitrations. Justice Stewart was appointed a Fellow of the Chartered Institute of Arbitrators (FCIArb) in 2014.

Stewart J graduated from the University of Natal (BA LLB *cum laude*) and the University of Oxford (BCL *first class*) where he was a Rhodes Scholar (Natal 1992). From 1996 to 2010, he practised at the Bar in South Africa and was appointed Senior Counsel in 2006.

His Honour acknowledged the traditional custodians of the land on which the ceremony took place and the traditional custodians of the land on which he grew up, the San or Bushmen people who inhabited that area for tens of thousands of years before it was then settled by others.

The Judge's key theme was 'belonging'. To illustrate it he quoted the evocative lines from a South African novel:

> 'There is a lovely road that runs from Ixopo into the hills. These hills are grass-covered and rolling, and they are lovely beyond any singing of it. The road climbs seven miles into them, to Carisbrooke; and from there, if there is no mist, you look down on one of the fairest valleys of Africa. About you there is grass and bracken and you may hear the forlorn crying of the *titihoya*, one of the birds of the veld. Below you is the valley of Umzimkulu, on its journey from the Drakensberg to the sea; and beyond and behind the river, great hill after great hill; and beyond and behind them, the mountains of Ingeli and East Griqualand.' (*Cry the Beloved Country* by Alan Paton 1948.)

The quote describes the countryside near where his Honour grew up and named a river in which he most loved to kayak, and the mountain range over which he often hiked and climbed. It was, his Honour said, a profoundly beautiful place to be.

His Honour also captured another theme, 'community' and in the *isiZulu* phrase, '*umuntu ngumuntu ngabantu*' – a person is a person through other people. For the Judge it meant that we live our lives among and through other people, as others live their lives with and through us and others. The notion recognised our common humanity and the responsibility we bear to each other.

In that regard, his Honour reflected that he had been born into privilege. He was born white, male, able-bodied, cis-gendered and heterosexual, to parents who had themselves been born into similar privilege. He did not suffer the discrimination, inequality, marginalisation and disadvantage that people of colour, women, people with disabilities and LGBTQI+ people faced, and still face in this world. His Honour recognised that just as he had advantages, there were others did not have such things. That recognition informed the responsibility that he bore to others.

His Honour thanked and acknowledged his wonderful, intelligent and modern parents, Iona and Greig, from whom, he had learnt so much. He paid tribute to their industry; their demonstration by example of the act of living, that through hard work and application one can make the most of one's circumstances to literally create an interesting life. By their engagement with the world, their energy and enthusiasm, and their scientific scepticism and critical thought, they set an example of critical public service.

The Judge recalled that he enjoyed life at the Bar in Durban, where he did a wide variety of commercial, maritime, international and public interest work. Perhaps the most rewarding was the public interest work. It is very special to live and to practise law under a justiciable bill of rights; where the exercise of public power is set within universally adopted value-boundaries, including the values of equality and human dignity, and not only the executive but also the legislature has freedom only within those limits; where the tyranny of the majority is confined to history.

The Judge made reference to the circumstances of he and his family leaving South Africa and coming to Sydney with his wife Lyndsay. His Honour's first contact was with Dr Andrew Bell, now President of the Court of Appeal, whose acquaintance he had made at Oxford, and his wife, Jo Bird who had been in his BCL class. His Honour recalled that Dr Bell had thoughtfully arranged for a meeting with the Hon David Ipp, who sagely said once, describing the experience of appearing as a recent immigrant in an Australian Court as being 'like a blind man floundering around in a room full of traps'. It was also to be true for his Honour.

In one example illustrative of the array of problems and challenges which plague newcomers, his Honour recounted a story of when in Court he challenged a witness' version of a story that a particular person could not readily have been called as a witness because he was 'in Silverwater'. After first establishing that that was no more than an hour away, his Honour asked facetiously, 'so you are saying that it is not possible to travel from Silverwater?', not appreciating that the reference was to a gaol.

About ten years before his Honour and his family came to Sydney, his father's youngest brother, Robbie, and his family, made the move from Cape Town. That family has been an extraordinary support to his Honour and his family. The same is true of his cousin Jinty, and her family who relocated at the same time as his Honour. He expressed deep gratitude for their unwavering support.

His Honour noted gratitude to the members of the 12th Floor for accommodating him in the early days and assisting him.

In due course, his Honour worked with Gail Furness SC, the Senior Counsel Assisting the Child Sex Abuse Royal Commission; he paid tribute to her extraordinary work that contributed to making that Royal Commission the success it was.

His Honour subsequently moved to New Chambers where he was a founding member.

It was at that time that his Honour started to feel that he belonged in Australia. When he first arrived on these shores, he noticed the eucalyptus trees, which are a source of environmental harm in South Africa, and were eyesores. Over time, in Australia, he came to appreciate their beauty, and their majesty in the landscape. The raucous cockatoos and laughing kookaburras had been an affront at first, but he had also come to love their sounds and their musicality. This was part of his Honour's crucial sense of belonging.

His Honour paid tribute to his spouse of 30 years, the indefatigable Lyndsay Brown. He spoke of her extraordinary energy, passion, tenacity, empathy, and straight-out directness which had brought them through so much to this country.

The judge also referred to his children, twins, Stirling and Olivia, who continue to be the principal source of joy in his life. He expressed his pride in their courage, their engagement with the world, their intelligence and sense of humour.

Thus it was proven, that his Honour had lived his life among and through other people. In turn others live their lives with and through him. This is now his community. This is how his Honour came to belong here.

Kevin Tang

Recent Judicial Appointments

His Honour Judge Justin Smith SC – District Court of New South Wales

Admitted in 1992, his Honour came to the Bar in 1997, and took Silk in 2014. His Honour was then appointed to the bench of the Federal Circuit Court of Australia in 2015 at the Parramatta registry. Appointed to the District Court on 11 February 2019

His Honour Judge Ian Bourke SC – District Court of New South Wales

His Honour was a lawyer for more than three decades including seven years with the Commonwealth Director of Public Prosecutions, 22 years at the NSW Bar and four years as Senior Counsel, formerly of Frederick Jordan Chambers. Appointed to the District Court 4 February 2019

His Honour Judge Jonathan Priestley SC – District Court of New South Wales

First admitted as a lawyer in the Northern Territory, his Honour then moved to NSW where he practised as a solicitor for a time before coming to the Bar in 1995. His Honour was appointed Senior Counsel in 2014, formerly of 9 Wentworth Chambers. Appointed to the District Court on 4 February 2019

His Honour Judge Robert Webber SC – District Court of New South Wales

Admitted as a solicitor in 1982, his Honour was admitted to the Bar in 1987 where he practised for 14 years before taking Silk in 2001, formerly of 11 Wentworth Chambers. Appointed to the District Court on 7 February 2019

Her Honour Judge Kara Shead SC – District Court of New South Wales

Formerly of the Office of the Director of Public Prosecutions for some 20 years, her Honour then spent 18 months as Deputy Senior Public Defender, she then returned to the role as Deputy DPP. Her Honour was admitted in 1996 and came to the Bar in 2005 before taking silk in 2016. Appointed to the District Court on 7 February 2019

His Honour Judge Walter Graham Turnbull SC – District Court of New South Wales

Admitted to practice in 1984, his Honour came to the Bar in 1994 and was admitted as a Silk in 2007. Formerly of Forbes Chambers, his Honour has been appointed to sit as a full-time judge of the District Court at Orange, Bathurst and Parkes. Appointed to the District Court on 11 February 2019

His Honour Judge Richard Weinstein SC – District Court of New South Wales

Having been raised in Canada and having completed a Bachelor of Arts and a Masters of Arts, his Honour also holds a Diploma in Acting. He pursued an acting career for a time, which brought him to Australia. He honoured a promise to his mother that, if he had not made a success of acting by age 30, he would return to university to study law. His Honour was admitted to practice in 1992 and was called to the Bar in 1993. He took Silk in 2011 and was a member of 8th Floor Selborne Chambers. Appointed to the District Court on 11 February 2019

His Honour Judge Sean Grant – District Court of New South Wales

Admitted in 1985, his Honour came to the Bar in 2011. His Honour's practice spanned a number of states including Victoria. Formerly of Henry Parkes Chambers, he will return to his hometown in 2020 as he has been appointed as the first permanent Judge to sit at Albury and Griffith. Appointed to the District Court on 14 February 2019

Her Honour Judge Nanette Williams – District Court of New South Wales

Admitted in 1981, her Honour commenced with the Department of Public Prosecutors where she spent over 30 years. She rose to the position of Deputy Senior Crown Prosecutor. Her Honour came to the Bar in 1999. Her Honour also holds the rank of Commander in the Royal Australian Navy Reserves Appointed to the District Court on 14 February

Her Honour Judge Sharon Harris – District Court of New South Wales

Admitted as a solicitor in 1993, her Honour joined the Office of the Director of Public Prosecutions (NSW) in 1996. She was then called to the Bar in 2014, and was appointed a Crown Prosecutor that year. Appointed to the District Court on 18 February 2019

His Honour Judge Alister Abadee – District Court of New South Wales

Admitted in 1995, his Honour came to the Bar in the year 2000. His Honour has also served as a Navy Reservist and was formerly a member of 7 Wentworth/Selborne Chambers. Appointed to the District Court on 21 February 2019

Her Honour Judge Susan Cole – Deputy President of NCAT

Admitted in South Australia, her Honour worked in the Crown Solicitor's Office for some time. She was appointed to the bench of the District Court South Australia and the Environment Resources and Development (ERD) Court in 2002. Appointed to NCAT on 27 February 2019

Photography: Michele Mossop

'Mullenjaiwakka' Lloyd Clive McDermott (1939–2019)

Mullenjaiwakka, the first Aboriginal man to be admitted and to practise at the New South Wales Bar and to represent Australia in test rugby, has died. He was a proud Mununjali and Waka Waka man, universally respected and whose passions in life were: family, sport and the law.

Lloyd Clive McDermott was born in November 1939 in Eidevold, Queensland. He was educated at Brisbane's Church of England Grammar School, known as 'Churchie'. He gained admission to study law at the University of Queensland. His exceptional prowess on the rugby field won him great respect and he debuted for the Wallabies against the All Blacks in May of 1962. Mullenjaiwakka played only one more test for Australia before he famously refused to join the 1963 tour of South Africa as a 'token white'. The incident became infamous internationally and this principled stance against apartheid influenced several of his white team mates in the years to come. They refused to play against the Springboks during their subsequent tour of Australia. It was a significant step taken by an Australian sportsman.

Mullenjaiwakka had a lifelong passion for rugby and was never far

from it. He was patron of the Lloyd McDermott Rugby Development Team Inc. (later known as the Lloyd McDermott Foundation), which sought to give Aboriginal people a sense of belonging and identity through sporting achievements. The foundation enjoyed considerable support from the legal profession and success on the field. In 2001 it supported the first all-Aboriginal rugby union team to tour the new South Africa.

Mullenjaiwakka was called to the New South Wales Bar in June 1972. He appeared in a number of cases that were dear to his heart. In one notable case he was junior counsel to Jeff Shaw QC (later a Supreme Court judge), then the attorney general of NSW, in the first determination of native title in NSW (*Buck v State of New South Wales* (FCA per Lockhart J, 7 April 1997, unreported)).

He was, for many years, a trustee of the Bar Association's Indigenous Barristers Trust – The Mum Shirl Fund. This gave him a particular sense of fulfilment because he knew Mum Shirl and her welfare work in and around inner Sydney for Indigenous and Aboriginal youth.

Tony McAvoy SC remembers the first time that he met Mullenjaiwakka's mother Aunty Vi in the 1980s. She came to the law firm where he was working in Brisbane. He was a young solicitor at the time. Aunty Vi had come to support her cousin who had a legal issue. Before they got down to business she said to Tony 'Now, do you know my son? He is a top barrister in Sydney, his name is Lloyd McDermott.' He remembers saying 'No Mrs McDermott, I don't think I do.' 'Well, you should have heard of him' went on Aunty Vi 'he is very famous you know.' 'Yes, Mrs McDermott, I'll have to find out about him.' Then she added 'and he played rugby for Australia too, you know.' Later Tony McAvoy made Mullenjaiwakka's acquaintance in Sydney.

In 2000 Chris Ronalds (now of Senior Counsel) and Michael Slattery QC (now a judge of the Supreme Court) recognised that it was a disgrace on so many levels that Mullenjaiwakka and Tony McAvoy were the only practising Indigenous barristers at the NSW Bar and something had to be done. The statistics for Aboriginal and Indigenous participation in the legal profession were scandalously low. The first initiative developed was an Indigenous Barristers Strategy which was given strong support by the President of the NSW Bar Association Ruth McColl SC (later a judge of the NSW Court of Appeal) and was adopted by the Bar Council. Second, an Indigenous Barristers Trust was established to support law students and lawyers to make their way to and then survive at the Bar. Mullenjaiwakka was an inaugural trustee of the Indigenous Barristers Trust.

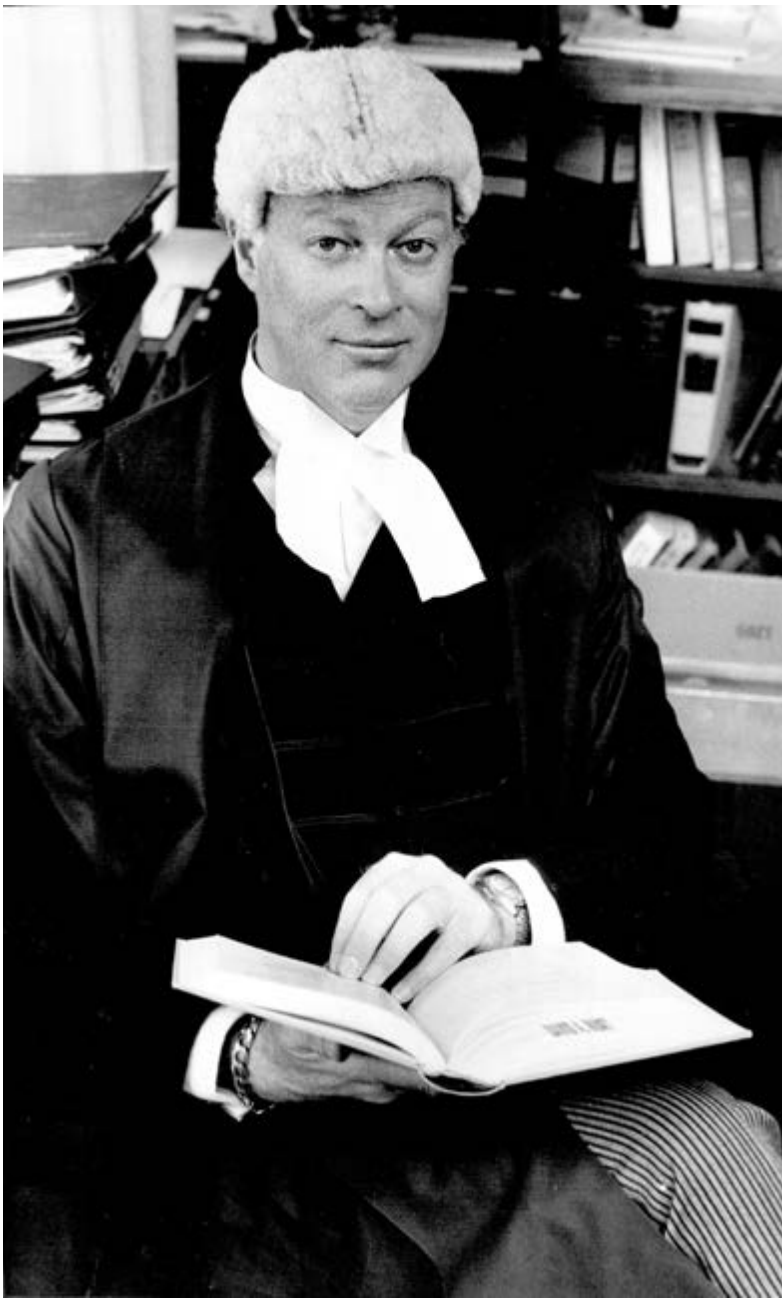
In 2006 Mullenjaiwakka was given the honour of opening the first National Indigenous Legal Conference, at which time he remarked on the contrast of being the only Aboriginal student at law school. Mullenjaiwakka served as the chairperson of the NSW Aboriginal Justice Advisory Committee.

In 2016 Mullenjaiwakka was appointed to the Mental Health Review Tribunal having also served as an acting District Court judge and a part-time commissioner of the Land and Environment Court of NSW.

Mullenjaiwakka was considered an activist, a champion of Indigenous rights and identity. The struggles of his era coincided with many international changes of thought regarding First Nations People. His work has positively influenced thousands of young Indigenous Australians. Mullenjaiwakka was known as a proud, but humble man who refused to accept Australia Day honours on several occasions until the rights of his people were recognised.

The struggle for recognition and acknowledgement of Aboriginal people defined Mullenjaiwakka's life and he has been a pivotal figure in the move towards social awareness of the Indigenous situation throughout Australia. Mullenjaiwakka will be greatly missed by the Australian Indigenous community and sportsmen. Many Indigenous lives breathed easier because Mullenjaiwakka lived.

Kevin Tang



Photograph: Fairfax Media

The Honourable David Anthony Hunt AO QC

(1935–2019)

Barrister, Queen's Counsel, Supreme Court Judge

Judge of the United Nations International Criminal Tribunal

David Hunt was a celebrated QC, widely regarded as one of the brightest of his generation to come to the Bar. His practice featured defamation law and it is said his knowledge of that area of law even as a junior barrister surpassed that of the judges. Hunt is fondly remembered for his inimitable style as an advocate and as a Supreme Court judge.

David Anthony Hunt was born in Sydney to Noel and Brenda. His father died while he was a child. Life was unsettled for some

time. He spent most of his childhood at boarding school where he experienced a piercing loneliness. He grew up in wartime and during his early adolescent years the haunting hum of war planes over Sydney disturbed his sleep.

His mother remarried in the early 1950s. David moved to be with her and his stepfather in Brisbane Queensland. This was the beginning of a golden era. He gained admission to study for a combined Arts and Law degree at the University of Queensland. He would enjoy the beach on the Gold Coast, which was where he met his wife Margaret during those years. Margaret was an elegant and poised woman who often wore her hair in a beehive. She had a joyful and bright disposition and was the perfect complement to David's seriousness. She was an air hostess on Qantas international routes. She had a wonderful life flying to Europe and exotic locations in Asia, until they married in 1959 and they promptly returned to live in Sydney. Their sons Fraser, Simon and Adam were born in the early 1960s.

That year David was called to the Bar in Sydney. He took chambers on the Seventh Floor of Wentworth Chambers. He fraternised with the great barristers of the day. From the earliest time his specialty was defamation. His other area of particular expertise was criminal law and procedure. After some years of practice, he took a retainer from Sir Frank Packer at Australian Consolidated Press and *The Sydney Morning Herald*, which had been previously held by Anthony Larkins QC who had taken an appointment to the Supreme Court.

Hunt took silk and became one of Her Majesty's counsel in 1975. He was appointed counsel assisting Mr Justice Nagle in the Royal Commission into NSW prisons. The violent world of prison inmates was laid bare to the public at the time. This was a pivotal Inquiry and required visits and views of all NSW Prisons. The Report changed the culture of incarceration and clarified the true purpose of the prison system. Sentencing and punishment had not been scrutinised much until then. The key principles and findings of that Royal Commission helped develop this rather antiquated area into the more enlightened era which followed. The Inquiry was a line in the sand and was of utmost importance for the changes which would take up to 25 years to find full expression and to be implemented.

In 1979 Hunt QC took a judicial appointment as a Judge of the Common Law division of the Supreme Court of NSW. He would become the Defamation Judge, and he was also given to criminal law. His lucid judgments have stood the test of time and matters of defamation were revivified through his judgments. He was relatively young to be appointed to the Court and became a shining light. Hunt QC was always acutely aware of exercising judicial power – he was born for the role. He never lost sight of the significance of the judicial burden and the fact that a judge's power could not be taken lightly.

Hunt J would sit for some 20 years as a Supreme Court judge, for seven of those years he was the Chief Judge at Common Law. During his time on the bench he heard many high-profile cases including that of High Court Judge Justice Lionel Murphy's case for attempting to pervert the Court of justice. As the head of the Common Law Division, he sat almost permanently on the Court of Criminal Appeal. Hunt J was an industrious judge and this was a time when the policy and practice of the Court was evolving. Hunt J revolutionised case management between 1979 and 1991 and the fabled delays from another time ceased.

The most difficult case which Hunt J heard was a criminal case, that of the serial killer Ivan Milat. The trial ran over five months. It was traumatic for most involved including the Judge and the emotional toll was significant as he presided over the trial in the presence of some seven grieving families and surviving relatives.

Hunt J had inexhaustible reserves of stamina, joviality and good humour. He was much loved by the profession and by his fellow judicial colleagues. The responsibility was heavy but he was always pleasant. He was always erudite and he had a sparkling intelligence and knowledge about many things. He was widely read and beautifully spoken. His conversation was fascinating.

By early 1998 future adventures were awaiting. He retired from the Court.

For a short time, Hunt QC was retained by the Judicial Commission of NSW on a project concerning directions made to juries in criminal trials. However, by October of 1998 Hunt QC had accepted a nomination to become Judge of the United Nations International Criminal Tribunal for the Former Yugoslavia. This was a United Nations initiative in the years after the Bosnian War. The Hunts moved from Sydney to The Hague where they lived for five years. Life was delightful.

Hunt QC was a most eminently qualified individual to sit on that Court and he brought with him the rigour of the common law jurisdiction that he had administered in NSW and its time honoured procedure. Hunt QC was magisterial in that atmosphere and his presence there recalled that of Sir Hartley Shawcross GBE PC QC, Britain's authoritative prosecutor at The Nuremburg Trials after WWII. The focus was the rule of Law and not victor's justice. Mostly his fellow appointees were academics in different legal traditions and often were political appointees. They had never run criminal trials. The Court adopted criminal trial rules that were an amalgamation of the procedures followed at The Nuremburg Trials and the NSW Supreme Court Criminal Trial Procedures. The rules are still in use in the International Criminal Court. This was an extraordinary chapter of his life. He indicted Serbian leader Slobodan Milosevic as a war criminal and signed his arrest warrant. He bore witness to the opening of the mass graves in Srebrenica in fields of prairie grasses and flowers. Hunt QC was a witness of our times.

Hunt QC also sat as a judge in the Appeals Chamber of the International Criminal Tribunal for Rwanda. This tribunal was created in the aftermath of the genocide in 1994.

In 2000, Hunt QC was made an Officer of the Order of Australia for his services to the Judiciary to the Law and to the Community particularly in the areas of criminal law, defamation and international law in defence of human rights.

The Hunts returned to Sydney and resumed living in the Eastern suburbs. They had a happy and quiet life of family and social functions. He resumed his position as a part-time commissioner of the Law Reform Commission for a time. For some years, he travelled with Margaret to exotic locales and experienced a wonderful time in retirement. One Supreme Court judge recalls having breakfast regularly in London with Hunt QC and Margaret at their club. They had a full social life in the weeks and months they spent there annually.

In 2013, the Hunts experienced ill health. Margaret suffered a stroke in 2013. Life for her never regained its full momentum from that time. She died in 2017. Hunt QC was devastated by Margaret's demise. For years Hunt QC then fought a courageous battle against Alzheimer's disease which ruthlessly set in on him. Three sons survive them.

David Hunt QC has left a formidable mark and an indelible legacy in the Law, his contribution to international criminal law jurisprudence will be felt for years to come. He was magnificent and a sheer delight to know. The Bar has lost one of its all-time giants.

Kevin Tang

Ross Tyndall McKeand SC

Soldier, Solicitor, Barrister and Silk (1945–2019)

Ross Tyndall McKeand SC was a soldier, solicitor, barrister and senior counsel. Ross was born in Sydney on 25th June 1945 to Constance and Ernest. His older brother David was born on 16 July 1940. He grew up in the Ramsgate and Sans Souci area in southern Sydney. He later attended Sydney Technical High School where he took the leaving certificate.

Ross deferred his national service in the heady 1960s and opted to attend the University of Sydney graduating with a Bachelor of Laws in 1968. He was admitted as a solicitor in November 1968. Ross was employed as a solicitor with RJ Pettiford Solicitors prior to entering the Army with the first intake of 1969. Ross was allocated to the Australian Army Legal Corps and posted as a legal officer to Directorate of Legal Services, Army Headquarters as a temporary captain. This was followed by a short time at Headquarters Eastern Common when he was posted to the number 6 Task Force in HQ Southern Qld as a legal officer.

On 13 May 1970, Ross was posted to HQ Australian Forces Vietnam as a legal officer before being posted to HQ 1 ALSG at Vung Tau. Ross appeared in many Court martials including an appearance as assistant prosecutor in a double murder trial. Having extended his national service by a few months, Ross returned to Australia on 12 May 1971 and shortly after was discharged. One great story he shared with some over the years was about his R&R in Vietnam. He went to the Hotel Metropole in Hanoi – one of those legendary and grand hotels east of the Suez. Ross went to the hotel deliberately to see the grand reception room where Colonel Christian de Castries (Head of French Armed Forces in Vietnam) telephoned the French President Rene Coty to notify him of the defeat of France at Dien Bien Phu on 7 May 1954, within hours of it occurring. It was a line in the sand for France in the Far East. Colonel de Castries had booked a scratchy old trunk call from the sumptuous ballroom to announce the defeat, 'Nous avons perdu les deux […] la guerre et l'Indochine […]'. The President was speechless. The line dropped out. It was a sombre moment in French modern history. The French presence in Indochina for over a century ceased abruptly with those words. Ross was an enthusiast of all military and general history with a great recall of the events which marked his times. One might even have thought that Ross fought at Dien Bien Phu.

After his national service, life back in Sydney resumed comparatively normally. Ross continued as a solicitor and married Suzanne Roslyn Dickson in April 1972 with whom he had two daughters. He moved to London briefly and after four years working in a law firm he returned to Sydney. He was an employed solicitor with Messrs Stephen Jaques & Stephens.

Ross was admitted to the Bar in 1979. It was a glorious time to be at the Bar. His experience was marked by the commercial fortunes of his clients throughout the 1980s and 1990s. He took Silk in 2003 with Scot Wheelhouse SC, Harry Shore SC and Mark Marion SC among others in the list. His principal areas of practice were building and construction, commercial, equity and related aspects in trade practices, corporations law, professional negligence (other than medical) and in later years he delved into some criminal law.

A little-known detail about Ross was his predilection for English Georgian furniture of the finest quality of the 18th century. He had an eye for such art and furniture of the great makers. In St James's Hall, he kept sparse chambers except for an important secretaire bookcase of the finest quality and of the period (1st lustrum 19th century). His friend the late Martyn Cook, the iconic Sydney antique dealer noted its provenance and coveted it.

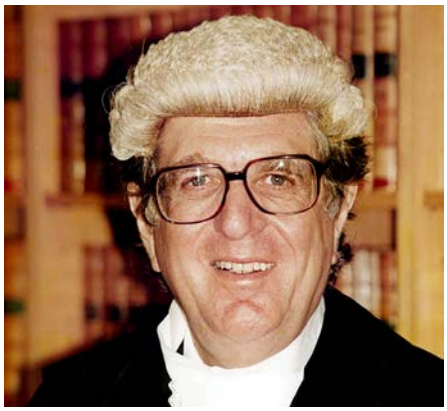
Ross joined the Army Reserve in September 1977 and served as a legal officer at Headquarters 2nd Military District, Headquarters Field Force Command and Director of Army Legal Services. He was appointed a Judge Advocate and a Defence Force Magistrate in 1988. He retired on 1 March 1990 with the rank of Lieutenant Colonel.

Ross married Diane Maxwell in 1996 and continued in practice until 2017 when he retired to Avoca Beach, far from the pressures of Queen's Square. Ross continued to indulge his abiding interest in motorcycles. It was the wind, the speed and the freedom which those machines represented that appealed to him.

Ross' sudden and unexpected demise was reported in circulars to the Bar. He was tragically killed on 26 March 2019 in a motorcycle accident near Forster on the NSW North Coast. Apart from a replacement pacemaker, installed but a few days prior, Ross was in excellent health. It was a great shock to all those who knew him during his distinguished years as a soldier and a barrister. Ross made a strong mark on the law and loved case strategy and the intellectual side of the law. Many barristers would remember him as a polite and most Courteous opponent to have encountered. He carried himself in a most dignified way. Those who knew him will remember his charm, Courtesy and delightful sense of humour as a friend and colleague. Ross was always informative, entertaining and knowledgeable.

His loving wife Diane, three stepchildren Chloe, Brodie and Camilla Maxwell and his two daughters Elissa and Chloe McKeand, all survive him. He was privately cremated on 2 April 2019.

Kevin Tang



Linton Mearns Morris QC

(1935–2019)

For more than 50 years Linton Morris QC was one of the legendary and most distinguished barristers of the Sydney Bar – he was a custodian of the traditions of the Bar and a giant in the art of advocacy.

Linton Mearns Morris QC was born to Paul and Violet Morris on 20 January 1935. Alwyn and Ailsa were his siblings. He lived with his family at Roseville and then Killara on the North Shore. His father was a businessman and there was no family connection to the law. His father died when he was young and he and his mother moved to a modest timber cottage in what was then a semi-rural area in St Ives.

Morris QC attended Knox Grammar School at Wahroonga where he became a champion debater. He came to the attention of Jack Shand QC during a national debating competition and the connection endured until life at the Bar began.

Morris QC attended the University of Sydney and took articles of clerkship at Cutler Hughes Harris and Garvan. He graduated with an LLB on 5 May 1960.

He was then Associate to Mr Justice Ferguson.

Morris QC read with Harold Glass (as his Honour then was) another master of the common law trial. He would go to Glass's large room on 8 Selborne where he had a burgeoning practice to take instruction and learn from his pupil Master. The senior bar in Phillip Street comprised the greats who inspired Morris QC including: Jack Shand QC, Jack Smythe QC, Sir Garfield Barwick, Michael Helsham QC, Sir Jack Cassidy, Sir Cyril Walsh, Sir Victor Windeyer and Anthony Larkins QC – the luminaries of the day. Many members of the Bar were retired servicemen who fought hard and played hard.

Morris QC commenced in practice on 2 February 1961. He would never leave the Bar.

Morris QC was from another time. Phillip Street was then a string of charming ramshackle Victorian terraces and where Selborne Chambers now stands was a war-time brothel. His first home was the old Denman chambers which had its staircase propped up with an old telephone pole.

Slowly but surely his star rose. He watched with horror at the changing face of Phillip Street as its Victorian terraces were demolished. He saw Wentworth and Selborne Chambers take shape.

Morris QC quickly established himself as a hard worker and a competent junior. It was the age when the common law bar comprised both criminal and personal injury and workers' compensation cases and he was frequently briefed to address juries and would also appear in catastrophic injury cases. He also acted in defamation, commercial and the odd equity case, and acted in numerous Royal Commissions and Inquiries. He demonstrated a strong appreciation for the forensic skill required in Court and had that unmistakable quality of turning his hand to any case, whatever the subject matter. Versatility became him. He had a way of persuading a judge or jury that his view was the only reasonable view. Morris QC's expertise as a jury advocate was second to none – he knew how to capture the attention of a jury and to speak to and mesmerise them. He sought to beguile and persuade rather than lecture. In judge alone trials it was often said Morris QC would have the judge eating out of his hand in the opening. He became a master of the common law trial.

He practised from 7 Selborne from 1974 for some 25 years where his clerk was Brian Bannon. Those were his busiest years and indeed his most famous during which he developed a fine reputation as a preeminent advocate. He then moved in the late 1980s to Blackstone Chambers. His fellow chamber denizens over the years were Don Grieve QC, the Honourable TEF Hughes AO QC, David Yates SC (later a Federal Court judge), Kieran Smark SC and JJ Garnsey QC.

Morris QC was one of the famous few who attended the Broken Hill assizes, the circuit Court to which he was drawn annually. For years, he would travel to Broken Hill for a month or so prior to the sittings to confer with every plaintiff, every witness and every expert and prepare every proof of evidence and chronology prior to trial. As a result, he could control which cases to settle and which to run in the month-long rolling list. In one sitting, he reputedly opened and settled five cases before morning tea. During those circuit weeks, Morris QC would stay for two to three weeks with his great friends and opponents which included Dusty Ireland (later a Supreme Court judge) and many others. He also went to Griffith, Canberra and around the State.

There was no secret to his success. Morris QC was meticulously prepared for a case and for example how he gained a reputation as 'the Silver Bullet' and a most capable counsel whose instinct and foresight was uncanny. He would analyse the case on the papers he had and prepared them with a focus on what the final submission would be at the conclusion of the trial. What he predicted and planned for usually unfolded. He always presented as a sober-minded straight talker in Court. If he failed to beguile a witness with simplicity and logic, he had an ineffable stare that could shake them.

Garling J remembers appearing with Linton Morris QC in many criminal and civil trials. He described him as the finest role model. Garling J observed how Morris QC considered the why of a case as well as the how of a case. Morris QC was scrupulously concerned to uphold the administration of justice and the independence of the Bar.

A newly minted Silk in November 1979, Morris QC was offered judicial appointment by Sir Nigel Bowen who was then Chief Justice of the Federal Court of Australia. It would have been a fundamental change in all that Morris QC had known – he was the classic trial advocate. He took a night to consider it. Morris QC resolved the next morning that he would never leave the Bar.

One former Supreme Court judge remembers fondly being led as a junior by Morris QC in a long case in the Supreme Court of the ACT. He recalled Morris QC's generosity in words and actions

and his tendency to never speak down to a junior. Many junior barristers sought out Morris QC's assistance and as ever, Morris QC was happy to give it. His door in chambers or at home was always open to senior and the most junior members of the Bar.

He was imbued with the solemn responsibility which came with being one of her Majesty's counsel to attend to the training of the junior ranks. We are poorer now for the loss of his watchful eye.

In 2010, the President of the Bar, TF Bathurst QC (as his honour the Chief Justice then was) commemorated Morris QC's 50 unstinting years at the Bar. Morris QC was steeped in the traditions of the Bar and was eager for his notion of the independent Bar to live on. He weathered the commercial times with his clients, the changes in Court practice and procedure and the legislative changes over five decades. He practised at the Bar until age 75 with what seemed an inexhaustible reserve of energy and enthusiasm, after which time he practised as a mediator and spent many happy years at Jack Shand Chambers. He was always learned and unfailingly polite. Morris QC was one of the last bastions of the old Bar and every good tradition it stood for in society.

A place where Morris QC recovered from the enormous pressures of Queen's Square was at his rural property at Isabella. There was no landline phone or electricity for years. It was a true place of isolation and some years before the small country shack evolved into an eclectic country retreat. On one occasion a message regarding the Murphy trial was delivered from the local telephone exchange on horseback.

During the 1980s and 1990s, Morris QC travelled Australia and the world in pursuit of his many interests. Skiing in Europe or America, fly-fishing in New Zealand, Ireland, Scotland and England, driving his 1928 vintage Lancia car in a 1,000-mile rally around Italy, or from England to Italy and back and thundering along dusty rural roads in Australia in a vintage car, usually with his fly-fishing rod in the back. He loved reading and art. He did not think much of golf. It was an extraordinary life.

Morris QC had several close shaves with death. He survived each one. He came back stronger each time. But this time, he relented.

Morris QC is survived by his loving wife of 56 years Joanne, his children Christopher, Jeremy (a Silk), Fiona, his extended family and his grandchildren.

On 21 June 2019, his obsequies took place. The Bar's loss individually and collectively is deep. The pews in St James's King Street were lined with High Court, Supreme Court, Federal Court and District Court judges (both sitting and retired), counsel, solicitors, businessmen, doctors, engineers, farmers, friends and family came to pay final respects to a great barrister. Among the mourners were: the Hon Cal Callaway QC, Justice Andrew Bell, the Hon Michael Kirby AC, the Hon David Kirby, the Hon WV Windeyer, the Hon JP Bryson QC, The Hon TRH Cole AO QC, Lionel Robberds QC, RR Stitt QC, Burleigh J, Katzmann J, GW McGrath SC, Justice Peter Garling, the Hon John Dunford QC, the Hon Dennis Cowdroy QC, the Hon Michael McHugh QC, the Hon Trevor Morling QC among many, many others. Many more sent their apologies for which the family is extremely grateful. Each one had memories of Morris QC and of other times. It was a superb memorial to a great barrister whose vigour for the law and devotion to the Bar were undiminished to the last. It was a privilege to have met him.

As the Bard said:

He was a man, take him for all in all.
[We] shall not look upon his like again.

Hamlet Act 1 Scene 2

Kevin Tang

IN MEMORIUM

The Honourable Joseph Xavier Gibson QC

(26 October 1931–2 June 2019)

Admitted to the Bar on 14 March 1958, his Honour was appointed a Crown Prosecutor in 1971 and appointed one of her Majesty's Counsel on 23 November 1979.

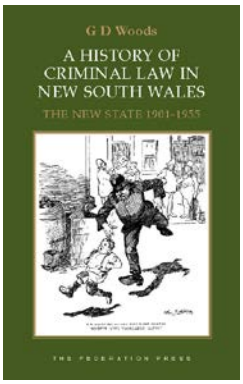
Gibson QC served with distinction on the District Court of NSW, having been sworn in on 3 February 1987. And His Honour retired 18 July 1987 after spending some 16 years on the District Court Bench. The Judge was very well known in Criminal Law circles and that was his preferred area of expertise at the Bar and later on the bench of the District Court.

His Honour's funeral took place at the Sacred Heart Church at Mosman on 12 June 2019.

His Honour is fondly remembered by his fellow judicial colleagues of the District Court and the Prosecutors of that time.

Sketch by Levy DCJ – Courtesy of Len Attard, Crown Prosecutor.

BOOK



A History of Criminal Law in New South Wales – Volume 2: The New State, 1901–1955

by G D Woods QC

This book is the second volume of Dr Woods' work in writing about the history of criminal law in NSW. The first volume dealt with the period 1788–1900, i.e. the start of the colony and all of the convict inspired criminal laws and punishment that we are all too familiar with. Volume Two deals with life after 1900, i.e. the start of a new century and the start of Federation, and finishes at 1955, which was a significant year as it was the year that the death penalty was effectively abolished in NSW for all offences (notable exceptions were treason and piracy).

What we have in this book is a wonderfully detailed summary of what seems like the most famous/infamous/important criminal law cases and legislation (both substantial laws and procedural laws) that were dealt with by the Courts in NSW during this period, and it is through these cases and laws that we learn about the life and times of the day, the feelings and prejudices of the times and the political issues that were grappled with. The research is from standard sources of the law, and also from the major city and regional newspapers which apparently reported parliamentary proceedings very fully, at least between 1901 to about 1945.

The book also shows us how the social, cultural and political issues of the day shaped the decisions of the Courts and the introduction of particular pieces of legislation, and it is this understanding that makes a history of criminal laws so important and fascinating because its history is, indeed, history itself.

The author notes in the Preface that

> *In this half century, life and the law were disrupted by the two great international wars of 1914-1918 and 1939-1945, by the Great Depression, and by major demographic, social, technological and economic changes. 'Crimes' are not decreed to be so by heavenly fiat, but through political decisions. Over the decades studied, the question of what conduct should be regarded as criminal was the subject of intense controversy, particularly in the field of industrial relations and in the policing of so called 'victimless crimes.'*

He also notes –

> *I remain influenced by the jurisprudence of American legal realism, the thrust of which is that criminal law is better understood as what police and Courts actually do, rather than from its exposition in textbooks; and by the central message of Julius Stone's The Providence and Function of Law that senior Courts do sometimes make policy decisions, and thus create the law, rather than merely apply it in accordance with logical syllogisms. Realpolitik dictates, of course, that judges cannot always frankly expound this latter truth, at least while they are on the bench, but what I call the Stone High Court – otherwise the High Court under Sir Anthony Mason and under Sir Gerard Brennan – has shown it to be so. However it is important not to be distracted by arguments about so called 'judicial activism'. Parliaments make vastly more laws than judges do, which is why in this study… I have focussed on the central work of the parliaments in changing the criminal law.'*

There are 38 chapters and in each chapter the author gives us a summary of what legislation was introduced, what government was in power and who were the main politicians involved, what cases were decided, the facts of those cases, who were the lawyers involved in the cases and some of the history of the day, either State, Federal or in the world. Some of my favourites are as follows:

In chapter 1 we start with 1901 and the author summarises our 'Legal inheritance' although there was of course the *Crimes Act 1900*, English judge-made law dealing with the standard of proof, criminal procedure, criminal defences and right to trial by jury (12 men) continued to apply. The author summarises the Courts that existed in NSW and it is quaint to note that one of these Courts was the beautiful sandstone Water Police Court at Circular Quay, now a fabulous museum I love to visit (as it has very good historical exhibitions about criminal law in NSW). The other Courts were the Central Court of Petty Sessions in Liverpool St and of course the Central Criminal Court at Taylor Square in Darlinghurst. We are told of the emergence of Commonwealth Criminal Laws and a new High Court and the 'Breelong Blacks' murder cases which resulted in the first executions for the new State (Aboriginal accused, extreme racism, brutal murders and one of the accused saying 'Will I be in heaven by dinner time?')

In chapter 2 we learn of how the vice regal prerogative of mercy was used in the 'Friedman affair' (a case of receiving stolen goods) and how Banjo Patterson, who was the editor of the *Evening News* at the time wrote a verse about the case, mocking the procedure. We learn of the efforts towards a Criminal Code and the influences of Jeremy Bentham and Sir Harry Gibbs as well as the realization for the need of a Children's Court to deal with children who commit crimes. There is of course a chapter on two ex ministers of the NSW government who, in the years shortly after Federation, were prosecuted for fraud or corruption. Chapter 7 deals with the beginnings of Legal Aid and public defenders.

The author notes that at Federation in 1901 there were hardly any motor cars in NSW but by 1910 there were many and this led to the *Motor Traffic Act 1909*. Regular strikes started to occur and the Premier of the day (CG Wade) embarked on major amendments to the industrial arbitration law. This led to many protests and the inevitable criminal charges including a charge of riotous behaviour against the socialist orator and organiser, Tom Mann and then charges against the Newcastle Union leader Peter Bowling and others of conspiring to instigate certain persons to do an act 'in the nature of a strike'.

Chapter 12 deals with the *Girls' Protection Act 1910* and the hard-fought battle to raise the age of consent. The common law age of consent was 12 years and only went up to 14 years as late as 1883. The Act ended up identifying the principles which governed consenting sexual relations between men and young women in NSW for most of the 20th century, particularly the general age of consent of 16 years. Chapter 13 deals with the introduction of the *Criminal Appeal Act 1912*, as parliament acknowledged the possibility of wrongful convictions. Importantly, it allowed an appeal against jury error on the facts adverse to an accused: 'The Court… shall allow the appeal if it is of the opinion that the verdict of the jury cannot be supported, having regard to the evidence…' This was qualified by the proviso that an appeal would be rejected if the appellant could show only a minor error not amounting to a substantial miscarriage of justice. There was also the issue as to who should sit on this Court and what appeal then should be permitted to the High Court. There was also provision for an appeal against sentence, as there had been numerous complaints about inconsistency in sentencing in NSW Courts.

On 4 August 1914, Britain declared war

on Germany, and Australia also was at war. The most important effect upon the criminal law of NSW and Australia was the creation of many new laws and regulations. Up until this time, most of the criminal law was State based, but after 4 August 1914, the Commonwealth defence power-section 51(vi)-assumed overriding legal significance. The result was the Commonwealth *Crimes Act 1914* and the main aim was secrecy concerning the war effort. The Commonwealth *War Precautions Act 1914* was enacted shortly after and delegated to the Governor General in Council a very wide power to make regulations 'for securing the public safety and the defence of the Commonwealth'. This dealt with the control of enemy aliens, censorship of newspapers and media and the safeguarding of strategic assets such as the docks. We learn of various cases in the Courts dealing with some of these crimes eg Mr Farey's appeal to the High Court to test the legality of a regulation controlling the distribution and prices of various primary products and staple goods. There was Arthur Kidman who was a business man a prosecuted for defrauding the Commonwealth, a retrospective criminal law in his case. Others were prosecuted for 'trading with the enemy', including Frank Snow who in 1914 had a firm which had extensive commercial arrangements with German manufacturing interests to supply metal ores. The author notes how the 1915 High Court judgments in *Snow* were important to understanding Commonwealth criminal law and the role of the High Court in criminal appeals from all the states. There were also cases dealing with fortune tellers, publishing cartoons which resulted in charges of 'prejudicing recruiting', conscription and the suppression of dissent against government policy.

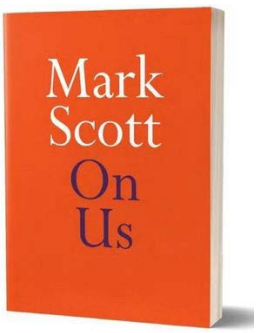
After WW1 the Courts were filled with numerous criminal cases of 'shell shock' and the shocking problem of how to deal with such defendants with such 'mental illness' in the face of serious criminal actions. 'Clear up Razorhurst' was a headline in the *Truth* magazine on 23 September 1928, being a reference to the 'razor gang' period in Sydney and the author tells us of the very famous case of Gordon Henry Barr and his prostitute wife 'Diamond Dolly'. The Great Depression and its effect on NSW criminal law is detailed in chapter 19 and we learn of how the extensive job losses, serious industrial disputes, strike action and evictions led to for example, cases of conspiracy to instigate a strike, charges of rioting and charges of obstructing police. Of course, we also learn of the infamous case of Horatius de Groot at the opening of the Sydney Harbour Bridge on 19 March 1932.

The rest of the book details much of NSW legal history involving the importance of *Woolmington v the DPP* [1935] AC 462, the prosecution of homosexuals, illicit betting, the 'thousands of new criminal offences' as a result of the outbreak of the Second World War, 'gingering' (a trick performed by two prostitutes to remove a wallet from the customer), socialism and 'advancing unlawful doctrines', Australian fraudsters and the influx of American servicemen, the introduction and failure of the dock brief, 'confessions' to the NSW police and the famous case of Frederick Mc Dermott, a new Jury Act which included women but only if they submitted their names for inclusion in jury service lists, the Cold War and the laws of sedition, 'New Australians' and racial tensions in the criminal Courts, the Liquor Royal Commission between 1951-1954 and finally the abolition of the death penalty. Although the last person to be executed in NSW was John Trevor Kelly in August 1939 at Long Bay Gaol, the death penalty was commuted in every case between 1939 and 1955. Nevertheless, NSW could now see itself as a more humane and tolerant society than it had been in the previous century – at least in some respect.

The book is beautifully written, with a story book feel rather than a text book, and there is much to learn. One can only imagine what the next period of criminal law would look like, from 1956 to now. Changes to the role of women affecting the Jury Act and personnel in our Courts, the rise of corporate criminal law, significant changes to sexual assault legislation, necessary changes to sentencing, a new form of immigration and the law of terrorism, are just some of the key topics we may see being dissected and discussed, in such a detailed and interesting way.

Reviewed by Caroline Dobraszczyk

BOOK



On Us

by Mark Scott

'*On Us*' is a short and bittersweet book. The ideas with which it grapples stay with the reader for a long time. The book deserves a close reading. The book is part of a small series of books by University of Melbourne Press featuring current day personalities 'on' social issues. Scott meditates on how, we as a society embraced technology without reservations. The book invites us to step outside our own echo chamber to consider what we might have gained or lost in this process of being buffeted on a wave of technological genius.

Mark Scott is the secretary of the NSW Education Department. He was for some time the Chairman of the ABC and prior to that he was a traditional print journalist for many years. He is eminently qualified to speak about the rise of technology and its effects upon the world of the written word.

Scott lulls us into the reflection by opening with a reverie of a summer holiday and it ends similarly. The questions posed by the book are manifold and deep. Were we too hasty in embracing technology without understanding its ultimate cost? We adopted each new advance without censure. The sophistication of the technology now leaves us in an invidious situation. The internet, social media, the real time interactions, is it all as good as we are told?

Smart phones are the platform upon which most of the world bases its reality today. Smartphones are how most people conduct their daily lives and communicate with each other by message and social media. Scott asserts that we did not prepare ourselves adequately for this technology laden life.

We did not engage in much forethought on the subject of how technology would affect us both physically and ethically in the future. Some questions would have been so vague as to defy any meaningful answer – i.e., accepting all technologies – how would the world of the future play out?

Scott spares a thought for children in our society and he considers how schools might help future generations avoid this mistake. More saliently, a question in the book emerges – what chance do we have of preparing current day youth to live in the world of tomorrow? Will children today even need to be prepared for the relentless onslaught of technological advancement? Will the world change more quickly and dramatically in the years to come? Undoubtedly.

Progress is hardly ever predictable or linear. What are the technologies that the author is considering? It's the use of mobile phones and the thousands of digital applications and additions which facilitate some aspect of our lives. The technologies layer upon each other, to the extent that they reinforce each other. It's that widespread cumulative effect which causes the trickle of fear even in the most fervent of supporters. That layering makes the technology truly remarkable. For example, the humble mobile phone – it is the access point of the internet, it is the source of most communications – text and verbal. It allows a volume of information and learning that was hitherto unfathomable. Mobile technology correlates to and amplifies social distribution. Location tracking and algorithmic targeting are now the buzz words of our times, as people are considered in their tribes and are objects of marketing – it is a whole new paradigm.

While we wait another dozen years for Moore's Law to make everything even smaller, faster and cheaper – the ethical problems which arise over personal use of social media will have only become worse.

There are few answers for the young adults of the 2030s. But Scott's personal reflection is a salutary one. We can attempt to help a new generation find the right questions to ask. Since classical times, this has been the essence of a good education. It's an old formula. One poses the right questions first. One challenges the assumptions. That is the way one gets an insight and some understanding into an area. One ends up asking the questions why things are the way they are. That all may be so – but how many of us did this in the last 25 years when confronted by the vast array of new gadgets, phones and screens.

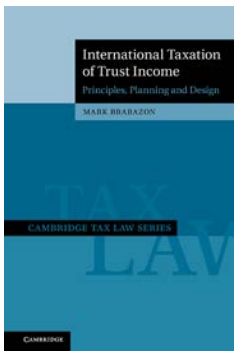
There will be no revolution in the classroom. The time-honoured procedure is adopted. Demand a hypothesis. Challenge the assumptions, using the data and the evidence. Press for a greater insight and understanding. The uncertainty of the future workplace means the only guarantee is consistent and insistent change, coupled with the need to learn and relearn. There is a certain quality of resilience that is required by taking on the new ad infinitum. We need to think carefully about how the current curriculum is shaped and structured to help prepare young people for all they will face: we must gauge the extent of change, the speed of change and its inevitable unpredictability. No one has any idea of the world of the 2030s, when those who started school this year will finish year 12.

There have been countless examples of how biases shape the programming that changes the outcomes we take for granted. For decades in schools, English classes would explore how language could be deployed to manipulate meaning – persuasion – propaganda. Film studies showed examples of propaganda and image manipulation. Now we must help young people understand how insidiously we can be shaped by the barrage of images, text, sounds, algorithms and new experiences which less than a generation ago did not exist. Those images and that data in constant exposure also means something. We must help the new generation to be sceptical, to be critical, to be wise and to take a moment to consider.

It is more important than ever for us to ask questions for the young adults of tomorrow to find the false news and to be alert to it or to seek out the facts. This book, at its heart, encourages independent thought. A great lesson in all of this is for youth to understand there is something wonderful about being different.

Reviewed by Kevin Tang

BOOK



International Taxation of Trust Income: Principles, Planning and Design

by Mark Brabazon SC

Cambridge Tax Law Series
Cambridge University Press, 2019

There's more than one way to tax trust income: while trusts usually serve legitimate non-tax purposes recognised by the general law, they can also be viewed as a vehicle for tax evasion and avoidance. This book identifies the principles and policies by which Australia, New Zealand, the United Kingdom and the United States tax income derived by, through or from a trust in an international setting where more than one country may have a claim to tax. The author considers various questions of tax design, as well as who should be regarded for tax purposes as deriving the income of the trust and how they should be taxed.

The book examines and compares the principles and policies underpinning the various methods for the taxation of settlors, beneficiaries, trustees and trust distributions. Differences in taxation regimes invariably reveal a conflict of approach. The author identifies a set of important common themes for the taxation of trusts and highlights potential cross-border mismatches which can present issues of unintended non-taxation or double taxation that sometime comes with the presence of a trust. This book addresses these and many other issues and provides practical insight for taxpayers and revenue authorities. As part of that analysis, the author outlines a range of tax design solutions as well as points for practitioners, tax administrators, legislators and academics.

The international taxation of trusts is seldom written about due to the lack of global cohesiveness on the topic. A standalone study on the subject is welcomed, though

no general review is undertaken of countries whose tax laws are not representative of the four countries surveyed. Nor does the book address the taxation issues presented by exotic entities not recognised by common law jurisdictions which are not trusts per se but have some of the attributes of a trust. This is deliberate as the work is foundational, and serves to provide a basis for similar analysis to be extended to other jurisdictions (and trust-like entities) not considered by the book. Nevertheless, this book is an essential read for those who advise on the taxation of trusts in an international setting.

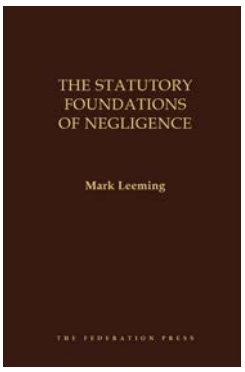
At just over 400 pages in length, the book is concise and comprehensive. The chapters in Part I examine the settlor/grantor (chapter 2), the beneficiary (chapter 3), the trust (chapter 4) and trust distributions (chapter 5). These chapters focus on the principles underlying the attribution and taxation of trust income in the four surveyed countries, while chapter 6 considers the circumstances in which double taxation and double non-taxation can occur as a result of the interaction of countries' domestic laws.

Further developing the international taxation discussion in chapter 6, Part II delves into the interaction of domestic laws with respect to the taxation of trusts in treaty and non-treaty situations. Part II also includes consideration of the OECD Partnership Report and Actions 2, 6 and 15 of the BEPS project and how they apply to trusts (chapters 7 and 8). The Partnership Report and BEPS project concern perceived international tax avoidance which are significant current global taxation issues. Part II identifies risks in relation to the issue of double taxation and double non-taxation and posits a range of suggested solutions to prevent those unintended outcomes (chapter 9).

The taxation of trust-related income can raise difficulties and the interaction or impact of the domestic laws of more than one jurisdiction only further complicates matters. This book presents a detailed study of international trust taxation as a topic in its own right and is a useful addition to any tax practitioner's library.

Reviewed by Keni Josifoski

BOOK



The Statutory Foundations of Negligence

by Mark Leeming
Federation Press, 2019

Leeming J is well-known as a giant in equity: Challis Lecturer in Equity at Sydney University for over 15 years; co-author of the latest editions of *Jacobs' Law of Trusts* and *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*. A search of LexisNexis, however, reveals only 39 decided cases in which Leeming J appeared as counsel and in which the word 'negligence' appears in the text. Of those 39, the cases that were truly about the law of negligence can be counted on one hand. Most of the other cases arise out of claims in negligence, but are in fact authorities dealing with questions of jurisdiction, questions his Honour has addressed in works such as *Authority to Decide* and *Resolving Conflicts of Laws*. Why turn his hand to writing a text on the law of negligence?

In an important respect this is *not* a text about the law of negligence. It is a book about the interaction between statute and judge-made law. In an earlier publication Leeming J wrote:[1]

> Most of what is actually occurring in the legal system is the construction and application of statutes. A great deal of what is simplistically described as 'common law' is the historical product of, or response to, statutes. And much of the contemporaneous 'development' in the day-to-day workings of Courts in fact involves a process of harmonisation informed by statutory norms.

The present work seeks to expose and then to analyse the foundational role of statutes, using the law of negligence as an illustration of the processes of interaction between the two.

Since his appointment to the NSW Court of Appeal Leeming J has decided a number of important cases for the law of tort in NSW. In spite of his Honour's apparent lack of experience with the law of tort, or perhaps because of it, those judgments are scholarly and erudite and trace the long and often tortuous history to arrive at the relevant principle. *White v Johnston*[2] is a good example. His Honour's analysis of the authorities relating to consent and trespass in their historical context, particularly having regard to the extant rules of pleading, led to a rejection of the view expressed by McHugh J in *Marion's Case*[3] that a defendant to an action in assault and battery bears the legal burden of proving a valid consent. It is a classic illustration of Windeyer J's observation that:[4]

> The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of to-day by seeing how it took shape.

The analysis of the application of Part 1A of the *Civil Liability Act 2002* (NSW) to questions of causation and the materialisation of inherent risks in *Paul v Cooke*[5]is a masterly exposé of the difficulties in reconciling the language used in that Act. It is a process that his Honour continues in the present work, with a more expansive (albeit not exhaustive) journey through the common law of negligence.

The book has chapters devoted to Duty of Care, Breach, Causation and contributory negligence, Roads Authorities, Damages where there are multiple defendants, Damages for pure mental harm, and particular heads of damages for personal injury (lost capacity to provide domestic services, and discount rates and interest). These are not, nor are they intended to be, comprehensive treatises on these topics. They are simply aspects of the law of negligence that provide a vehicle by which the interaction between statute law and judge-made law may be analysed.

This is an important book for anyone who practises in the area. The historical analysis enlivens each topic area, reminding practitioners that the law was not always thus and need not always be. Despite the precision with which Leeming J writes, it is engaging. It offers fresh perspectives on how statute law engages (or in some cases fails to engage) with the common law. Although directed towards analysing more abstract jurisprudential issues, it nonetheless provides valuable insights relevant to day-to-day consideration of the impact of statutory reforms to the common law.

ENDNOTES

1 M Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) UNSWLJ 1002.
2 *White v Johnston* (2015) 87 NSWLR 779.
3 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 310–11.
4 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 595.
5 *Paul v Cooke* (2013) 85 NSWLR 167.

A View from the ~~Bench~~ Bridge of Starship Justice

Judge's Log: Star date 41553.4. Destination: Unknown. We have been plumbing the outer reaches of the star system Tedium now for 3 months in search of the issues in this proceeding but with little success. The forward sensors detected them briefly two weeks ago but just as we were about to make contact with them they were sucked into a cloud of ionised waffle. Our attempts to enter the waffle cloud have been thwarted by a force field of highly energised but impenetrable solicitors' correspondence. On first contact, the force field overwhelmed our issue detectors and caused the electronic court file temporarily to crash which is entirely unprecedented. After an alarming period during which I was forced to steer the courtroom manually, my associate, Spok, was eventually able to reboot the system using an adults-only version of Angry Birds, a small piece of brioche and some dental floss. For now, the guidance system is stable although I have lingering doubts about Spok who has been behaving strangely since we first encountered the waffle cloud.

The next step is not clear. Access to the Commonwealth Courts Portal remains blocked by a temporal anomaly so it will not be possible, until the anomaly is cleared, to return to normality, whatever that is. In the meantime, a detachment of counsel have begun to gather on the starboard bow in preparation for what will no doubt be another sortie. They have a new and particularly powerful weapon, the hyper-linked written submission in PDF format, which they have been firing at the court intermittently with some limited success. The shields have not failed yet but our energy levels are low and it is only a matter of time before one of them gets through and I have to read it. They did not warn me about this at the Star Fleet Academy.

In the meantime, the number of reserved judgments has shot up dramatically and a complaint stream has been opened on the hailing channel. It is beginning to approach critical levels and the bridge has begun to flash red and to appear to shake violently from side to side as the crew throw themselves around rather unconvincingly. I knew that that this was bound to happen if I spent time writing this log. I convened a meeting about this problem with my senior officers to see if some solution could not be found before the entire propulsion system blew. This meeting took place in the rearward kitchenette just behind the teleporter which connects us to the Chief Justice and other distant bodies, heavenly or otherwise. Minutes were kept and a fine poppy seed cake served. As a result, I have determined to use the temporal anomaly against this problem. By reversing the bipolarity of Spok, running a new patch for my dictaphone which I have written called '<HearTrialNow>', changing the hold music from Depeche Mode to Aerosmith and giving the whole system a good solid whack with back copies of the Spectator, I believe I will be able to deliver the judgments before the cases to which they relate have even been filed.

I confess this idea was not entirely original but was inspired by the Circuit Court. Its insight, for which it is justly famous, was that much higher warp speeds could be achieved if one shut down the procedural fairness algorithms in the warp drive. My insight was that one could improve on this outcome still further if one simply excluded the litigants altogether from the court system and wrote the judgments without reference to them or their pesky problems.

It is early days yet with this new method and there have been, I do not mind admitting, some minor teething problems such as, for example, how does one describe the plaintiff-to-be but who is-not-yet? And, of course, there have been the usual complaints from the rule of law rent-a-crowd about the administration of justice &c &c and that is not to mention the predictable grumbles from the Sandanistas lurking in the upper reaches of the judicial firmament. But I am not concerned about those cheerless types who do but wile away the hours pondering the big questions such as: can a judge, not in a state of jurisdictional grace, receive the sacraments of judicial review; is the concept of law part of the law or separate from the law or merely non-contiguous with it; must there be an even number of torts; and, is the law of contract made from soft cheese or hard? Heady stuff, no doubt. But no use to me out here in the outer reaches of Tedium dealing with waffle cloud.

The advantages which will flow from dispensing with litigants will have associated efficiencies. For example, it will free up time to spend on important judicial work such as looking out the window, complaining about the decline in the quality of the legal profession and generally just remembering the good old days when unreported judgments were actually unreported and counsel got in and out of the lift in order of seniority. Judge's log closed for now.

Archon's View is a new column. It provides an opportunity for a current judicial officer to provide an anonymous view of the Bar.

Advocatus

So another couple of old warhorses have pulled the plug. It always seems to happen in little clumps. There's never any organisation about it. No collusion. No, 'Smithy's going to retire June 30, then Schofield September 30, then Jones on the last Friday before Christmas'. It's always sudden. In fact it's usually: 'Where's Smithy? I haven't seen him all week?'

'Haven't you heard? Done. Doctor's orders.'

A horse trainer once told me that mares are a bit like that. Just when they're about to enter the twilight of their racing careers they just stop. They won't run any more. They can't. They won't. A stallion or a gelding might forge on, their times and placings gradually getting worse. But when a mare's done she's done. Old barristers are the same. Usually with the postscript 'Doctor's orders' attached.

And so, as I walk the halls of our now depleted floor I ask the only question that matters: does this mean more work for me? I certainly hope so. You see, the Smithys, Schofields and Joneses of this world have cultivated practices like their wine cellars: rich and diverse. What if I get some of that commercial work Smithy's always hogged? Or what if I start getting that appellate stuff Schofield always seemed to horde? I can finally dream of my mortgage being knocked completely out. I could afford a Beamer or a Merc that was built this century. Oh the possibilities.

But it's been a couple of months now and the clerk hasn't exactly been ringing me every 10 minutes. Is there anything more I could be doing? Should I be selling myself as the next Smith, Schofield or Jones? No. That seems a little tacky. A bit like dancing on their graves. Besides, a new plan has emerged.

I've been walking the halls and popping in to some of my colleagues to conduct what I call 'welfare checks'.

'Everything alright Brucey?' I venture. And when the reply is mostly positive, I might offer in return: 'You know, the way Smithy and Schofield went out really makes you think, doesn't it?'

'Why?'

'Well, you know, one day they're at their desk beavering away and the next they're gone. Doctor's orders. It's not the sort of way you want to go is it?'

'I suppose not.'

'Look at yourself, Brucey. What are you? 68-69?'

'Sixty-two.'

'Well there you go. Surely it's time you thought about going out on your terms and nobody else's. You'd have plenty in super by now?'

'Super? What's that?'

Now I know you might think me heartless and selfish, but we really need to discuss these issues as a profession. And as I saw somewhere recently we need to be asking each other: R U OK?

So I've taken it upon myself to inquire upon all members of our floor about their preparedness for life after the Bar. And I'm horrified by what I've learnt.

'Retire?' exclaimed one chap. 'I've put three kids through boarding school, divorced twice and survived one heart attack. I'll be here till I drop.'

Another chap cried: 'I married young.'

I replied: 'You got married three years ago.'

'Yes, but to a much younger woman. After I get my hip done in August we're going clubbing in Ibiza in September - whatever clubbing is - and I've just bought an electric car to reverse global warming. I won't be able to retire for some time unfortunately.'

When I approached the most senior female of our floor to discuss life after the Bar she slapped me for suggesting she was anywhere near retirement age then kicked me in the shins.

'What was the kick for?' I whined.

'If you ever read *Bar News* or watched any of those CPD videos I sent you you'd know full well I spent my 30s raising children and my 40s re-building my practice. I'll have to go to 70 until I retire and I can assure you I'm a long way off that.'

So that's it. No more prying from me. No more caring either. It's every man and woman for themselves and if he and she refuses to think about the future then that's their problem.

As for me, I plan on being an old gelding. I'm going to run until I drop out of the placings and then hope that my faithful owner will retire me to a juicy paddock. I don't need summer at Palm Beach, nor winter in Aspen. I haven't the energy for walking the Camino de Santiago, nor the taste for fine wines or seven-course degustations.

I'm going to open an account and drop some dollars into it, hoping it will accrue over time. I'll shut up shop when the time comes, sell my outdated editions of the books I've never touched and hope that that will be enough to see me through to the grave. And if I fall short, so what? A couple of my clients are on the pension and they seem OK.

Golf on public courses. All meals at home. In fact, why not start now? No more breakfasting at Silks. No more coffees at Beanbah. It will be toast and porridge at home, Nescafe Blend 43 in the office. And as for the monthly catch-up with the lads? Well that can be BYO sandwich and we'll sit in the park instead.

Actually, upon deeper reflection, do me a favour: when the time comes take this old mule up to the top paddock and shoot him.

The Furies (Sartorial Edition)

Is it still frowned upon to wear brown shoes to court? If we are at a place of acceptance in relation to brown shoes, what of other more demonstrative (dare I say) splendid shoes? I once had a colleague who wore black and white chequered brogues to court on each occasion and it did not appear to have any adverse impact on outcome.

This is serious stuff! And we, the Furies, do not shirk the heavy responsibility of providing the definitive guidance sought by male[1] barristers on this essential issue. After a meticulous search of governing legislation, we looked to subordinated legislation, and then to rules and then to policy guides whereby we found a 2007 edict handed down by the then Chief Justice of the Supreme Court of New South Wales going by the title 'court Attire Policy'. In a user-friendly tabular format, the policy helpfully sets out, for each type of hearing, the requirement for the barrister to wear first, a robe and, secondly, a wig. We are reliably informed this policy has strict application. However – *and we cannot emphasise this strongly enough* – the items of clothing listed in the policy are not exhaustive. We feel confident in saying, in keeping with the policy's stated purpose[2], that barristers are indeed also required to wear *other* items of clothing. But what are these *other* items of clothing we hear you ask?

Our research has also taken us to judicial expositions on the matter. We have taken heed of the words of Justice Frederico of the Family Court in 1983 when refusing to take a barrister's appearance because she wore trousers instead of a skirt, as well as the extra-curial writings of Justice Young who, in 2006, out of politeness, reserved his condemnation of certain advocates' attire for his column in the *Australian Law Journal*, entitled, 'Politeness'[3]. We have reduced these curial and extra-curial expositions to a golden thread which we think is best pithily expressed as follows: thou shalt dress according to one's gender, but not overly so.

Thankfully, female advocates have never been spared advice on this issue, but pity the poor male barrister who, every day, must dress in fear that an unwitting display of excessive masculinity will forever diminish his professional image. Serendipitously, a barrister's attire (wig and gown) tends to spare the male barrister from such excesses, masking as it does, all his clothing, except for his shoes. And this brings us to your question: what shoes ought a male barrister wear? It is an unfortunate fact, and one that we, the Furies, are not afraid to state in these overly politically correct times, that men's feet are larger than average. In keeping with the above ratio, we consider it would be best for men[4] to draw the least attention possible to their large feet by wearing black shoes which, as we all know, is both a slimming colour and one that merges with the black of the robes to hide the largeness of all but the most distractingly large of these male appendages. The only exception to this might be where the man has much smaller than average feet such that black shoes might not make sufficiently clear his maleness for the bench. For the truly abnormally small footed man, we suggest a variegated colouring, perhaps white spats over black shoes or, dare we suggest, your friend's bold adventure in chequered brogues. But never brown. That's just plain ugly.

1 We say 'male', since female barristers have the innate sense not to wear brown shoes with black robes; a discreet lick of Leboutin red on the sole of a tastefully heeled stiletto, perhaps, but never brown!

2 The policy commences with these words: *'This policy aims to ensure barristers appear before the court in attire that meets the court's expectations'*. Thankfully this excuses a purposive reading of the text that might otherwise elude a black letter, and possibly chilly, jurist.

3 His Honour politely observed: *'. . . it is clear that some female solicitors have no idea of appropriate court dress. The worst offenders are usually well-built women who expose at least the upper halves of their breasts, and as they lean forward to make a point to a judge sitting at a high level they present a most unwelcome display of bare flesh'*, Justice PW Young, 'Politeness', *Australian Law Journal*, March 2006.

4 Especially, dare we say, those men who are 'well-built'.

When I came to the Bar I was deeply ashamed of my pristine court attire. I'd availed myself of a cut-price readers' package that included wig, gown, bar jacket and three jabots as white as snow. I was subjected to endless jibes from senior members of the floor about how unpolluted my attire was and so I embarked on a campaign of befouling my jabots and bar jacket in particular in an effort to fit in. My problem is: I've moved. I'm now on a hip, progressive floor with a state of the art fit-out and members shinier than the stainless steel appliances in the kitchen. Should I replace my coffee-stained, cigarette-burnt rags to fit in? Or could they help me form a nice point of difference between myself and my new colleagues?

We are trying to reconcile 'hip and progressive' with 'state of the art fit-out' and 'shiny members'. The latter descriptors suggest your new chambers are far from the Rumpole-like dark wood, stained carpet affairs where the members, still using fax machines, treat with great suspicion anyone with straight teeth. But the former descriptor suggests something different again to the glass and chrome joint enterprises styled as direct replicas of the top tier law firms they service exclusively and where it is rumoured new members are microchipped lest they be found straying to clients who are 'off-brand'.

If your new floor is truly hip and progressive, it will be, like, *totally woke* and accept you as you are with your statement coffee-stained jabot, especially if you have the barrista skills to match. But perhaps that was never truly your shtick?

Whatever is your thing, we suggest you find it and that you stick to it no matter where you are. After all, it takes all types to represent all types of people and you will never be a servant to all (and yet of none) if you are cravenly subject to the demands of some.