THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2019

barnews

SUMMER EDITION

A brief meditation on artificial intelligence

Guidance for NSW Barristers in the wake of lawyer X

Updated sentencing statistics on the Judicial Information Research System

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Officers of the Court

A person whose knowledge of courtroom advocates is derived from American TV would find the reality of the Sydney bar confounding.

Not just because we do not routinely pause our cases while we investigate the facts.

We try our hardest to win cases against our opponents, but we do not cheat or mislead them. We may be competitors, but we share offices and go out of our way to give assistance to other barristers.

Walter Sofronoff's Maurice Byers annual lecture (*The constitutional significance of the Australian Bar*) ends with a reflection from an American judge on the difference between barristers in the English legal system and trial lawyers in America. The judge describes the American open bar as being dominated by lawyers whom Judges do not trust. *"American lawyers are called 'officers of the Court', but this is said with a smile (or a sneer). [In contrast] Barristers are officers of the Court".*

It reminded me of an observation made an American legal academic who visited a silk at the Sydney Bar. The academic was fascinated by the fact that his friend shared a floor with barristers who were commonly his opponents. He was taken aback that there were no locks on the doors. *"There is nothing to stop your opponent just walking into your room when you are not there and reading your brief?"* he asked. The part of that story that I like best was the reaction of the silk. He was no less surprised (and amused) at the thought that a floor member would contemplate such a thing.

While honesty and straight dealing remain a core element of practice as a barrister, other aspects of practice are changing. Undoubtedly in some ways these are changes for the better: the bar is becoming more diverse and increasingly embraces the efficiencies that technology can provide. However, as a number of authors in this edition identify, not all the change is positive.

For a start, while the number of practising barristers continues to increase (now 2412 in 2018/19, a 7.5% increase over the last 5 years) the number of cases that are commenced is decreasing. Farid Assaf and Penny Thew (*Are there implications of NSW Court filing trends*) report on the decline in court filings over the last 13 years: filings in all State Courts are down by almost 45% in total, which can only have been partly offset by a 13% increase in Federal court filings and the increasing uptake of Alternative Dispute Resolution.

Working at the Bar as a sole practitioner carries with it financial challenges and risk.

Anthony Cheshire (*The bar needs to fight for its future*) discusses some of these changes in barrister practice. He focusses on a worrying trend of viewing barristers as merely an additional lawyer (and cost). In what he identifies as a possible reaction to the reduction in the number of cases, solicitors increasingly do the work they previously sent to counsel. As Cheshire identifies, the bar needs to continue to take steps to inform the public that not only is it often less expensive to brief junior counsel to draft pleadings and prepare evidence, briefing at an early stage will often assist to identify the real issues in a case and to provide advice on prospects that can lead to early settlements.

Kavita Balendra (*There is a future in the Bar – a response*) identifies the phenomenon of barristers appearing without a solicitor present, which occurs before the Workers Compensation Commission.

Another change that has been well documented is the increasing reliance on written submissions. *Advocatus* describes how the modern written submission is written: in rainbow colours, each colour representing the input of the many solicitors and client officers who 'assist' to finalise a submission, more often than not in the hours before it is due to be filed.

This being the summer edition, it has a number of interesting pieces to read during the annual shut down. Sean O'Brien's *A message from the Free State of Prussia to Hong Kong* examines how legal systems can used to give legitimacy to 'law by decree'. It was how the German Government deposed the democratically elected government of Prussia in 1932, and he draws a comparison with the Bill introduced in Hong Kong to allow the Chief Executive to make *ad hoc* extradition orders to mainland China, which has led to more than 6 months of protests.

For those who want to do some reading on the beach, there is a practical article on how to electronically borrow a vast range of articles and books from the library. Of particular interest is the new service that allows members to borrow a large number of popular looseleafs, including Ritchies, as an e-book.

Kevin Tang has again penned some wonderful pieces in appointments, retirements and obituaries. In particular, for those who were not able to be present, I highly recommend the obituary for Jane Matthews AO, which draws on the words spoken at the State memorial, in particular by our Governor, Her Excellency Margaret Beazley AO.

I have a particular soft spot for good historical pieces, and this edition carries two. Michael Kirby's piece, *Australian Racism: The story of Australia's First and Only Black Premier and Chief Justice – Sir Francis Villeneuve Smith* tells the fascinating tale of the third Premier and fourth Chief Justice of Tasmania, whose mother was of African descent, and succeeded due to his great talent, despite the outrage that 'a coloured person is sitting in judgment upon the Anglican race'.

John Bryson QC (*Debtors Prison and the Rules of the Prison*) describes a period of our history when debtors were imprisoned. To deal with the practical problem of a small gaol, in 1834 the NSW Supreme Court deemed a small part of what is now the CBD near Circular Quay to constitute the boundaries of the 'prison'. This area, which came to be known as 'the Rules', after the Supreme Court Rules that determined the boundaries, was a place where debtors could walk and live, if they could find the means to do so. Bryson ends by asking the reader to spare a thought, next time you drive over the Harbour Bridge, for the judgment debtors of the distant past who were required to live in the streets below the Southern pylon.

There are a number of book reviews that are well worth reading, ranging from *The Constitution and Government of Australia 1788 to 1919* by William Pitt Cobbett, edited by Anne Twomey with Amanda Sapienza to *Fleishman is in trouble* by Taffy Brodesser-Anker. The latter is a novel about a professional man's experience of marriage, estrangement and single parenthood. In addition, there are two short but illuminating extracts from Nicholas Cowdroy's new book Frank & Fearless (with Rachael Jane Chin).

Whether you are a fan of a book review or not, you must read Justice Andrew Bell's highly learned and very funny speech given at the launch of *Heydon on Contract*. It picks out gems from the book like sixpences from a Christmas pudding. Bell cites Heydon's concern as to excessive use of extrinsic evidence as *clogging the arteries of commercial litigation*. He pulls out delicious quotes, such as *"The cost pressures affecting large firms of solicitors operating under their expensive business models are notorious. In those circumstances a cynic might say that greater love hath no managing partner than this – the eruption of large-scale commercial litigation against a loyal and valued client."*

Bell has no compunction about teasing the author: noting that *"'Modern' is not a term of approbation in the Heydon lexicon"*; and identifying that the book's strong Australian focus (and its criticism of English law where it has departed from orthodoxy) does not derive from any republican tendencies.

So as we head to the beach at the end of a busy year (on our Vespas) let's try not to think too much about how the work of barristers might ultimately be replaced by artificial intelligence (Farid Assaf: *A brief meditation on artificial intelligence, adjudication and the judiciary*).

Rather, focus on the proposition underpinning Walter Sofronoff's Maurice Byers annual lecture: namely that the continued existence of the bar, in its fundamental respects, is "*constitutionally guaranteed*".

With that reassurance enjoy the break and come back recharged in 2020.

BN

Funding and Reform Processes

By Tim Game SC

Since the last edition of Bar News the Bar Association has held its annual election for Bar Council. A number of members have been re-elected and I would like to thank them for their continuing support. In addition, there are a number of new members elected to Bar Council and I welcome them and look forward to working with them.

In this column I would like to discuss some pressing issues for the profession and to update you on some developments.

Personal injury

For some time the Bar Council has been communicating to members its concerns about the CTP scheme. Of particular concern is the width of the definition of 'minor injury' which can result in people with significant and permanent injuries being entitled to only limited weekly and statutory benefits. Close to 60% of claims are being disposed of as minor injuries.

Another troubling development is looming. The State Government is considering a recommendation of the 2018 Standing Committee on Law and Justice Review of the Workers Compensation Scheme to "consolidate the workers compensation scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise".

This is not an occasion to review all aspects of this recommendation as we are awaiting a full proposal from the government. However, there is an overriding and significant aspect of this recommendation which appears to be integral to it.

Under the current system, in respect of unresolved work injury damages claims under the Workers Compensation Act 1987 and unresolved claims for damages under the *Motor Accidents Compensation Act 1999* (NSW) and the *Motor Accident Injuries Act 2017* (NSW), there is a process by which there can be a hearing on the merits before the Supreme or District Court together with the normal and appropriate rights of appeal to the Court of Appeal.

The current rates for legal aid work are parlously inadequate and members should not feel that they have any obligation to take on Legal Aid briefs when they will not receive anything like adequate payment for work done.

Matters that are determined by the Workers Compensation Commission are final. Any judicial review is limited to error of law on the face of the record or jurisdictional error or an appeal confined to a question of law.

The recommendation under consideration would apply to both CTP and work injury damages claims. Such a development on both of these fronts would be significant and adverse; eroding the entitlement to curial determination of important issues of liability and quantum. Further, the existing system whereby claims are heard in the Supreme or District Court (after unsuccessful mediation) works well.

Given the significant rule of law implications from this recommendation this should be a matter of concern not just for the Minister concerned but also for the Attorney General.

Legal aid

As members know, the Association has consistently raised concerns about the adverse impacts of underfunding legal aid on access to justice and the quality of justice in NSW.

In November, the NSW Government announced an $88 million injection into the state's chronically underfunded legal aid system. The funding increase will be delivered over four years. However, the $88 million is only about one third of what Legal Aid NSW advised was urgently needed and it is not clear how this injection of funding will translate into legal aid fees.

While we welcome the funding announcement we will continue our statutory discussions with Legal Aid NSW under section 39 of the *Legal Aid Commission Act 1979* (NSW).

In the meantime, as I said earlier in the year, the current rates for legal aid work are parlously inadequate and members should not feel that they have any obligation to take on Legal Aid briefs when they will not receive anything like adequate payment for work done.

The other dimension to this whole problem is Commonwealth funding. The deeper problems with legal aid funding nationwide cannot be properly addressed unless the Commonwealth Government accepts its share of responsibility and restores its 50:50 funding arrangement with State Governments. The Commonwealth contribution is now down to approximately 30% and slated to further diminish in coming years.

Legal Assistance Referral Scheme and Duty Barristers Scheme

In November the Association celebrated the 25th anniversary of the Legal Assistance Referral Scheme (LARS) and Duty Barristers Scheme. During those 25 years LARS has processed over 6000 applications. The occasion was marked by a small ceremony at the Bar Association where Heather Sare, who has managed LARS for is entire 25 years, announced her retirement. I would like to thank Heather for all her work over those years as well as the many barristers who have given their time to this work.

This is important work and it allows members to help underprivileged members of our community. However, it is not, and cannot be, a replacement for a properly funded legal aid system and, importantly, LARS does not take cases unless legal aid has been refused.

The work of LARS has grown over the years. In addition to handing LARS referrals, the Bar Association also manages the Duty Barrister Scheme which operates at the Downing Centre and John Maddison Tower to assist the Local and District Courts. Members also support pro bono schemes operating in the Federal Court, the Full Bench of the Family Court of Australia, Federal Circuit Court, Land and Environment Court, the District Court of NSW and NCAT in its Anti-Discrimination list, as well as the Court of Appeal.

We hope to soon announce Heather's replacement. In recruiting for that position we have taken into account the growth in LARS referrals and Heather's feedback on the future of LARS and determined that it is now appropriate to recruit a practicing solicitor to the role who can brief counsel and appear as the solicitor on the record when required.

The deeper problems with legal aid funding nationwide cannot be properly addressed unless the Commonwealth Government accepts its share of responsibility and restores its 50:50 funding arrangement with State Governments.

Family law merger

Members will be aware of the Government's proposals in this area. Last year, the Federal Government introduced the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and an accompanying transitional amendments bill into the 45th Parliament to seek to legislate its merger proposal. After opposition from the legal profession and key stakeholders, the Senate's Legal and Constitutional Affairs Committee inquired into the Merger Bills and recommended substantial amendment. The Merger Bills were not brought on for a vote in the Senate in April. The Merger Bills lapsed when Parliament was prorogued for the May Election.

In March the ALRC made recommendations in its Review of the Family Law System. Put very broadly these proposals include increasing collaboration, coordination and integration between Commonwealth family law jurisdiction and state and territory family support services, family violence and child protection systems. These recommendations have not been acted upon yet. The position of the NSW Bar Association has been that these long awaited recommendations must be given proper consideration and we maintain that position.

After re-election and re-appointment to the Ministry, Attorney-General Porter indicated that structural reform of the family courts would be his "highest priority". The Attorney-General subsequently committed to reintroducing the Merger Bills before the end of 2019.

In the meantime a Joint Select Committee has been appointed to report on Australia's Family Law System, which is due to report in October 2020.

The Association's long-standing position has been to oppose the Government's merger proposal and this continues to be our position. Our position has been to maintain a specialist stand-alone Family Court and to bring into that court the Federal Circuit Court's family law jurisdiction and judicial officers as a separate division. The Association recently joined with more than 60 organisations in calling for the Government to abandon the flawed Family Court merger proposal and focus on strengthening the existing system and addressing important issues such as family violence. Other organisations signing that letter included the Law Council of Australia, the Women's Legal Services Australia, Community Legal Centres Australia and the National Aboriginal and Torres Strait Islander Legal Services.

We will continue to advocate our position in 2020.

Finally, may I take this opportunity to wish you and your families a restful break and a happy new year. I look forward to working with you in 2020. BN

NEW SOUTH WALES
BAR ASSOCIATION

The bar needs to fight for its future

By Anthony Cheshire SC

The practice of a barrister has always involved different aspects, such as Court advocacy and chamber work. Although the former probably does not change much over time, the latter continues to change out of all recognition.

When I began at the bar in the early 1990s, a brief was delivered for a specific task and not 'to advise and appear' generally. Thus, I might be asked to provide an initial advice on liability and evidence and I would then return the brief. A further brief might then follow a few months later with additional material incorporated into it for the drafting of proceedings; and so on.

Now briefs tend to be delivered at the outset for an entire matter; and additional material follows on an ongoing basis, to be 'filed' as we see fit (and often accompanied by the unanswerable question: 'Have I given you everything that you need?'). Further documents are often provided as large and multiple email attachments or by way of links to mysterious website locations. A brief held by counsel is now far more similar to the solicitor's file (although no doubt in a completely different order) than was ever the case.

As a result, barristers are often now involved in every aspect of the litigation, including matters such as drafting solicitors' correspondence. There are advantages to this, both for the lawyers and for the client. For instance, trial counsel are now often involved from the outset, identifying relevant issues and assisting with strategic calls; and litigation is now more of a collaborative effort between the lawyers.

It must be accepted, however, that there is scope in such arrangements for duplication of costs or at least an increase in costs.

I was struck then by the recent announcement in *InBrief* that the Workers Compensation Commission online system:

> … envisages that many solicitors will not send a traditional brief to counsel and that instead barristers will read most of their brief by accessing the filed documents through the WCC 'portal'.

That seemed to me to be consistent with a worrying trend in debate about the costs of litigation. There is an apparent underlying

assumption that litigation is expensive because of the involvement of barristers. Approached in that way, the obvious solution is to keep barristers out of litigation. If that is the best solution, then we have a real problem.

As Penny Thew has written elsewhere in this edition, Court filings in the State Courts over the last 13 years are down by nearly 45%. Solicitors appear to be reacting to this downturn by doing more themselves that they previously sent to counsel; and many cases are now not briefed until shortly before trial.

I have not heard any suggestion, however, that the costs of litigation have been decreasing as a result. Keeping barristers out of litigation may allow solicitors to charge for the work that barristers previously did, but it does not seem to reduce the costs.

This also ignores the fact that the value that barristers can bring to litigation can actually reduce costs. For instance, barristers can assist in identifying the real legal issues and thus avoiding costs of pursuing irrelevant or unnecessary issues; and they can provide advice on prospects and tactics that can lead to early settlements.

It seems to me that the problem lies in approaching the issue of costs in absolutes; and in attempting to identify single across-the-board solutions.

Technology provides a good example of this: the fact that technology makes a solution available that may save some costs does not mean that it is one that should be promoted across the board or indeed at all.

For instance, pushing directions hearings into online Courts may save the costs of briefing counsel to attend a hearing and indeed the costs of briefing counsel at that stage at all, but any overall saving may be illusory. Many cases would benefit from the early involvement of counsel; and solicitors may spend more time (and therefore costs) in engaging in correspondence and argument about online Court matters than would be associated with a brief Court hearing.

Similar comments could be made about a system whereby counsel only receive a brief through a Court portal after the filing of the relevant documents; and this is even before considering what happens when the 'portal' is 'unavailable…for scheduled [or indeed unscheduled] maintenance'.

In his paper set out in the last edition of *Bar News*, Chief Justice Bathurst suggested that there might in the future be 'a much more iterative process' of case management involving the parties and the judge posting comments online on an ongoing basis. While technology might make this feasible, it would lead to an extraordinary increase in judicial workload and it might simply result in a greater focus (and therefore greater costs) on arguing about directions.

So what can be done?

One of our traditional advantages has always been that we are self-employed and do not have the overheads of solicitors. The bar (and in particular the junior bar) can undercut solicitors on fees while at the same time adding value to the case. I wrote in the last edition of *Bar News* about disadvantages of online Courts, particularly in terms of issues not being identified and settlement not being discussed at an early stage, but are the solicitors' costs of corresponding about and conducting an online Court necessarily cheaper (and better) than asking a junior barrister to sort it out for, say, one hour of his or her time? There appears to be an assumption that they are, but an affirmative answer is certainly not self-evident.

One of the recurring criticisms of the use of counsel is a fear of duplicating costs. Maybe solicitors should be encouraged to send more briefs for specific tasks rather than to advise and appear generally. Many hearings could be conducted by counsel without a solicitor

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"Apparently, you have very little respect for our judicial system, sauntering in here with only one lawyer."

present, especially if the Courts encouraged this practice and were sympathetic in the event of short adjournments being required to take instructions.

Chief Justice Bathurst also wrote about how the modern barrister should be more familiar with, and attuned to, clients' business environments. Barristers need to be marketing themselves to clients, not only as individuals but also in terms of the skills, advantages and costs savings that they can provide (and which we should not be shy about promoting). Increasing commercialisation and corporatisation of barristers' floors, particularly in terms of marketing, will assist in making clients aware of the advantages that barristers as a whole can offer; and this may include agreeing fee structures and instruction protocols with larger frequent litigators.

Fixed fees may be attractive to solicitors or clients, particularly for smaller cases. For many clients, their entire future depends upon the success of the litigation, but they may have only limited means to pay costs. An all-or-nothing conditional fee may be unattractive, but why not a differing rate (or a differing fixed fee) depending upon whether success is achieved? Why not a contingency fee?

If the focus is upon the costs of litigation generally, then the bar must ensure that the debate is not focussed on removing barristers from the process and that the light is also shone on matters such as the costs of solicitors and expert witnesses.

The Courts, encouraged by prompting from the bar, can do their part. Innovations such as the use of online Courts and standardised directions and the determination of matters without a formal hearing all have their part to play, particularly in smaller litigation, but should not be over-used. There need to be strategies in place to identify, at an early stage, cases outside of the standard model. In those cases, the Courts should expect and insist that any advocate who appears should have a detailed knowledge of the case and be able to identify and discuss the real issues at stake (consistent with the Chief Justice's 'more iterative process'). Ideally in those cases, there would be the involvement of trial counsel at an early stage, but at the latest immediately before a matter is set down for trial.

These approaches are already adopted by some judicial officers, particularly in the specialist lists and in the Federal Court docket system. The volume of work (often including as it does matters that could be dealt with under a standardised model), however, often means that they are not enforced. Issues are then often not identified until a much later stage and settlement discussions (whether formal or informal) often do not occur until significant costs have already been incurred.

Duty barrister schemes provide a service to the public (and assistance to the Court) that would otherwise not be available; and provide useful experience to the junior bar. There seems no reason why they should not be extended to every Court and tribunal.

There is undoubtedly increasing pressure and competition in relation to what has traditionally been regarded as barristers' work. We need to shift the debate away from single one-size-fits-all models and towards more nuanced solutions. While this starts with individual barristers, the debate has to involve floors and the Bar Association. BN

The future of the Bar – a response

By Kavita Balendra

Let's be honest, litigation to the average person is expensive. However the ongoing debate about the costs of litigation has somewhat unfairly focussed on the role of barristers in particular. There have been attempts to reduce the involvement of lawyers through the use of technological innovation and legislative change. Whether this has resulted in better outcomes for litigants is questionable, but what it has done is cause a worrying decline in the availability of work for the junior bar, especially the very junior bar.

Anthony Cheshire SC has provided a number of innovative solutions. One suggestion is conducting hearings without the presence of solicitors. This is a phenomenon that, to some extent, already occurs in certain jurisdictions.

The Workers Compensation Commission for instance is one of the jurisdictions where the role of solicitors and barristers is clearly delineated. Barristers are usually only briefed to appear at the hearing (or rather the conciliation/arbitration) and are typically only provided with documents filed in the proceedings. In the Workers Compensation Commission, barristers are used principally for advocacy. It therefore came as no surprise when the Workers Compensation Commission announced their online system:

> … envisages that many solicitors will not send a traditional brief to counsel and that instead barristers will read most of their brief by accessing the filed documents through the WCC 'portal'.

Barristers, especially those appearing for respondents, often appear without a solicitor. Appearing for an applicant without a solicitor present is almost unheard of, and would create a number of difficulties not the least of which is the possibility of transgressing, or being accused of transgressing ethical duties.

It is not unusual when appearing without a solicitor to seek breaks in order to obtain instructions from a solicitor (and an insurer) that is only availably by telephone. But this process is not more efficient than having a solicitor present in Court. One is often left to wait a frustrating period of time in order

to obtain instructions, as one needs to raise a solicitor on the telephone who in turn then has to raise a client. This process is not helped by the fact that the costs available to a respondent (whether solicitor or barrister) is significantly less than that available to an applicant.

The system can be efficient, but only in very limited circumstances where the issues are narrow.

Legislative changes in jurisdictions such as Motor Accidents has attempted to limit or even remove the involvement of lawyers in the claims process. While this has resulted in a massive loss of work, recent media releases by the Bar Association illustrate that the loss of work has not necessarily resulted in better outcomes for claimants.

Courts have embraced technological change which in attempting to reduce litigation costs by introducing the online Court system. However this too is not without its flaws.

For instance the nature of the communication in the online Court system is not clear. What does a message on the online Court mean? Is it a submission or correspondence with the Court? If it is correspondence, does it fall foul of the requirements of the obligations under Rules 13(b), 54 and 56 of the *Legal Profession Uniform Conduct (Barristers) Rules* and the equivalent provisions in the Solicitors Rules? Is it even appropriate to allow parties to make submissions online? What happens if a matter is raised that is not immediately relevant to the orders sought? Should each party, as a matter of fairness be provided with an opportunity to respond? And what of principles of open justice?

Moreover where submissions are made online rather than face to face it is all too easy for practitioners to take on the role of a keyboard warrior, lowering both the tone and the content of communication. Anecdotally there appears to be a reduction in the civility and discourse in the online messaging system.

There is no doubt that, for matters that are by consent, the online Court system is more efficient and less expensive than Court attendances. Matters where parties cannot come to an agreement, where submissions need to be made or where a listing for hearing is required should, in my opinion, still require attendances in Court.

There is also the very difficult issue of the massive reduction in work that the online Court system has heralded. This loss of interlocutory advocacy work is devastating to the junior bar, not just in a monetary sense but for the valuable advocacy experience and contact that could be gained.

When I began at the bar the bulk of my practice involved interlocutory work. Briefs were rarely delivered at the outset for an entire matter, rather I was briefed to attend on specific interlocutory issues with my instructions quite often comprising little more than a brief email or phone call. Attending a registrar's list several times a week for directions hearings meant that I not only gained valuable advocacy experience, but also made important contacts among solicitors. More importantly it meant that I had a cash flow that kept me afloat. I imagine my experience is not very different to many who commenced at the bar before the advent of the online Court, but it is one that may not be available to the junior bar in the future.

So what can be done?

I agree with Anthony Cheshire SC that we should be trying to maintain our traditional advantages. Learned senior counsel has suggested that there is room for individual barristers, floors and the Bar Association

to do more to shift the debate to a more nuanced one, and on this I agree.

There is a significant gap in understanding what costs savings a barrister can bring to a matter. Trying to explain to a lay client, who is faced with the burden of paying their legal fees out of pocket, that their matter requires not one but two types of lawyers is a herculean task. This is not assisted by the lack of understanding of what a barrister's role is in a matter that does not proceed to hearing. It appears to me to be increasingly necessary for barristers to advocate for barristers – to provide opportunities for clients and members of the public to understand the role of barristers by emphasising our areas, namely our independence, deep understanding of the Court system and advocacy expertise.

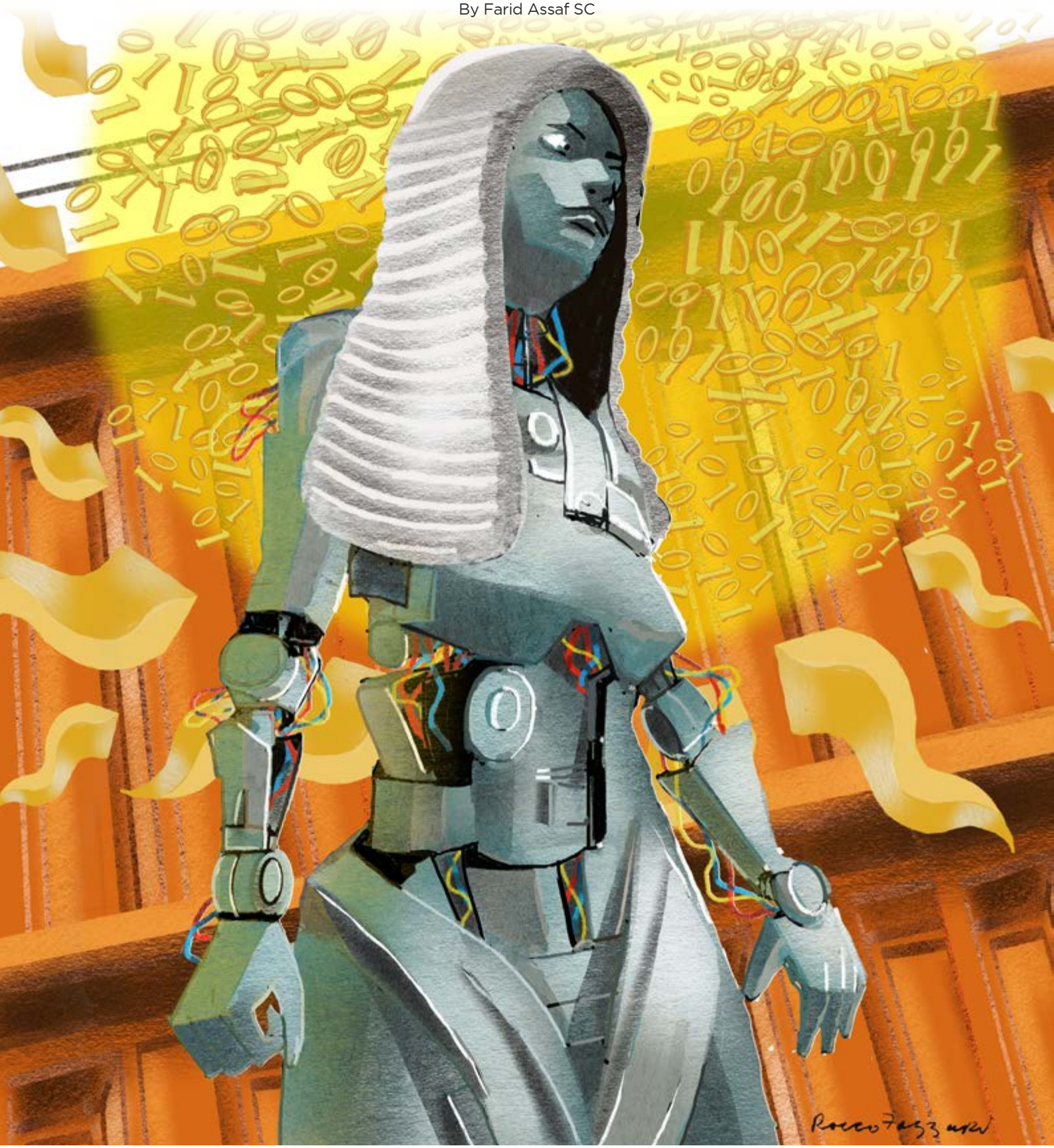
The only issue that I, respectfully, disagree with learned senior counsel on is the focus on costs. The Junior Bar are already competitive on fees. It is not unusual for a very junior barrister to charge a similar amount or less than an agent for appearance work. Working for government clients or in jurisdictions with set statutory rates also provide significant costs limits on barristers fees.

Duty Barrister Schemes, which is effectively work that barristers do not get paid for do provide both an opportunity for junior barristers to market themselves and an opportunity to gain valuable advocacy experience. The junior bar, particularly those who cannot afford to donate their time, cannot and should not be required to rely on these schemes for work, nor should they be used as an opportunity for the State to absolve itself of its responsibility to properly fund legal aid for both civil and criminal matters.

There is increasing pressure and competition, with universities churning out ever-greater number of law graduates and costs pressures causing an expansion of solicitors into traditional barristers' work. It is incumbent upon us, as individuals, floors and as an association to ensure that we are able to advocate and present ourselves as a separate, valuable and relevant part of the legal profession. BN

A brief meditation on artificial intelligence, adjudication and the judiciary

By Farid Assaf SC



I. Introduction

In the previous summer (2018/19) edition of *Bar News* I provided a brief overview of AI and its increasing use in the legal profession.[1] In this article I seek, somewhat ambitiously, to examine some potential implications of AI upon adjudication and the judiciary itself. In so doing, I have had to make a number of (perhaps unrealistic) assumptions. Firstly, at some stage in the future, humanity will have achieved what has been dubbed 'General Artificial Intelligence', that is, AI possessing intelligence equivalent to human intelligence. Second is that there are no Constitutional impediments to an AI assuming the role of a superior Court justice. Readers may understandably scoff at the prospect of a non-biological entity assuming the role of a human judge and dismiss such a notion as the realm of science fiction. Such an attitude may require reconsideration. Since my last article appeared in *Bar News* in December 2018, the Beijing Internet Court has launched an online litigation service featuring an artificially intelligent female judge[2] and the Estonian Ministry of Justice is designing a 'robot judge' to process and decide a backlog of small claims disputes.[3] These are just a few examples.[4]

The extant level of technology presently limits the use of AI in adjudication however those technological constraints will soon disappear such that at some stage in the not too distant future technology may be capable of supplanting human judicial decision-making. What that means for adjudication and the judiciary requires consideration of some quite profound philosophical, anthropological and jurisprudential questions. In the limited space available it is not possible to traverse all of those questions. Instead, this meditation is limited to a cursory examination of a number of possible concerns which are likely to require consideration in any debate regarding the implementation of AI in the judicial process.

II. The Judicial Reasoning Process

As mentioned above, I have assumed in writing this article that at some stage AI technology will have reached a level where it rivals that of human intelligence. Even so, one question that arises is whether there is anything especially idiosyncratic about the judicial reasoning process such that humanity will or should continue to maintain its monopoly on the adjudication of legal disputes? To answer this question an exploration of the nature of the judicial reasoning process is first required.

While numerous competing theories have been advanced as to the nature of judicial reasoning there nonetheless exist common elements and characteristics. The first is that the basic pattern of legal reasoning in the common law world is what legal academics refer to a 'exemplarity', namely, reasoning by example or from 'case to case.'[5] While there is a logic to legal reasoning, that logic differs from the

formal logic or syllogistic reasoning familiar to mathematicians. In his celebrated work on legal reasoning, Edward Levi observed that it cannot be said that the legal process is simply the application of known rules to diverse facts.[6] It is nonetheless, a system of rules – the rules are discovered (and changed) in the process of determining similarity or difference between cases. The problem for the judicial officer is determining when will it be just to treat different cases as though they were the same. The second characteristic of judicial reasoning in the common law world is the use of narrative and narrative reasoning. For present purposes narrative reasoning may be described as 'norm-based arguments that motivate a judge to want to rule in a party's favour.'[7] Rule-based, that is case-law based arguments, can be thought of as 'justifying arguments' whereas norm-based arguments can be seen as 'motivating arguments.'[8] As will be explained in the next section, 'the law' is essentially a branch of anthropology[9] where legal decision-making does not proceed *in vacuo* but rather against a background of a relatively well established set of rules, principles, standards and values.[10] The third characteristic is what Hart has described as the 'relative indeterminacy' of legal rules and precedents.[11] This characteristic necessarily stems from the first two characteristics but can be seen as an independent characteristic in its own right. The indeterminacy stems from the fact that it is impossible in framing general rules to anticipate and provide for every possible combination of circumstances which future cases may bring.[12]

III. The Humanity of the Law

The above excursus lays the foundation for appreciating one of the key likely concerns that may arise in consideration of the use of AI in judicial adjudication, and that is the concept of what Allsop CJ has described as the 'humanity of the law.' In a paper presented at the Annual Quayside Oration in Perth in November 2018 entitled 'The Rule of Law is not a law of rules'[13] his Honour discussed the concept of the rule of law focussing on what Dicey described as the 'pervading legal spirit of freedom' in the common law. In doing so, his Honour focussed in particular on the anthropological notion alluded to above that the rule of law is a 'state of affairs and an attitude of mind, as much as, if not more than, it is an abstracted principle or body of rules.' For his Honour, law is conceived and derived from values which inform and underpin a fair and reasonable expectation of how power should be organised, exercised and controlled at the private and public level.[14] Critically:

> … the law is human in its character, and in its object. Law, being society's relational rules and principles that govern and control all exercises of power, must have a character and form that is adapted to, and suited for, application to law's *human task*. An appreciation of this humanity of the law is central to its proper expression and to preserving its strength [emphasis in original]. [15]

That observation is well founded by a substantial corpus of academic and legal commentary including Sir Maurice Byers, Holmes and Cardozo. The human 'values' in that regard comprise honesty; a rejection of unfairness; an insistence on essential equality; respect for the integrity and dignity of the individual; and mercy. His Honour goes on to conclude that this humanity of the law transcends a logical reductionist approach to law:

> That the law is drawn in part from an indefinable human source – a source of feeling, of emotion, of a sense of wholeness – gives it a protective strength in the service of human society. That source of feeling and emotion includes a sense of, or need for, order or stability, but order in its human place informed by the dignity of the individual, and not overwhelmed by abstraction and taxonomy. That partly indefinable sense of wholeness of the law provides the systemic antidote to logical reductionism that, on its own, would see the law as the sharp instrument of those who control power … Law is not value-free. Law is not built and defined solely by rule making, by formulae or by inexorable command, but rather it is organised around, and derived from, inhering values (*human* values) and serves as an expression or manifestation of natural (and experientially founded) human and societal bonds of conduct. [16]

Central to the above observation is the assumption that 'life and experience' shape the law (echoing Holmes' famous aphorism[17]). The 'experience' to which Holmes was referring in that regard was the judge's subconscious intuition[18] while the logic refers to an attempt to impose consistency on intuitively developed law. [19]

IV. Some possible concerns

Having regard to the above, at least three main concerns can be identified with the implementation of AI in the judicial adjudication process whether that be ways of supplementing or supplanting the judicial process: (i) de-humanisation of the law; (ii) procedural fairness considerations; and (iii) possible erosion of the law's legitimacy and authority.

(i) De-humanisation of the law

I have already described the humanity of the law and its current significance for the rule of law. One possible concern with the use of AI in adjudication is its impact upon the above described human aspects of the law. How for example would an artificially intelligent judge ascertain relevant human values or human and societal bonds of conduct? To what extent would those values once determined be used in the adjudication process? What impact would this have on judgment generally? A proponent of AI may respond by arguing that the ascertainment of human values or human and societal bonds of conduct by human judges is equally as problematic as that of an artificially intelligent judge. The ascertainment of values by a human judge is necessarily limited by that judge's own limited experience and perceptions. By contrast, an artificially intelligent judge may be able to inform itself of human values by, for example, analysing mass media reports, social media posts and internet forum posts. Proponents of AI may also assert that human 'judgment' is merely a euphemism for arbitrariness, discretion or bias[20] which may be able to be reduced or eliminated through the use of AI. In that regard, in the field of sentencing, two Australian academics have recently argued that computerised sentencing has the potential to achieve superior outcomes to sentences imposed by human judges and that it can lead to greater transparency, predictability and consistency in decision-making, and eliminate the subconscious bias that 'currently afflicts' the decisions of some sentencing judges.[21]

(ii) Procedural fairness considerations

Academic commentators have noted that one of the most widely identified risks of AI decision-making is that it could function in ways that are difficult or impossible for humans to comprehend.[22] At present, machine learning which underpins most current AI technology, relies upon mass correlations within data to infer sophisticated statistical patterns.[23] These 'deep learning' techniques lack the explicit logical or inferential reasoning that characterise conventional human explanation.[24] Even if an explanation were to be comprehended, that may not be accessible. For example, in *State of Wisconsin v Loomis*[25] the Supreme Court of Wisconsin upheld a trial Court's sentence of seven years imprisonment imposed on Mr Loomis where the trial Court relied on results of a risk assessment provided by proprietary risk assessment software known as the 'Correctional Offender Management Profiling for Alternative Sanctions', or 'COMPAS'. The risk assessment provided a prediction about the risk that Mr Loomis would reoffend based on a comparison of information about Mr Loomis to a similar data group. The software developer however considered the algorithms used to be confidential and did not disclose how the risk scores were determined and how certain factors were weighed. Neither Mr Loomis nor the sentencing judge had access to the algorithm. Mr Loomis filed a petition for a writ of certiorari in the Supreme Court of the United States but that petition was denied.

Another aspect of procedural fairness which would need to be considered is the possible impact AI adjudication may have on advocacy and the role of the advocate. Even assuming that AI technology was capable of exhibiting human level intelligence, one wonders how an advocate would go about persuading such a technology or whether an advocate was required at all.

(iii) Possible erosion of the law's legitimacy and authority

One can easily foresee a Kafkaesque dystopia where 'codified justice' establishes an adjudicatory paradigm that privileges standardisation above discretion[26] and logical reductionism to the wholeness of the law identified by Allsop CJ above. The implications for law's legitimacy and authority could face significant challenges by providing possible fertile ground for disillusionment and alienation among stakeholders.[27] Such disillusionment may also alter the judiciary's internal composition, culture and attitudes.[28] For example, it is not difficult to imagine AI replacing relatively mundane judicial functions with the result that only a relatively small population of elite judges are responsible for deciding more complicated cases. Even then, the appeal of becoming a judge may decline in a world where human decision-making is criticised and perhaps seen as inferior to AI adjudicators.[29]

V. Conclusion

In this article I have sought to canvass some possible concerns that may arise in the implementation of AI in the judicial sphere. It is hoped it can be seen that in considering whether to implement such technology, stakeholders and those responsible will need to take into account and assess a number of considerations and possible repercussions for judicial decision-making and the rule of law generally. For what it is worth the writer considers that the possible perceived advantages of AI adjudication (costs savings, efficiency, consistency) are outweighed by the potentially profound disadvantages alluded to above and further research and analysis is required. It is hoped that this brief article at least gives readers pause for thought about what is likely to become a significant issue for the legal community and in particular for the Bar. BN

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The consequence of delay in Local Court criminal matters

By The Honourable John Nader RFD QC

With the passage of time it has become necessary to illustrate by specific example that the process of the administration of minor criminal law cases in the NSW local courts is so slow as to have become a disgrace to the executive administration.

Those delays are complained about time and again but rarely with specific reference to cases. I will refer to one such case below.

Many of the cases are either traditional summary cases or what I refer to as hybrid cases being prosecutions for indictable offenses that can be heard and decided by magistrates without committal for trial by judge and jury.

Although I have no statistical evidence, I am confident that the great majority of such cases are financed by the New South Wales Government legal aid system. Legal aid is strictly subject to means testing. There are persons charged with summary and indictable offenses who do not qualify for legal aid but who cannot afford the expense of a legal practitioner. Persons in that situation seek *pro bono* representation in a process akin to begging. Such *pro bono* work has come to me from time to time by sympathetic referrals by concerned persons, mostly with no connection to the case or the persons involved but concerned about justice.

The faults that gives rise to the grossly excessive delays in Local Courts are not faults of the magistrates or of the public servants who work to the limits of their mental and physical ability to perform very difficult duties. That should be kept in mind if occasionally court staff show some irritability when the pressure is on, which it is on most sitting days. Pressure on staff and magistrates seems to an outsider like myself to occur mostly on what are called "short matters days" when pleas of guilty and mentions are before the court.

It would be wrong to think that the problem is in part due to a shortage of courts.

Without the benefit of statistics I am reasonably confident in saying that a shortage of courts is not a significant factor. Many of the courts are not used as such on most days. They are not used because there are not enough magistrates or court staff to utilize and staff them.

What I call excessive delay is illustrated in the case to which I now refer.

The defendant was an 18 year old boy who was working as a fencing contractor and earning a reasonable amount of money. He

attended a party on 15 July 2017 at a private home and yard in a country town at which there may have been as many as 30 persons, almost all young males: 17 and 18 were the ages of a number of them. The host was 17.

The party commenced at about 6 PM and ended a little before midnight. Alcohol was consumed at the party, most of which was purchased by the Defendant who had a debit card and was asked by the host to purchase some alcohol. The Defendant purchased a large amount of beer after being driven by the host to purchase the beer. The Defendant had only been at the party for a short while when he became concerned after he saw a large number of the party goers sitting around a table smoking what he believed to be ice and marijuana. At one stage the Defendant left his wallet on the table and went to the toilet. When he returned his wallet was missing. The Defendant became quite distressed and was asking everyone where his wallet was. He was told by one of the other party goers to stop accusing people of stealing. The wallet was eventually located but the keycard was missing. The Defendant got into a scuffle with a couple of other guests as a result. When the scuffle broke out the Defendant has a leatherman type tool in his hand which made a cut on the shoulder of one of the others involved in the altercation. The injured man reported to the hospital and the hospital reported the incident to the police. The Defendant was charged with an assault offence. This is the only time he has ever been in trouble.

On 20 August 2017 a potential witness made a statement to the senior constable in charge of the prosecution.

On 25 October 2017 the defendant was interviewed by the senior constable.

On 24 May 2018 a potential witness made a statement for the senior constable.

On 12 April 2018 the defendant voluntarily attended the police station where he was interviewed by the senior constable and charged with two indictable offences based on the same facts.

On about 11 or 18 May 2018 a potential witness made a written statement for the senior constable.

On 16 November 2018 the date fixed for the hearing of the case did not proceed because so called *short matters* had also been listed and the presiding magistrate decided that the possible start time was after midday. That is understandable because the magistrates do not know from day to day where they may be required to sit.

Because the day had been fixed for the hearing, the defendant and his family had travelled from another town to be at there.

On *25 February 2019* the case was, at last,heard. The defendant and his family again travelling from another town for the hearing.

The case took well under a day to be heard. The defendant was found guilty and the matter was adjourned to 11 April 2019 for sentence. The magistrate considered it for some time. Although finding the Defendant guilty he was only sentenced to counselling for a short period of time and under section 10 of the Crimes Act does not have as criminal record.

You will notice that the case was on foot, from beginning to end, from July 1917 to April 1919: one year and eight months to dispose of a trial for a crime which on any view was not serious.

You will have no difficulty in imagining the distress of the defendant and his family as well as a number of close friends through that inordinately long time.

The defendant had only recently turned 18 when he attended the party: no convictions, no money other than his wages as labourer; never paid out of the taxpayer's purse; and paid $100/week to his mother for his board.

No adjournment or other delay was applied for by the defendant or his counsel that might have extended the duration of the case. The defence was ready to proceed at all times. The defendant was not granted legal aid and, although he was at all material times employed, he had to seek representation p*ro bono*.

The government has a duty to the community at large to improve the unsatisfactory system of management of summary criminal offences. BN

Scrutinising Two-Candidate Preferred Counting in the High Court

Andrew Emmerson reports on *Palmer v Australian Electoral Commission* [2019] HCA 24

The High Court has held unanimously that the Australian Electoral Commission's (Commission) practice of publishing a two-candidate preferred count (Indicative TCP Count) indicating the candidate most likely to be elected for a Division before the close of all polling Divisions within Australia did not infringe either ss 7 and 274 of the *Commonwealth Electoral Act 1918* (Cth) (Electoral Act) nor ss 7 and 24 of the *Constitution*.

Background

Prior to the 18 May 2019 election, Clive Palmer and three other candidates for the United Australia Party (Plaintiffs) applied to the High Court challenging the Indicative TCP Count and, in particular, the publication of the identity of candidates selected by the Commission for the purpose of the Indicative TCP Count in a Division (the TCP Candidates) and the progressive results of any of those indicative counts (the TCP Information) while polls remained open in some parts of Australia.

Two main issues were raised for the Court's determination:

- First, whether publishing the TCP Information before polls closed in all parts of Australia was unauthorised by the Electoral

Act because it would, in effect, impugn the Commission's required impartiality or its need to avoid the appearance of favouring one or more of the candidates; and

- Secondly, whether the effect of publishing the TCP Information while polls remained open in parts of Australia impermissibly distorted the voting system and the representative nature of the future Parliament, contrary to ss 7 and 24 of the *Constitution*.

The High Court's decision

In a joint judgment, Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ, held that as a matter of fact, neither issue was established on the evidence before the Court.

In respect of the statutory construction of s 7 of the Electoral Act, the Court held that publishing the TCP Information was authorised. The Court held there was an absence of evidence which would show impartiality or favourability toward one or more candidates constituting a breach of the Electoral Act, or distort the voting system contrary to, or have 'any effect on the requirement for direct and popular choice' required by ss 7 and 24 of the *Constitution* (at [6], [53]).

Their Honours construed s 7(3) of the Electoral Act as permitting the Commission to do all things necessary or convenient for or in connection with the performance of its functions', as including its s 274(2A) Electoral Act power '*…to conduct a count of preference votes* (other than first preference votes) ... that, in the opinion of the Australian Electoral Officer, will *best provide an indication of the candidate most likely to be elected for the Division*' (at [14], original emphasis).

To facilitate the Indicative TCP Count, the Commission had developed a process and procedure described in some detail in the joint judgment. At [14]-[26], their Honours described the Commission's practice of selecting and scrutinising TCP Candidates before polling day. The names of the TCP Candidates selected remained confidential until polling day, by being placed within a sealed envelope under Commission control. Only after the close of polls within a particular Division was the sealed envelope opened. The counting of preferences was then directed to TCP Candidates to reveal the Indicative TCP Count, which information was fed to the tally room for general publication.

Their Honours found several reasons as to why, on the evidence before the Court, the application failed for lack of factual foundation:

- First, there was an absence of evidence before the Court demonstrating that publishing the TCP Information had any effect on voters' choices where polls remained open in other Divisions in Australia (at [7], [31]–[36]).
- Secondly, the Plaintiffs' case was not put on the basis that *any* publication of TCP Information was impermissible. Rather, it was only put that publication was impermissible if it had an adverse *effect* on direct and popular choice. It was not shown how publishing the TCP Information about one Division might affect choices of voters in another Division (at [7] and [37]).
- Thirdly, the selection of TCP Candidates had not been shown to be inaccurate or misleading (at [38]-[39]).
- Fourthly, the Indicative TCP Count was not an expression of any Commission opinion about whether or not the prediction was 'a desirable or undesirable outcome'; rather, it was a prediction of the most likely candidate to be elected based on votes cast (at [7], [39] and [49]–[50]).

Their Honours considered the Commission's processes were within power and consistent with:

- promoting public awareness of election and ballot matters (at [47]);
- providing the public with an early indication of the candidate likely to be elected (at [48]); and
- meeting electors' expectations of receiving information about the vote made publicly available and promptly, to achieve transparency and give confidence in the maintenance of the electoral system chosen by the Parliament (at [49]).

Justice Gageler agreed with the joint judgment. His Honour considered that while some of the arguments raised by the Plaintiffs were 'sound' (at [59]), the absence of cogent evidence which would lead to the conclusions sought was fatal (at [68]-[69]).

Door to future challenge remains ajar?

Notwithstanding the outcome in this proceeding, the High Court appears to have left open the potential for future challenge based on cogent evidence that establishes that the publication of the TCP Information before polls close throughout Australia distorts voting behaviour. **BN**

Australian Securities and Investments Commission v Kobelt [2019] HCA 18

By Shipra Chordia

In *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, the High Court held by a majority of 4-3 that the provision of credit to residents of remote Aboriginal communities in the Anangu Pitjantjatjara Yankunytjatjara (**APY lands**) in far north South Australia pursuant to a particular form of the 'book-up' method was not unconscionable within the meaning of s 12CB(1) of the *Australian Securities and Investment Commissions Act 2001* (Cth) (**ASIC Act**).

Background

From the mid-1980s until 2018, the respondent – Lindsay Kobelt – ran a general store called Nobbys in the community of Mintabie, which is located on a leasehold excised from APY lands. Nobbys sold food, groceries, general goods, fuel and second-hand cars primarily to Indigenous residents of the APY lands (the **Anangu people**). Mr Kobelt also offered to his customers a system of credit known as 'book-up'. Under the system, in return for credit, Mr Kobelt's customers would hand over to him the debit card (**keycard**) and personal identification number (**PIN**) linked to their bank account. Mr Kobelt would use the keycard and PIN to withdraw money directly from those accounts on the day that payments were credited to them. The withdrawals continued until the debt was repaid.

The 'book-up' system was mainly used by Mr Kobelt's Anangu customers to finance purchases of second-hand cars. Mr Kobelt sold cars under the book-up system for approximately $1,000 more than the price he charged to cash-paying customers for similar cars. At his discretion, Mr Kobelt would also allow certain customers to buy a restricted set of grocery items from his store with the funds he had withdrawn from their bank accounts (known as 'book-down'), and would at times issue purchase orders and cash advances, for a fee of $5 or $10, to enable his customers to buy goods from a limited number of other stores in the region.

The Australian Securities and Investments Commission (**ASIC**) commenced proceedings in the Federal Court, alleging, inter alia, that the book-up system maintained by Mr Kobelt contravened s 12CB(1) of the ASIC Act. Section 12CB(1) proscribes conduct that is, in all the circumstances, unconscionable in trade and commerce in connection with the supply or acquisition, or possible supply or acquisition, of financial services. Section 12CC sets out, non-exhaustively, matters that a Court may have regard to in determining whether conduct is unconscionable under s 12CB(1).

What some might consider the denial of autonomy via the paternalistic intrusion of alien legal standards others may view as the necessary protection of vulnerable sections of the community by the force of law.

The primary judge (White J) considered that ASIC had established unconscionability under s 12CB(1). This aspect of the first instance decision was, however, overturned on appeal to the Full Federal Court (Besanko, Gilmour and Wigney JJ). Justices Besanko and Gilmour in their joint judgment emphasised that those who had entered into book-up arrangements with Mr Kobelt had some understanding of the system, did so voluntarily and understood that they could end the arrangement by, for example, cancelling their keycard. Their Honours also considered it relevant that no allegation had been made that Mr Kobelt had acted dishonestly. Justice Wigney, in a concurring but separate judgment, added that the primary judge had given insufficient consideration to anthropological evidence of cultural practices of the Anangu people which might explain their disposition towards entering into book-up arrangements with Mr Kobelt.

Reasoning of the majority

Chief Justice Kiefel and Bell, Gageler and Keane JJ held that Mr Kobelt's conduct was not unconscionable. In their joint judgment, Kiefel CJ and Bell J observed that the word 'unconscionable' in s 12CB(1) is not statutorily defined and is to be given its ordinary meaning of 'being against conscience'. The values that might inform the standard of conscience include 'certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made' as well as the protection of those with a vulnerability that precludes them from protecting their own interests. Their Honours accepted that a supplier of financial services might engage in conduct that is unconscionable even where a recipient has voluntarily entered into a contract for the supply of such services. They did not, however, accept that the absence of undue influence was irrelevant to a finding that there had not been unconscionable conduct. Similarly, Kiefel CJ and Bell J held that the absence of dishonesty, or other moral taint, is relevant to determining whether there has been a departure from accepted community standards, even if unconscionability is capable of being found in the absence of dishonesty.

Chief Justice Kiefel and Bell J emphasised that book-up credit provided Mr Kobelt's customers with the opportunity to purchase goods notwithstanding their low incomes and lack of assets with which to secure a loan. It was also relevant that Mr Kobelt's book-up system suited his Anangu customers 'for reasons that stemmed from cultural practices and norms and not from their position of special disadvantage' (at [66]). Their Honours held that it was open to the Full Court to have placed reliance on the system's capacity to assist Anangu people in avoiding the cultural practice of 'demand sharing' or 'humbugging' under which there was an expectation that resources, including financial resources, would be shared with relations upon their becoming available. By contrast, the only advantage that Mr Kobelt obtained from the system of book-up was to encourage his customers

to become dependent on Nobbys. Kiefel CJ and Bell J did not consider this sufficient to establish unconscionability.

Justice Gageler considered that the words of s 12CB 'make clear that the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a Court exercising jurisdiction in equity' (at [83]), and the function of a Court is to 'recognise and administer [the] normative standard of conduct' set out in s 12CB including by taking into account the considerations identified in s 12CC. His Honour noted that the appropriation of equitable terminology in s 12CB did not, however, authorise a Court to produce 'equity-lite', by adopting 'a process of reasoning which starts with the equitable conception of unconscionable conduct, involving exploitation of a special advantage, and then uses considerations in s 12CC to water down the Court's assessment of what amounts to a special disadvantage or to allow the Court to arrive more easily at an assessment that conduct amounts to exploitation' (at [89]). Justice Gageler retreated from his observation in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 that s 12CB requires 'a high level of moral obloquy' on the part of the person said to be acting unconscionably. His Honour clarified that that reference was meant only to convey that the conduct ought to be 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct offensive to conscience' (at [92]). Justice Gageler acknowledged that there were factors in both directions on the question of statutory unconscionability. Pointing towards unconscionability were Mr Kobelt's relative strength of bargaining power, his differential treatment of Anangu customers from non-Indigenous customers, that his credit could have been provided by means less restrictive of his Anangu customers' freedom of action, that he had no particular reason to withdraw all, or almost all, of the funds paid into his Anangu customers' accounts, that his bookkeeping did not allow his Anangu customers to keep track of their indebtedness, and that the credit charge on car purchases had been found to be 'very expensive' (at [98] – [99]). On the other hand, Mr Kobelt did not exert undue influence or pressure and also did not act in bad faith. Beyond that balancing of competing considerations, Gageler J observed that the continuing relationship between Mr Kobelt and his Anangu customers was not the involuntary consequence of the book-up system, but 'a matter of choice on the part of those customers'. ASIC's contention that the customers' choice was evidence of their vulnerability failed, in Gageler J's opinion, 'to afford to the Anangu people the respect that is due to them within contemporary Australian society' (at [110]).Unlike Gageler J, Keane J continued to find utility in the concept of 'moral obloquy', holding that 's 12CB calls for a judgment as to whether the impugned conduct exhibits the level of moral obloquy associated with predatory conduct' (at [120]). For Keane J, ASIC had failed to establish that Mr Kobelt had exploited his Anangu customers' vulnerability with a view to securing pecuniary advantage. His Honour considered that ASIC's contention regarding the Anangu people's vulnerability did not consider that they exercised market power 'inherent in their numbers and social solidarity' as well as by virtue of the existence of competing suppliers (at [129]).

The dissenting judgments

A critical distinction between judges in the majority and those dissenting was that the latter accepted ASIC's assertion that the Anangu people's choice in entering into book-up arrangements with Mr Kobelt was evidence of their special disadvantage or vulnerability rather than of their agency. Thus, for Nettle and Gordon JJ, the central question in the case was whether Mr Kobelt's book-up system 'took advantage of an inability on the part of some of his customers to make worthwhile decisions in their own interests, which inability was sufficiently evident to Mr Kobelt, or should have been, to render his system exploitative' (at [151]). Their Honours considered that it was not paternalistic to look at a transaction and the position of the parties 'objectively'. Justices Nettle and Gordon considered that Mr Kobelt had taken advantage of his Anangu customers by failing to assess their financial situation before offering them credit, by charging undisclosed credit fees on the sale of the second-hand cars, by withdrawing extra amounts without authority, by arbitrarily exercising discretion in relation to the 'book-down' system, by maintaining poor records, and by encouraging a dependence on Nobbys. Their Honours considered that the anthropological evidence disclosed little support for the purported advantage of avoiding demand-sharing. Justices Nettle and Gordon also considered it relevant that Mr Kobelt's particular book-up system could have been offered in such a way as to avoid its unconscionable aspects. Their Honours observed that the 'ready willingness of Mr Kobelt's customers to hand over their key cards and their PINs seems to reflect a lack of understanding as to the precautions which they should take in their own self-interest' (at [236]).

Justice Edelman's reasons were broadly consistent with those of Nettle and Gordon JJ, albeit that his Honour also emphasised that it was relevant that Mr Kobelt's system of credit was the only form of credit available to 'remote communities of highly vulnerable persons in need of credit' (at [313]).

Conclusion

ASIC v Kobelt is an example of a 'hard case' the unusual facts of which may curtail its wider application. The differences between the majority and the minority underscore the difficulties which can arise in characterising human decision-making as 'free' or otherwise. What some might consider the denial of autonomy via the paternalistic intrusion of alien legal standards others may view as the necessary protection of vulnerable sections of the community by the force of law. Such considerations undoubtedly take on further layers of complexity and the need for sensitivity when they are decided at what Gageler J described as 'the "intersection" between the distinctive culture of indigenous peoples in remote communities and "mainstream" Australian society' (at [94]). BN

Claims for *quantum meruit*

Bradley Dean reports on *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32

The High Court has held that the amount recoverable in a *quantum meruit* claim made following the repudiation of a contract may not exceed that which would have otherwise been available under the contract. In so doing, the High Court has not followed the previously accepted position arising from *Lodder v Slowey* [1904] AC 442 to the effect that a claim for *quantum meruit* could exceed what might otherwise have been payable under the contract.

Background

The appellants entered into a contract with the respondent, a builder, for the construction of two townhouses on land owned by the appellants. The contract was prepared in accordance with the *Domestic Building Contracts Act 1995* (Vic) (DBC Act).

After entering into the contract, the appellants orally requested a number of variations in relation to the townhouses. The variations were carried out by the respondent.

At or about the time of the handover of one of the newly-constructed townhouses, the respondent issued an invoice to the appellants for the cost of the variations requested by the appellants.

The appellants refused to pay the invoice on the basis that it was issued in breach of the contract.

The appellants further asserted that the respondent had breached other aspects of the contract, and the breaches were said to amount to a repudiation of the contract by the respondent, which the appellants accepted. In response, the respondent denied having repudiated the contract, asserted that the appellants' purported determination of the contract was itself repudiatory and confirmed that the respondent accepted the appellants' repudiation of the contract.

The respondent instituted proceedings in the Victorian Civil and Administrative Tribunal (VCAT) seeking damages, or 'alternatively, a balance of moneys for work and labour done and materials up to the date of termination'. VCAT found the appellants had wrongfully repudiated the contract, and that the repudiation was accepted by the respondent as bringing the contract to an end. Having made those findings, VCAT determined that the respondent's 'claim for recovering on a *quantum meruit* basis [was] established', and the respondent was 'entitled to an amount that reflected the value of the benefit that it … conferred upon the Owners' – that is, 'not the builder's entitlement according to the contract but rather, the reasonable value of the work and materials the [appellants] requested and the value of the benefit they have received from the builder'. VCAT observed that, 'by succeeding in a claim for a *quantum meruit,* the Builder … recovered considerably more than it might have recovered had the claim been confined to the Contract' (see *Mann* at [135]-[140]).

The appellants sought and were granted leave to appeal to the Supreme Court of Victoria. The appeal was determined in favour of the respondent.

The appellants then sought and were granted leave to appeal to the Court of Appeal. The Court of Appeal granted leave on a limited basis and dismissed the appeal.

The appellants were granted special leave to appeal to the High Court.

The High Court decision

In three judgments, the High Court unanimously allowed the appeal.

In a joint judgment, Kiefel CJ, Bell and Keane JJ allowed the appeal on the basis that the Victorian Court of Appeal erred in holding that the respondent was entitled to sue on a *quantum meruit* for the works carried out by it.

Their Honours observed that the notion that a 'contract between … parties becomes 'entirely irrelevant' upon discharge for repudiation or breach is … fallacious. As Mason CJ said in *Baltic Shopping Co v Dillon* [(1993) 176 CLR 344 at 356]: 'It is now clear that … the discharge operates only prospectively, that is, it is not equivalent to rescission ab initio'.'

Their Honours stated (at [19]-[20]) that in circumstances where the respondent has enforceable contractual rights to money that has become due under the contract 'there is no room for a right in the respondent to elect to claim a reasonable remuneration unconstrained by the contract between the parties'. To do so 'would be to subvert the contractual allocation of risk'. The same applied where, as in *Mann*, 'the innocent party has an enforceable contractual right to damages for loss of bargain'. Their Honours stated further that to allow a restitutionary remedy by way of a claim for the reasonable value of work performed unconstrained by the terms of the applicable contract 'would undermine the parties' bargain as to the allocation of risks and quantification of liabilities, and so undermine the abiding values of individual autonomy and freedom of contract'.

Their Honours thus determined that *Lodder v Slowey* should no longer be applied (at [50]).

In a separate joint judgment, Nettle, Gordon and Edelman JJ also allowed the appeal.

Their Honours identified three categories of work performed by the respondent:

(1) work done in response to a requested variation within the meaning of s 38 of the DBC Act, the amount of remuneration for which being determined in accordance with ss 38 and 39 of the DBC Act;

(2) work, not being work done in response to a requested variation, comprising completed stages of the contract as defined in the contract, the amount of remuneration for which being that prescribed by the contract, with any damages for breach of contract to be calculated accordingly; and

(3) work, not being work done in response to a requested variation, comprising part of a stage of the contract that had not been completed at the time of termination, being work in relation to which the respondent was entitled, at its option, to damages for breach of contract or restitution, with the amount of restitution being limited in accordance with the rates prescribed by the contract.

In relation to the third category, their Honours observed (at [205]) that 'where a contract is enforceable, but terminated for repudiation, there are no reasons of practicality and few in principle to eschew the contract price'. Although the contract is terminated for breach, 'it continues to apply to acts done up to the point of termination, and it remains the basis on which the work was done'. Accordingly, there 'is ... nothing about the termination of the contract as such that is inconsistent with the assessment of restitution by reference to the contract price for acts done prior to termination'.

Their Honours also referred to the allocation of risk, consistent with the observations of Kiefel CJ, Bell and Keane JJ, namely that the contract price reflected the parties' 'agreed allocation of risk' and that termination of the contract 'provides no reason to disrespect that allocation' (at [205]).

Their Honours further observed that 'just as a contract may inform the scope of fiduciary and other equitable duties' the price at which a defendant has agreed to accept the work comprising an entire obligation 'is logically significant to the amount of restitution necessary to ensure that the defendant's retention of the benefit of that work is not unjust and unconscionable' (at [214]). Their Honours said that that approach is consistent with 'the Australian understanding of restitutionary remedies that a contract, although discharged, should inform the content of the defendant's obligation in conscience to make restitution where the failed basis upon which the work and labour was performed was the contractor's right to complete the performance and earn the price according to the terms of contract' (at [215]).

Accordingly, Nettle, Gordon and Edelman JJ concluded that it was appropriate to recognise that where an entire obligation (or divisible stage of a contract) for work and labour was terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable as upon a *quantum meruit* by the plaintiff for work performed as part of the entire obligation (or the divisible stage of the contract) 'should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price' (at [215]).

Their Honours acknowledged, however, at [203]-[204], that there may be circumstances in which 'it is necessary or appropriate that the benefit of work to the defendant be determined without reference to a contract price', e.g. where a claim to *quantum meruit* is founded upon a contract which does not expressly fix a price for services, or where the claim is founded on an obligation to pay for services rendered under a contract which is unenforceable.

In a separate judgment, Gageler J also allowed the appeal, concluding that the amount recoverable on a non-contractual *quantum meruit* as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation 'cannot exceed that portion of the contract price as is attributable to those services' (at [102]). BN

Female Genital Mutilation and Statutory Construction

Cecilia Curtis reports on *The Queen v A2; The Queen v Kubra Magennis; The Queen v Shabbir Mohammedbhai Vaziri* [2019] HCA 35

Arising from the first prosecution of its kind in Australia ([2019] HCATrans016), the High Court held in *The Queen v A2; The Queen v Kubra Magennis; The Queen v Shabbir Mohammedbhai Vaziri* [2019] HCA 35 that for the purposes of the crime of female genital mutilation under s 45(1) of the Crimes Act 1900 (NSW):

- the word 'mutilates' does not carry its ordinary meaning but, rather, means to injure to any extent; and
- the word 'clitoris' includes the clitoral hood or prepuce.

Three judgments constituted the majority of the Court (Kiefel CJ and Keane J; Nettle and Gordon JJ; and Edelman J). Nettle, Gordon and Edelman JJ agreed with the judgment of Kiefel CJ and Keane J and provided some additional reasons for preferring the construction of s 45(1) advanced by the Crown. Bell and Gageler JJ dissented. The decision of the majority turned on taking a purposive approach to statutory construction.

Background

In 1994 the *Crimes (Female Genital Mutilation) Amendment Act* 1994 (NSW) was passed. It created a specific offence of female genital mutilation. That offence is contained in section 45(1) of the *Crimes Act* 1900, which renders any person who *'excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person'* liable to imprisonment.

The three defendants were tried on an indictment charging them with offences under that section. All of the charges arose out of allegations that two girls, C1 and C2, had been subjected to a ceremonial procedure known in the Dawoodi Bohra community as 'khatna', which procedure involved the 'cutting' or 'nicking' of the clitoris. Kubra Magennis was a nurse who was alleged to have actually carried out the procedure. A2 is the mother of the girls. The Crown case was that Magennis and A2 were in a joint criminal enterprise to perform the procedure. Vaziri was a spiritual leader

within the community who was charged with being an accessory after the fact.

The Crown case was that the procedure that had been carried out involved a 'cut' or a 'nick' to the clitoris or the clitoral hood (or prepuce). The defendants were convicted by a jury, having been directed that the word 'mutilate' means 'injure to any extent' and includes a 'cut' or a 'nick'. On appeal, the NSW Court of Criminal Appeal (*A2 v R; Magennis v R; Vaziri v R* [2018] NSWCCA 174) quashed the convictions on the basis (inter alia) that:

- the word 'mutilates' should be given its ordinary meaning of 'injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion'; and
- the term 'clitoris' did not include the clitoral hood or prepuce.

The Crown appealed to the High Court.

The three majority judgments

Kiefel CJ and Keane J said that although statutory construction 'commences with a consideration of the words of the provision itself', it 'does not end there' and that the taking of a literal approach to statutory interpretation has 'long been eschewed by this Court' (at 10). Their Honours said that the ordinary meaning of a word may, by its context, have a different legal meaning (at 11). Context involves a consideration of the mischief which the provision in question sought to remedy and its purpose (at 11).

Their Honours held that the heading of the provision ('Prohibition of female genital mutilation') and the Second Reading Speech identified the mischief the provision was designed to address and its purpose. The Second Reading Speech, in particular, indicated that the provision was intended to implement the recommendations of a report on female genital mutilation published by the Family Law Council (the FLC report). That report referred to four categories of 'female genital mutilation' and recommended that all four be outlawed. Those four categories included, in ascending order of seriousness, 'ritualised circumcision' (purely ritual or involving a 'nick' or scrape to the clitoris), 'sunna' (removal of the clitoral prepuce or hood), 'clitoridectomy' (removal of the entire clitoris) and 'infibulation' (removal of all external genitalia and the sewing together of the labia majora).

Their Honours concluded that the ordinary meaning of the term 'mutilates' had to be displaced by a broader meaning in order to give effect to the purpose of s 45, being the outlawing of 'female genital mutilation in all its injurious forms' (at 17 and 18). It therefore means to injure to any extent.

As to the meaning of 'clitoris', their Honours held that, taking a similarly purposive approach to the provision, it had to be understood as including the clitoral hood or prepuce (at 21).

Nettle and Gordon JJ agreed with Keane CJ and Kiefel J and but added that there were other considerations militating in favour of the broad construction of the term 'mutilates', including (at 49-50):

- the terms of the section itself do not speak of the infliction of irreparable damage;
- the section proscribes mutilation of 'any part' of the clitoris and there is no textual basis to make the 'vanishingly subtle distinction' between the 'excision' of a part of the clitoris (which would fall within the terms of the section on the Court of Criminal Appeal's construction) and its 'cutting' or 'nicking'; and
- excluding conduct which constitutes a 'cut' or a 'nick' from the provision would

deprive the words 'otherwise mutilates' and 'any part' of 'any meaningful work to do'. The terms 'excises' and 'infibulates' capture the last three forms of female genital mutilation referred to in the FLC report (namely 'sunna', 'clitoridectomy' and 'infibulation'). The first form, on the other hand, is captured by the term 'otherwise mutilates'.

Edelman J agreed with the reasons of both of the other majority judgments but also specifically rejected the argument that the words 'female genital mutilation' should be regarded as 'frozen in time' such that they could only bear the meaning available when the provision was enacted. His Honour relied on the principle of statutes 'always speaking', meaning that '[w]here legislation does not expressly delimit the scope of its application then its scope is usually to be determined by the contemporary application of its essential meaning that will best give effect to its legislative purpose' (at 57). His Honour said that no matter what was understood about the practice of female genital mutilation as expressed in the Second Reading Speech, the essential meaning of 'otherwise mutilates' captures any tissue damage to the genitals of female children. This was an argument that had not been advanced by the Crown (see judgment of Bell and Gageler JJ at 44).

Bell and Gageler JJ dissented, concluding that the extrinsic material did not support the contention that the expression 'female genital mutilation' had acquired a meaning that encompassed ritualised practices as at the date of the Amending Act (at 140). Their Honours rejected the proposition that the principle that an Act is 'always speaking' contemplates that conduct that did not give rise to an offence at the time the offence was enacted could become an offence (at 141). Their Honours held that giving the words 'otherwise mutilates' their ordinary meaning could not be said to not promote the purpose or object of the Act (at 145), since it proscribed the three forms of female genital mutilation identified in the Minister's Second Reading speech. BN

A Majority of the Victorian Court of Appeal Uphold Cardinal Pell's Conviction for Child Sexual Assault Offences

Emma Sullivan reports on *Pell v The Queen* [2019] VSCA 186[1]

On 21 August 2019, the Victorian Court of Appeal dismissed Cardinal George Pell's appeal against conviction for the commission of sexual offences by majority (2 to 1).

The appeal followed Cardinal Pell's conviction on 11 December 2018 in the Victorian County Court after a five week trial before a jury of one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16.

Cardinal Pell was sentenced to six years imprisonment (with a non-parole period of three years and eight months).

Grounds of appeal

Cardinal Pell sought leave to appeal from his conviction, relying on three proposed grounds of appeal (with the application for leave and the appeal itself being heard together). The first and primary ground was that the guilty verdicts were unreasonable and could not be supported having regard to the whole of the evidence (including evidence that was said to be unchallenged and exculpatory).

The second ground of appeal related to the trial judge's refusal to permit defence counsel to show the jury a 19 minute animation (showing a blue-print of the Cathedral complex with various coloured dots and lines depicting persons or groups) during his closing address to the jury.

The third ground of appeal asserted a fundamental irregularity in the trial process by not arraigning the accused in the presence of the jury as required under the *Criminal Procedure Act 2009* (arraignment being the process where the charge is read to the accused person named on the indictment and they are asked whether they plead guilty or not guilty). The issue arising was whether this had occurred 'in the presence of' the jury panel, who were in a different room watching via video link at the time of Cardinal Pell's arraignment.

Determination of appeal

Relevant context

The offences were alleged to have been committed by Cardinal Pell against two 13 year old choirboys in the St Patrick's Cathedral choir on two occasions while the Cardinal was Archbishop of Melbourne in 1996–1997. The first occasion was alleged to have involved both boys (A and B) in the Priests' Sacristy of the Church; the second involved only A and was alleged to have occurred in a busy corridor within the Church. By the time A made a report to police in 2015, B had died from accidental causes.

The prosecution case rested primarily on evidence given by A. In addition, numerous witnesses involved with Sunday Mass at the Cathedral gave evidence as to processes and practices ('the opportunity witnesses' whose evidence concerned whether there was a realistic opportunity for the offending to have occurred). Cardinal Pell's voluntary interview with police – in which he denied the allegations – was shown to the jury. The defence called no evidence at the trial.

The central prosecution submission was that A was a witness of truth. For Cardinal Pell, it was submitted that the jury must have had a doubt about A's account, said to be a fabrication or fantasy; the evidence of the opportunity witnesses was said to render A's account impossible, and to constitute a 'catalogue of at least 13 solid obstacles in the path of a conviction': *Pell v The Queen* [2019] VSCA 186, at [157].[2]

Ground 1 (unreasonable verdict)

The majority (Chief Justice Ferguson and Justice Maxwell, President of the Court of Appeal), found that on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was guilty of the offences. Their Honours relevantly held that:

- the inquiry into a ground of unreasonableness is a 'purely factual one': the appeal Court reviews the evidence presented to the jury and asks whether on that material, it was open to the jury to convict the accused (at [13]);
- the approach an appellate Court must take when addressing the unreasonableness ground was authoritatively stated in *M v The Queen* (1994) 181 CLR 487, where their Honours (Mason CJ, Deane, Dawson and Toohey JJ) said that the appeal Court must ask itself: 'whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty' (at [19]).

The majority stated that they had approached their task by trying to put themselves in the closest possible position to that of the jury, having read the transcript, watched some of the oral evidence and attended a view of the Cathedral: at [33]. Their Honours also tried on the Archbishop robes (as the jury had done); they considered it was well open to the jury to reject the contention of physical impossibility of manoeuvring the robes: at [144] – [146].

There was nothing about the complainant's evidence or the opportunity evidence which meant that the jury 'must have had a doubt': their Honours accepted A to be a compelling witness, whose account had the ring of truth.

In a lengthy dissenting judgment, Weinberg JA held that it was not open to the jury to be satisfied beyond reasonable doubt of Cardinal Pell's guilt. In particular, his Honour found A's account of the second incident (said to have occurred in a corridor in plain view) to be implausible (at [1054]); he considered A to have embellished certain matters (at [928]) and found there was a cogent body of evidence casting doubt on A's account, both as to credibility and reliability (at [1058] – [1059]).

Ground 2

In refusing leave on this ground, the Court of Appeal agreed with the trial judge's ruling refusing to permit the animation to be shown to the jury during defence counsel's final address. It was considered to bear little resemblance to the actual evidence and was described as 'tendentious in the extreme', with the potential to mislead or confuse the jury (at [16], [1128]-[1130]).

Ground 3

The Court of Appeal determined that the word 'presence' in the context of the legislation included presence by video link and did not require physical presence (at [16], [1136] ff).

Special leave application

On 13 November 2019, Justices Gordon and Edelman referred Pell's application for special leave to appeal to the Full Court of the High Court for argument as on appeal: *Pell v The Queen* [2019] HCATrans 217 (13 November 2019). BN

ENDNOTES

1 The judgment of the Victorian Court of Appeal extends to 325 pages – necessarily, this short form summary can provide a high level overview only.

2 *Pell v The Queen* [2019] VSCA 186, supra, at [157].

The UK Supreme Court finds that Boris Johnson's prorogation of Parliament was unlawful

Stephanie Gaussen reports on *R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

On 23 June 2016, the United Kingdom (**UK**) determined by referendum to leave the European Union (**EU**). After two extensions to the 'leave date' and several failed attempts by Prime Minister Theresa May to secure an approved withdrawal agreement, on 24 July 2019 Boris Johnson was appointed Prime Minister. On 28 August 2019 the UK Parliament was ordered to be prorogued by Queen Elizabeth II upon the advice of Boris Johnson. The prorogation was to suspend the Parliament for five weeks from 9 September to 14 October 2019 – with MPs returning just 17 days before the UK was scheduled to depart the EU on 31 October 2019.

What is prorogation?

Parliamentary sittings are divided into sessions. Prorogation is a prerogative act of the Crown which terminates the parliamentary sitting session – usually for less than a week. In effect, prorogation ends all business and proceedings in Parliament. Neither House can meet, debate or pass

legislation while Parliament is prorogued. Generally, bills which are not yet complete must be started again in the next session of Parliament.

Prorogation may be distinguished from the dissolution of Parliament, which brings the current Parliament to an end with a general election called. Similarly, prorogation may be distinguished from a parliamentary recess, whereby each house does not sit, but parliamentary business can otherwise continue as usual.

Parliament is prorogued by the Crown on the advice of the Privy Council. The Crown is obliged, by constitutional convention, to accept the Privy Council's advice.

Lower Court decisions

In early September 2019, the High Court of Justice ruled that the matter of prorogation was not subject to judicial review as it was a political decision: *R (Miller) v The Prime Minister* [2019] EWHC 2381 (QB). The same conclusion was reached by the Outer House of the Court of Session, the Scottish civil Court of first instance: *Cherry v Advocate General for Scotland* [2019] CSOH 70. However, on 13 September 2019 the Inner House of the Court of Session in Scotland overturned the Outer House ruling and held that the prorogation was justiciable and unlawful: *Cherry v Advocate General for Scotland* [2019] CSIH 49. The three-judge bench unanimously found that the prorogation

was motivated by the improper purpose of stymying parliamentary scrutiny of the Executive, declaring the royal proclamation null and of no effect. The High Court and the Inner House each granted leave to appeal to the Supreme Court (**UKSC**).

The UKSC Proceedings

The conflicting decisions of the High Court and the Inner House of the Court of Session were appealed and heard together in the UK Supreme Court (**UKSC**). The UKSC, in a unanimous decision, held that the prorogation was both justiciable and unlawful.

Justiciability

Counsel for the Prime Minister and the Advocate General representing the UK Government argued that the Court should decline to consider the matter on the basis that the issues raised were not justiciable.

The Court noted that Courts have exercised a supervisory jurisdiction over the decisions of the Executive for centuries. It observed that when considering justiciability, two different issues could arise. The first is whether a prerogative power exists, and if it does, its extent. The second question is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The Court held, and it was accepted by all parties, that it undoubtedly has the power to decide upon the first issue. The Court concluded that this case concerned the first question only, namely the existence and limit of prerogative power to advise the Queen to prorogue Parliament.

What then, are the limits of that power? Two fundamental constitutional principles were informative:

(1) Parliamentary sovereignty – that laws enacted in Parliament are the supreme form of law, with which everyone, including Government, must comply. The sovereignty of Parliament would be undermined if the Executive could, through prorogation, prevent Parliament from exercising its legislative authority for as long as it pleased. Such a position would only arise if there was no legal limit on the power to prorogue; and

(2) Parliamentary accountability – Ministers are accountable to Parliament through various mechanisms including their duty to answer parliamentary questions, to appear before parliamentary committees and through scrutiny of the delegated legislation which Ministers make. This requires that the Executive report, explain and defend its actions, thereby protecting citizens from the arbitrary exercise of Executive power.

The Court observed that the longer Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government. An unlimited power of prorogation would be incompatible with the legal principles of parliamentary sovereignty and parliamentary accountability.

The Court concluded that the ruling as to the extent of prerogative power to prorogue was a justiciable issue.

Defining the relevant limitation, the Court said that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if:

> the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the Executive. (At [50]).

The Court observed that it would only intervene if the effect was sufficiently serious. In judging any justification which might be put forward a Court must be sensitive to the responsibilities and experience of the Prime Minister and proceed with appropriate caution.

Was the advice lawful?

In then considering whether the prorogation had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions, the Court concluded: 'of course it did' (at [55] – [56]).

The prorogation was not a 'normal prorogation'. It prevented Parliament from carrying out its constitutional functions for several weeks and it was ordered in exceptional circumstances whereby the UK was scheduled to exit the EU on 31 October 2019. The Court observed that Parliament, and in particular the House of Commons, had a right to voice how the UK would withdraw from the EU, particularly since the House of Commons had not supported the Prime Minister on the issue of leaving the European Union without an agreement.

When considering whether there was a reasonable justification, the Court ultimately held that it was impossible to conclude on the evidence before it that there was a good reason, let alone a reasonable justification, to advise the Queen to prorogue Parliament for five weeks. In circumstances where Parliament was stymied with no reasonable justification, it followed that the advice was unlawful. It was outside of the powers of the Prime Minister to give the advice, meaning that it was null and of no effect. Accordingly, the actual prorogation was also null and of no effect.

The Court thereby declared that Parliament had not been prorogued at all and was still in session. Contrary to media reports that the Court found that Boris Johnson had 'lied' to the Queen, the Court explicitly declined to determine the Prime Minister's motive or purpose. This consideration was unnecessary in circumstances where it was satisfied that there was no reasonable justification for the Prime Minister's advice to the Queen.

Prorogation in Australia

In Australia, prorogation is a power held by the Governor-General under section 5 of the Constitution. Most modern Australian Parliaments (other than the 44th, which was prorogued in 2016) have consisted of a single session, being prorogued only shortly before the House of Representatives was dissolved ahead of a general election.

The use of prorogation as a political tactic is not a foreign concept. In 2010 Governor Marie Bashir accepted advice from New South Wales Premier Kristina Keneally to prorogue Parliament for more than two months, in the lead up to the State election. This act was widely criticised as an attempt to shut down a parliamentary inquiry into the privatisation of the State's electricity assets.[1]

While the UKSC emphasised that the decision was a 'one off', the case may be used as a framework through which prorogation could be challenged in Australia. This is particularly so if an order to prorogue is made for a lengthy period, or at a politically sensitive time. Questions arise in Australia as to whether the Governor-General's power to prorogue is constrained by the convention to act on the advice of responsible ministers, or is subject to 'reserve powers' that repose a discretion as to whether or not to accept that advice.[2] That may give rise to different questions of justiciability than those that arose before the UKSC.

The UKSC decision does not bind Australian Courts. However, an order to prorogue has never been contested in Australia. If it was, the UKSC decision would be persuasive. In the future, government may well have to answer a challenge by demonstrating that it had reasonable justification to prorogue.[3] **BN**

ENDNOTES

1 For discussion, see Oliver, E 'Proroguing the Parliament of Australia: The Effect on the Senate and the conventions that constrain the prerogative power' (2012) 40 *Fed LR* 69.

2 See Oliver, E, above at p 83, 87-88.

3 See discussion in Twomey, A 'The UK Supreme Court ruling on suspending parliament is a warning for Australian politicians.' *The Conversation*, 26 September 2019 [http://theconversation.com/the-uk-supreme-Court-ruling-on-suspending-parliament-is-a-warning-for-australian-politicians-124263].

Trouble in Paradise Papers: privilege may not found a cause of action

Claire Roberts reports on *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 (14 August 2019)

Legal professional privilege is not a legal right that may found a cause of action. The High Court unanimously held in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 that it is an immunity against the exercise of powers which would otherwise compel the disclosure of communications. Where disclosure does not need to be compelled – because the party wanting to use a document, or information, already has it – any injunction must be sought on an alternative basis.

Background

The 'Paradise Papers' are a collection of documents taken from offshore entities and made available to the International Consortium of Investigative Journalists. A significant portion of the documents were taken from electronic files of the law firm Appleby (Bermuda) Limited (Appleby). Appleby clients affected by the data breach included Apple, Nike, and members of the British royal family. (The 'Paradise Papers' followed the earlier 'Panama Papers' leak, which had involved documents from the Panama firm Mossack Fonseca).

The plaintiffs (Glencore) asked the defendants to return documents that Glencore claimed were subject to legal professional privilege (the Glencore documents) and to provide an undertaking that the Glencore documents would not be relied on or used. When these requests were refused, Glencore brought a proceeding in the High Court's original jurisdiction seeking to restrain the defendants from using the Glencore documents, and also for delivery up.

The High Court did not consider the underlying question of whether the Glencore documents were privileged, and concluded that a submission about s 166 of the *Income Tax Assessment Act 1936* (Cth) did not require determination in the circumstances of the case.

A right best characterised as an immunity

The High Court considered the history of privilege as a right. Early examples of the use of privilege – such as to shield a witness from the obligation to answer questions in Court – were consistent, the Court said, with the notion of privilege as an immunity rather than a substantive cause of action (see [15] – [18]).

The Court also addressed the policy rationale behind privilege: the public interest in encouraging parties to access legal advice. This was, the Court noted, a critical right. To the extent that the interest came into tension with the public interest of fairly conducted litigation, privilege was paramount: *Grant v Downs* (1976) 135 CLR 674. This was not so as to further a client's personal interests but to enhance the administration of justice generally (at [10], [27] – [30]).

The plaintiffs contended that this policy basis supported the view that privilege was actionable. The Court's view was that public policy was not a ground for change in and of itself: policy considerations might guide the development of law, but can only do so where settled principles provide an avenue. The Court did not consider the possibility of creating a new, actionable right to be open to it in these circumstances (at [13], [40] – [42]).

While privilege is a substantive immunity, the Court concluded, it is not an actionable right. A right to resist disclosing information or documents does not serve as a sword in circumstances where disclosure has already happened.

Domestic and foreign cases distinguished

The plaintiffs had argued that a number of domestic and international cases supported the case it sought to advance. The Court found that these could be distinguished.

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303 did not stand for a 'broader proposition' which would allow privilege to be asserted as the basis of an injunction (at [36]). In Expense Reduction, a case about inadvertent disclosure by solicitors, the Court did not need to consider the availability of an injunction because case management powers were sufficient to make the orders requested.

Two key foreign cases were found to be principally concerned with whether there had been a loss of the necessary quality of confidentiality to found an injunction.

In *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327, a publisher in a defamation case was prohibited from using information provided to it in breach of confidence. The High Court found that that case turned on its unique facts and contained commentary that supported the interpretation the High Court had taken of earlier authorities (at [37]).

In *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94, hacked emails were posted online, but similarly found to retain a confidential character. In that case, the Court of Appeal of Singapore considered it significant that the emails comprised only a small proportion of the data stolen, so the applicant must have known that they were confidential and privileged when he searched to find them. Again, the High Court in this case indicated that the centrality of confidentiality of that case meant that it provided no support for privilege as a cause of action (at [38]).

Alternative course of action

The Court suggested that the equitable basis on which Glencore might seek an injunction was an apprehended breach of confidential information (see particularly [6], [19], [34]-[39]). That right is well established.

While it was not necessary to decide the point, the Court did indicate that Glencore would need to overcome difficulties to obtain an injunction to protect the confidential nature of the Glencore documents. First, the fact that the Glencore documents have been widely disseminated is relevant to the question of whether they retain a confidential character. Secondly, there had been no allegations about the defendants' conduct or knowledge in obtaining the Glencore documents (see particularly [7], [33]). The Court also expressed concern about a hypothetical circumstance in which the defendants could be tasked with assessing tax obligations on a basis known to be wrong (at [33]). BN

Vale the *Chorley* Exception

Benjamin Goodyear reports on *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29

If a party had a choice between losing a case against a represented party or losing a case against a self-represented litigant, it is suggested that the latter might be preferred (even if counsel might think otherwise). Against the former, the losing party may be ordered to pay the costs that the represented party has spent on lawyers. Against the latter, the general rule is that the self-represented litigant would not be entitled to compensation for the value of his or her time spent in litigation.

The *Chorley* exception

There has, however, thought to have been an exception to the general rule. If the self-represented successful litigant happened to be a solicitor, the litigant was able to recover his or her professional costs of acting in the litigation. Having been established in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, the exception was known as the '*Chorley* exception'.

On 4 September 2019, the High Court of Australia delivered judgment in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 and unanimously held that the *Chorley* exception should not be extended for the benefit of a self-represented litigant who was a barrister. A majority of the Court went further to hold that the *Chorley* exception is not part of the common law of Australia.

The facts

Solicitors retained a barrister to appear in the Supreme Court of New South Wales. A dispute arose concerning the barrister's fees. The barrister sued the solicitors for unpaid fees (the 'Recovery Proceedings') and won. The solicitors were ordered to pay the barrister's costs of the Recovery Proceedings.

During the Recovery Proceedings, the barrister had been represented. But she had also done some work herself. The solicitors refused to pay any costs claimed in respect of that personal work ('Personal Work Costs'). Five levels of review ensued. First, a costs assessor rejected the barrister's claim for Personal Work Costs. That decision was based on, amongst other things, a view that the *Chorley* exception did not extend to barristers. Second, the Review Panel affirmed the decision. Third, the District Court dismissed the barrister's appeal. Fourth, the Court of Appeal reversed the trend and

found in favour of the barrister. That Court reasoned that the barrister could rely on the *Chorley* exception notwithstanding she was a barrister not a solicitor. Fifth, the solicitors obtained special leave and appealed to the High Court.

The reasons of the majority of the High Court

The reasons of the majority, comprised of Kiefel CJ, Bell, Keane and Gordon JJ, stated that the *Chorley* exception was 'not only anomalous', but that it was also 'an affront to the fundamental value of equality of all persons before the law': at [3].

The majority considered that 'the view that it is somehow a benefit to the other party that a solicitor acts for himself or herself, because the expense to be borne by the losing party can be expected to be less than if an independent solicitor were engaged, is not self-evidently true': at [18]. The majority considered that a 'self-representing solicitor, lacking impartial and independent advice that the Court expects its officers to provide to the litigants they represent, may also lack objectivity due to self-interest. That may, in turn, result in higher legal costs to be passed on to the other party in the event that the self-representing solicitor obtains an order for his or her costs': at [18]. The majority reasoned that 'it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation': at [19].

Accordingly, the majority considered that the *Chorley* exception 'cannot be justified by the considerations of policy said to support it' and for that reason it 'should not be recognised as part of the common law of Australia': at [3]. It was not the case that the exception could only be abolished by the legislature. Although 'costs are a creature of statute' (at [33]), the *Chorley* exception itself was the result of a judicial decision, and thus the Court was not prevented from determining the exception was not part of the common law of Australia: at [53]-[54].

Finally, the majority stated that its decision 'would not disturb the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity': at [50].

The other judges

Justices Gageler, Nettle and Edelman each delivered separate sets of reasons.

Justices Gageler and Edelman each agreed that the *Chorley* exception should be abandoned: at [63] and [99] respectively. Justice Nettle agreed that the *Chorley* exception did not extend to barristers, but considered there was no need or justification to decide, as part of the matter before the Court, that the *Chorley* exception should be abolished: at [70].

A closing observation

The majority rejected the suggestion that a change to the *Chorley* exception should operate only prospectively: at [55]. As Edelman J articulated, the consequence is that the 'legal rule which this Court determines to apply … is one that should have applied, and does now apply, at all relevant times': at [98]. This is interesting. Those who have previously paid costs to solicitors, under the mistaken belief that the *Chorley* exception was part of the common law of Australia, may well consider *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38 and the corresponding pocket of cases concerning monies paid under a mistake of law. BN

Guidance for NSW Barristers

In the Wake of the Matter of Lawyer X

In a judgment delivered in November 2018, the High Court unanimously condemned a Victorian barrister (Lawyer X) for 'appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the Court' when acting as an informant against her own clients: *AB (a pseudonym) v CD (a pseudonym) and Ors; EF (a pseudonym v CD (a pseudonym) and Ors [2018] HCA 58 (AB v CD)*. So egregious were those breaches that the High Court did not consider it necessary to further elaborate on what specific obligations and duties Lawyer X had violated.

Following the High Court's judgment, the Victorian Government established a Royal Commission into the Management of Police Informants. As part of its inquiry, the Commission is currently considering the legal obligations of human sources who may be under duties of confidentiality and privilege. However, the Royal Commission's report will not be finalised until 1 July 2020.

In the interim, there is a pressing need for barristers to understand the legal and ethical issues raised by the seemingly unprecedented deployment by law enforcement agencies of a barrister informant against her own clients in Victoria.

In particular, a narrow question is raised for the New South Wales Bar: is it ever appropriate for a barrister to act as a registered informant against a client? Broader questions are also raised, including whether there are any circumstances in which a barrister can act as an informant and in what circumstances counsel may be required to breach, or be justified in breaching, client confidences.

On 18 September 2019, the NSW Bar Association published a paper that provides guidance for NSW Barristers following the decision in *AB v CD*. The paper was published in *Inbrief* and is available at https://nswbar.asn.au/docs/webdocs/informants1.pdf.

The paper is comprehensive. The issues addressed in the paper include:

(i) the ethical and legal implications of New South Wales barristers acting as informants;

(ii) what obligations, if any, NSW barristers may be under to provide information to law enforcement agencies during the course of their legal practice; and,

(iii) whether NSW barristers can voluntarily report matters to law enforcement agencies where, in the course of their practice, a confider threatens the future safety of an individual.

All barristers, particularly those practising criminal law or on behalf of or against law enforcement in non-criminal law matters, should carefully read the whole paper.

An extract of the portions of the paper dealing with the issue of barristers acting as informants during the course of professional practice and barristers acting as informers other than in relation to clients follows (footnotes omitted).

Barristers as Informants during the Course of Professional Practice

Acting as an Informant against a Client

Acting as an informant against a client involves, as the High Court stated in *AB*, 'fundamental and appalling breaches of' the obligations of a barrister: *AB v CD* at [10].

There can be no room for exception: a barrister acting as an informant against a client cannot be countenanced in any circumstances. To do so involves a breach of fundamental – as opposed to merely conventional – rules of professional conduct. By acting as an informant against one's client, counsel:

(i) breaches the paramount duty owed to the Court by conniving in an abuse of process through executive misconduct that would:

  (a) likely give rise to a stay of proceedings or the quashing of a conviction; and,

  (b) certainly risk undermining the integrity of the Court and public confidence in the criminal justice system;

  [Rule 23 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (the Bar Rules)*];

(ii) breaks the oath made on admission as a legal practitioner 'truly and honestly [to] conduct [him/her]self in the practice of a legal practitioner of the Supreme Court of New South Wales and … faithfully [to] serve as such in the administration of the laws and the usages of that State' by engaging in conduct that will result in proceedings being 'corrupted in a manner which debase[s] fundamental premises of the criminal justice system' [*AB v CD* at [10]];

(iii) violates the general prohibition on engaging in conduct that is:

  (a) dishonest or discreditable to a barrister;

  (b) prejudicial to the administration of justice; or,

  (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute [Rule 8 of the *Bar Rules*];

(iv) violates to the point of negating client confidentiality and (if applicable) legal professional privilege [Rule 114 of the *Bar Rules*];

(v) abandons the duty to promote and to protect fearlessly a client's interests in favour of the barrister's own interests, whether they be civic minded or mercenary [Rule 35 of the *Bar Rules*];

(vi) wrongfully acts for a client notwithstanding the existence of a grave conflict of interest manufactured by counsel himself or herself [Rule 101(b) of the *Bar Rules*];

(vii) abuses the privileged position of a barrister to advance his or her own interests, whether they be civic-minded interests or mercenary [Rule 10 of the *Bar Rules*]; and,

(viii) breaches the fiduciary duty to disclose a fact to a client that would undoubtedly be material and relevant to his/her case and the safety of any conviction.

A barrister must never act as an informant against a current or former client.

Barristers as Informants other than in Relation to Clients

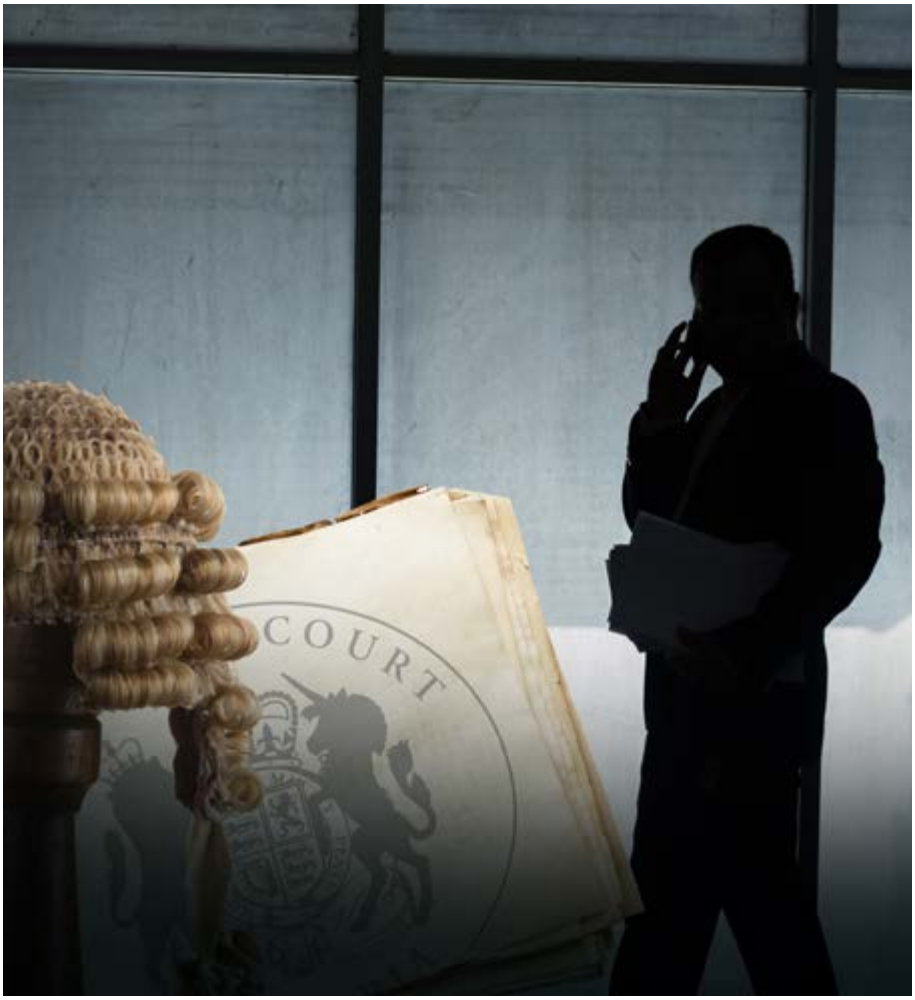
While individuals may volunteer to act as 'human sources' for civic reasons, a self-interested desire to avoid prosecution or to obtain a lesser sentence upon conviction or favourable treatment by law enforcement agencies undoubtedly lies behind many informants' decisions to relay information covertly to police or other investigative bodies.

Barristers who act as informants other than in relation to their own clients may have been investigated for conduct unbecoming of counsel or have engaged in dishonest or otherwise discreditable behaviour that would likely diminish public confidence in the legal profession. Counsel's reasons for acting as an informant may consequently themselves amount to a breach of the Bar Rules. Moreover, a barrister utilising his or her status as counsel when acting as an informant for private advantage (immunity, prosecution for a lesser offence, a sentence reduction or other favourable treatment) would be grossly misusing his or her professional qualification.

Even barristers acting for purely altruistic reasons when covertly cooperating with police outside of their professional practice may risk compromising their independence when later acting as counsel in unrelated matters.

It would be difficult to conceive of methods to ensure that a barrister-informant could remain 'independent of extraneous influence', preserve the 'benefits of objective detachment' and comply with necessary ethical disclosures when acting, for instance, in criminal proceedings (whether for the Crown or the defence), inquests (whether representing state bodies or families) or claims against the police (whether for plaintiffs or defendants). A barrister who was acting or had acted as an informant for regulatory authorities may be similarly compromised in current and future matters involving such agencies.

A failure to disclose a relationship between a barrister-informant and the Crown may engender in a fair-minded observer an apprehension that the barrister has not acted with independence in cases where the Crown or law enforcement is engaged in some capacity. A barrister has duties of candour, independence and confidentiality, all of which would be compromised by agreeing to become a covert source of intelligence. Acting as an informant demands secrecy (in many cases without legislative force) and, consequently, conflicts of interest cannot be remedied by disclosure and informed consent. The ethical obligations of counsel are paramount to the Court and the administration of justice and may be at risk of compromise even where a barrister is an informant other than in relation to his or her own client.



While it might be possible for some members of the profession to preserve their independence during and after a period of acting as an informant, it is unlikely that practitioners accepting briefs in criminal, extradition and inquest matters or those working in areas that might touch upon the operation of law enforcement agencies or their staff would be immune from influences that would risk diminishing their independence. The potential for conflict here is plain.

It is also difficult to imagine circumstances in which a barrister could be a registered source and still maintain ethical standards, including not engaging in conduct that would likely diminish public confidence in either the legal profession or the administration of justice or would otherwise bring the profession into disrepute. Furthermore, barristers practise in a highly collegiate environment where cases are frequently discussed with disinterested colleagues, including juniors discussing matters with more experienced senior counsel, who are subject to strict obligations of confidentiality. Such communications are in the interests of clients and serve the public interest by encouraging the highest standards of professional and ethical conduct which would be wholly undermined if the 'disinterested' barrister was acting covertly as an informer.

Law enforcement authorities should never use the significant power that they will inevitably be able to bring to bear over an informer to encourage, assist or procure a person to breach their professional obligations. These obligations are not only those demanded by legal professional privilege but extend to equitable and statutory obligations of confidence that arise independently from the relationship between a barrister and a client.

The independence of the bar is such an integral aspect of a barrister's professional obligations and the rule of law itself, that a barrister should not be subservient to the Executive. Acting as a registered source to a law enforcement agency carries with it so serious a risk to a barrister's independence that counsel is likely to be confronted with major ethical difficulties should he or she become an informant even against individuals who are not clients. BN

A Message from the Free State of Prussia to Hong Kong

By Sean O'Brien

If the recently withdrawn Hong Kong extradition bill[1] (the Bill) had been given legislative effect it would have enabled the Chief Executive to make *ad hoc* orders for extradition of permanent residents of Hong Kong to mainland China. The Bill was plainly aimed at working around the Basic Law's express preclusion of surrender to other parts of China, or to paraphrase the Hong Kong government, to fix a 'loophole'.[2]

Concerns arose about the potential for abuse of the proposed law for the political ends of the Communist Party of China (CPC). The Hong Kong Bar Association referred tangentially to such concerns in observing:

> 'An important common restriction forbidding surrender is that a fugitive is sought in connection with "an offence of a political character". Another is that surrender is sought for an offence which is being pursued for extraneous reasons, which means reasons that are connected with the fugitive's status as a member of a political party or a religious group.' [3]

Under the Bill no scope was allowed for a Court to review an *ad hoc* extradition order on substantive grounds such as the political character of the offence or prosecution for extraneous political reasons. The form of judicial review proposed in the Bill was limited to an exercise confirming the procedural regularity of any executive order issued under it, lending it a veneer of legal legitimacy.

To whatever degree democracy pertains in Hong Kong under the Basic Law, the Bill was in severe tension with the civil liberties which underpin its continued viability. The tension was heightened by the potential influence on the Hong Kong Chief Executive of the Central People's Government who had appointed her under Article 45 of the Basic Law.[4] Whether that influence was perceived or real, the antipathy of the CPC to civil liberties where exercised in a manner calling into question the legitimacy of its governance has been seen by some to have manifested itself in Hong Kong in the form of the force being used by police on protestors. In an open letter dated 9 October 2019 addressed to the Chief Executive of Hong Kong concerning the rule of law, the German Bar Association observed:

> 'We are deeply concerned by the recent events in Hong Kong which led to countless people being injured and/or arrested as well as to the destruction of public and private property. We are especially distraught by the indiscriminate use of tear gas and television and video footage of excessive force used by police officers to disperse protestors.
>
> The respect of human rights and civil liberties, a government accountable to the public and an independent judiciary are essential components of the Rule of Law which is the corner-stone of any democratic society. It prescribes rules and obligations for all members of society, both private citizens and public officials. We understand the pressure you are acting under but call on you to respect the procedures set out in the basic law. No one would want Hong Kong to give the impression of moving from the rule of law towards a rule by law.'

With those concerns in mind it may be instructive to briefly reflect on an historical precedent of the use of law to legitimise 'rule by decree' under an authoritarian regime. The situation in which that most commonly arises is where emergency powers are invoked to justify executive measures aimed at quelling civil unrest. As Ernst Fraenkel observed in 1941:

> 'Martial law provides the constitution of the Third Reich.

The constitutional charter of the Third Reich is the Emergency Decree of February 28, 1933. [Reichstag Fire Decree]

On the basis of this decree the political sphere of German public life has been removed from the jurisdiction of the general law. Administrative and general Courts aided in the achievement of this condition. The guiding basic principle of political administration is not justice; law is applied in the light of "the circumstances of the individual case",

An emergency decree as declared by Paul von Hindenburg on an advertising column in Berlin. Prussian government officials, including Carl Severing, Albert Grzesinski, Bernhard Weiss and Magnus Heimannsberg, were all arrested during the coup by military authorities.

> the purpose being achievement of a political aim.'[5]

The legal ground for issuing the Reichstag Fire Decree was arguably laid in 1932. Lacking majority support in the Reichstag, President von Hindenburg issued a decree on 20 July 1932, *'concerning the restoration of public safety and order in the area of the Land of Prussia'*. The alleged justification was the Prussian government's failure to suppress Communist threats to state order. The democratic government of Prussia was dismissed, a Reich Commissioner for Prussia was installed, and the Reich Minister of Defence took over control of the police, effectively bringing the Free Prussian State under Reich administration. The executive measures taken under the decree were collectively labelled the 'Prussian Coup'.

The Free State of Prussia lodged a complaint in the Constitutional Court. The Court was tasked with interpreting Article 48(2) of the Weimar Constitution on which the Reich relied as the source of the President's power to issue the decree. Article 48(2) provided:

> '48(2) In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to re-establish law and order, if necessary using armed force. In the pursuit of this aim, he may suspend the civil rights described in articles 114 [inviolability of personal liberty], 115 [inviolability of the home], 117 [privacy of mail, telegraph and telephone], 118 [freedom of opinion and of press], 123 [freedom of assembly], 124 [freedom of association] and 153 [inviolability of private property], partially or entirely.'

Counsel for the Free State of Prussia, Hermann Heller, argued that social conditions did not exist to justify the exercise of the discretion, the appointment of a commissioner was not a necessary measure for the return of public security and the decree was made for extraneous political reasons.[6]

Counsel for the Reich, Carl Schmitt, argued that it was the sole discretion of the President to decide whether grounds existed to invoke Article 48.[7] The power granted to the President under Article 48 delimited his role as the guardian of the Constitution concerning political matters. Since the matters in question were essentially political, they were not within the Court's jurisdiction to decide. In those circumstances the President was constitutionally entitled to decide whether a state of emergency existed and who were the enemies of the state, free of legal constraints and independent of party politics. Enemies of the state were those who threatened the unity of the Reich, including political parties who adhered to a destabilising democratic system. A homogenous state was the fundamental political structure underpinning the Constitution. It followed that the President's sovereign decision was the unique means by which the homogeneity of the state as a political entity could be preserved and the Constitution ultimately upheld.

The Court considered that it was not its place to inquire into whether the social conditions existed for the valid exercise of the discretion.[8] It found that it was not proven that the power had been invoked for political reasons, but even if that were true, it would not lead the Court to conclude that the measures taken were not aimed at the restoration of public order and safety.[9] In the result, the Court upheld the constitutional validity of the decree despite finding the dismissal of the government to be an unlawful measure.

With the imprimatur of the Court, on 28 February 1933 the President issued the Reichstag Fire Decree expressly based on Article 48(2). The 'Decree for the Protection of People and State' permitted the Reich government to:

> '…. restrict the rights of personal freedom, freedom of opinion, including the freedom of the press, the freedom to organize and assemble, the privacy of postal, telegraphic and telephonic communications, and warrants for house searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.'

Under clause (2) of the Reichstag Fire Decree, the Reich took another step toward usurping democratic governance of the Free Prussian State, declaring:

> 'If in any German state the measures necessary for the restoration of public security and order are not taken, the Reich Government may temporarily take over the powers of the supreme authority in such a state in order to restore security.'

On 24 March 1933, the Reichstag passed the 'Enabling Law' conferring legislative power on the Reich Cabinet, including the power to make laws that deviated from the Constitution. Subsequently, the Reich cabinet promulgated a law combining the office of President and Chancellor and transferring the authority of both offices to the Fuhrer, Adolf Hitler.

From that point onward the Constitutional Court became *functus officio*, since the Fuhrer principle allowed for no review of the legality of executive decisions by an independent judicial body. The newly prevailing view of the Constitution was expounded by Hans Frank in a speech delivered in 1938 as Head of the Nazi Lawyers Association and the Academy of German Law:

> 'Constitutional Law in the Third Reich is the legal formulation of the historic will of the Fuhrer, but the historic will of the Fuhrer is not the fulfillment of the legal preconditions for his activity. Whether the Fuhrer governs according to a formal written Constitution is not a legal question of the first importance. The legal question is only whether through his activity the Fuhrer guarantees the existence of his people.'

Returning to the present and the ongoing protests in Hong Kong, it is to be noted that the Basic Law grants emergency powers to the Standing Committee, specifically Article 18 which states:

> 'In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.'

The role played by Article 48 in the dismantling of the Weimar Republic is an historical precedent which may shed light on any future decision of the Standing Committee to invoke Article 18. Straining in the other direction, the demonstrations which culminated in the Chief Executive's belated withdrawal of the Bill illustrate that popular sovereignty as a source of legal legitimacy, or lack thereof, is not simply a concept invented by political philosophers.

In relation to Article 48 it has been observed that:

> 'embedded in the Weimar Constitution was a fatal ambiguity between two conflicting political commitments. On the one hand was the commitment to the legitimacy of parliamentary democracy, on the other was the commitment to the legitimacy of a charismatic leader.'[10]

A similar ambiguity is embedded in the Basic Law between democratic elections underpinned by civil rights and an independent judiciary which protects those rights on the one hand, and on the other, the unity and security of the People's Republic of China, a constitutional linchpin of which is allegiance to the Central Government. The requirement for that kind of allegiance appears to extend to democratically elected members of the Legislative Council having to swear oaths of allegiance[11], and the current Chief Executive who has reportedly made statements indicating the difficulties arising from a 'constitutional' requirement to serve two political masters at the same time.[12] One hopes that the ambiguity is not fatal to the autonomy of Hong Kong as it was to the Free State of Prussia. BN

ENDNOTES

1. *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*.
2. See Hong Kong Bar Association Press Release issued 06.06.2019, *A Brief Guide to Issues Arising From the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, point 5.
3. Ibid., point 16.
4. Article 45 sets out the requirements for selecting the Chief Executive. On 31 August 2014 the Standing Committee decided that at the 2017 election and onwards the Chief Executive would be appointed from three pre-approved candidates each of whom, "loves the country and loves Hong Kong', but the proposal was voted down in the Legislative Council after demonstrations: see https://www.economist.com/the-economist-explains/2017/03/21/how-hong-kong-picks-its-chief-executives, downloaded 26/10/2019.
5. Fraenkel, E., *The Dual State – A Contribution to the Theory of Dictatorship*, Oxford University Press, New York, 1941, p. 3.
6. Skach, C., *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic*, Princeton University Press, Princeton, NJ, 2005, p.65.
7. See discussion in Dyzenhaus, D., *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, Oxford University Press, Oxford, 1999, 121-134, at pp. 125-127.
8. Dyzenhaus, D., ibid., p. 124-125.
9. Dyzenhaus, D., ibid.
10. Dyzenhaus, D., op. cit., p. 131.
11. In 2016 the Standing Committee's interpretation of Article 104 of the Basic Law concerning the oath of allegiance effectively precluded two democratically elected politicians from taking their seats in the Legislative Council for expressing unpatriotic views towards the Central Government: see https://www.bbc.com/news/world-asia-china-37893070 downloaded 26/10/2019.
12. The Chief Executive has been reported as saying, 'But … once an issue has been elevated to a national level, to a sort of sovereignty and security level … the political room for the Chief Executive who, unfortunately, has to serve two masters by constitution — that is the Central People's Government and the people of Hong Kong — that political room for manoeuvring is very, very, very limited': https://www.abc.net.au/news/2019-09-03/carrie-lam-has-become-powerless-to-lead-or-quit/11474676, downloaded 26/10/2019.

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Are there implications of New South Wales Court filing trends?

Penny Thew and Farid Assaf SC[1]

As the Honourable Tom Bathurst, Chief Justice of New South Wales, recently observed, 'the nature of the legal market is arguably different' from that of the early 2000s.[2] His Honour was speaking in part of the legal market currently being a buyer's market and observed that the profession would need to adapt to the change wrought by technological innovation, including in the form of the recent transitioning of directions hearings in the New South Wales Supreme Court registrars' lists to the online Court system.[3] His Honour posited that 'physical appearances in Court might start to become a rarity, with perhaps more virtual appearances.'[4]

Anthony Cheshire SC similarly made reference to the online Court system in the New South Wales Supreme Court increasingly removing the need for attendance in Court, often until the later stages of litigation, and the impact of this on the opportunity for what currently is the junior Bar to gain advocacy experience.[5]

Impacting upon (or in part causing) the tightening market of which the Honourable Chief Justice spoke, is the not insignificant downward trend in Court filings in the New South Wales jurisdiction over the past 13–14 years. Between 2005 and 2018,[6] filings in the New South Wales Supreme Court Equity Division (all lists) trended down by 33.99%, from 6,254 to 4,128 per annum.[7] During the same period, filings in the New South Wales Supreme Court Common Law Division – Civil (all lists) decreased by 46.78%, from 6,674 to 3,552 per annum.[8] In the New South Wales Court of Appeal, the net number of filings decreased generally during this period by 27.55%, from 490 in 2005 to 329 in 2009 and back up slightly to 355 as at 2018.[9]

Registrations of civil matters in the District Court have also trended down by 25.03% from 2005 to 2018, decreasing from 6,129 to 4,595 per annum.[10] In the Local Court, civil actions have generally trended down by 46.12% between 2005 and 2018, from 144,881 civil actions commenced per annum to 78,069 per annum.[11]

Overall, this is a decrease in civil proceedings commenced across all New South Wales Courts between 2005 and 2018 of 44.84%.[12]

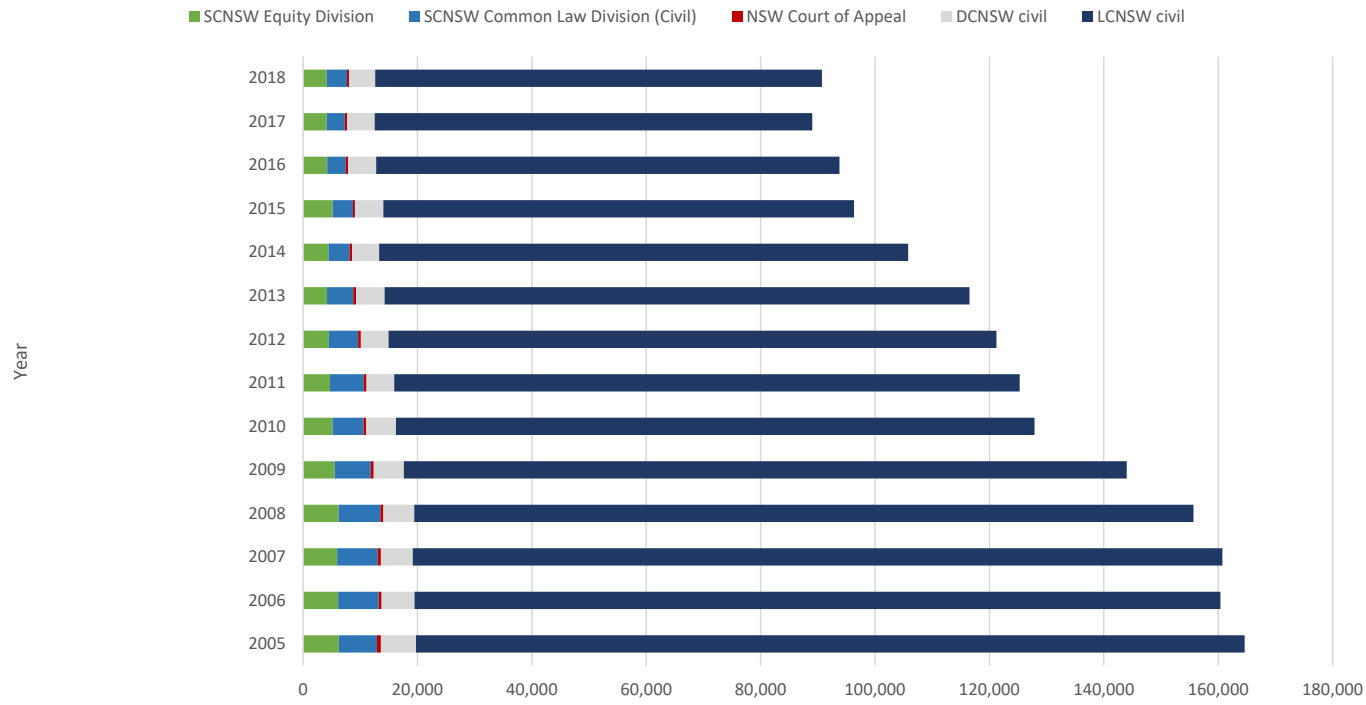
By contrast to the decreased filings in New South Wales Courts, actions commenced in the Federal Court of Australia (both in the original and appellate jurisdiction) and the Federal Circuit Court of Australia have increased from 2009 to 30 June 2019 by 13.1%, albeit this is nationwide.[13] This increase is made up of Federal Court actions commenced in the original and appellate jurisdiction trending up from 3,642 in 2009 to 6,029 as at 30 June 2019.[14] Similarly to the Federal Court, actions commenced in the Federal Circuit Court have trended up from 85,984 in 2008–9 to 95,330 as at 30 June 2019.[15] These numbers include both family and general federal law matters. If the same time period is considered for the New South Wales Courts (about the last ten years from 2009), there is still a reasonably significant decrease of 40.99%.[16]

It is clear that the increase of 13.1% in actions commenced in the federal Courts nationwide over about the last ten years does not counteract the sharp decline in about the last 14 years in Court filings across the New South Wales Courts of 44.84%, or the last ten years of 40.99%. This is so particularly when the raw numbers are considered. It may be that it is timely to examine any implications for the Bar (and particularly the junior Bar) of the overall fall in Court filings, and whether it is likely to continue.

However, if the implications for the Bar of these statistics are to be considered, additional factors may be relevant. There have, for instance, in recent years been the numerous royal commissions and inquiries continuing to require the expertise and advocacy skill and experience of the Bar. Additional relevant factors may also be the spike in class actions as well as the enhanced ability generally of Australian lawyers to practise internationally.

Overall, it may be that Court filing trends do have implications for the Bar. But, as the Honourable Chief Justice recently observed, 'you can't have law without lawyers' and the 'high-value and very complex work will likely continue in the conventional manner for some time ….'[17] BN

CIVIL MATTERS FILED IN NSW



	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
SCNSW Equity Division	6,254	6,125	5,964	6,205	5,526	5,172	4,694	4,500	4,202	4,439	5,168	4,234	4,147	4,128
SCNSW Common Law Division (Civil)	6,674	7,094	7,056	7,316	6,313	5,396	5,923	5,112	4,573	3,679	3,538	3,216	3,163	3,552
NSW Court of Appeal	690	494	564	530	496	501	490	493	502	461	379	397	354	355
DCNSW civil	6,129	5,769	5,598	5,375	5,297	5,158	4,844	4,849	4,968	4,737	4,956	4,938	4,875	4,595
LCNSW civil	144,881	140,914	141,549	136,242	126,366	111,642	109,323	106,274	102,257	92,475	82,304	80,976	76,468	78,069

Number of civil actions commenced in NSW

ENDNOTES

1 The authors would like to express their gratitude to Garth Blake AM SC, Anthony Cheshire SC, Joanne Shepard and Victoria Brigden for the helpful feedback and suggestions on this article.

2 The Honourable TF Bathurst, Chief Justice of New South Wales, 'The role of the commercial bar in the mid-21st century' [2019] *Bar News* (Winter), p28.

3 Ibid, p28, p29.

4 Ibid, p30.

5 Anthony Cheshire SC, 'The incredible shrinking Bar' [2019] *Bar News* (Winter), p8.

6 Filing data for the New South Wales Supreme Court, District Court and Local Court for the equivalent 2019 period is not yet available at the time of writing.

7 These numbers have steadily decreased from 6,254 in 2005 to 5,526 in 2009 and 4,128 in 2018 (Supreme Court of New South Wales 2009 Annual Review p58 (which shows all filings from 2005 to 2009; Supreme Court of New South Wales 2018 Annual Review, p29).

8 These numbers have decreased from 6,674 in 2005 to 6,313 in 2009 to 3,552 in 2018, although this was a 12% increase from 2017 (2009 Supreme Court of New South Wales Annual Review, p57 (which shows all filings for 2005 to 2009); 2018 Supreme Court of New South Wales Annual Review, p27).

9 2005 Supreme Court of New South Wales Annual Review, p59; 2009 Supreme Court of New South Wales Annual Review, p55; 2018 Supreme Court of New South Wales Annual Review, p45.

10 Registrations of civil matters in the District Court have decreased from 6,129 in 2005 to 5,297 in 2009 and to 4,594 in 2018 (District Court of New South Wales Annual Review 2005, p14; District Court of New South Wales Annual Review 2009, p14; District Court of New South Wales Annual Review 2018, p45).

11 Local Court of NSW Annual Review 2005, p12; Local Court of NSW Annual Review 2009, p22; and Local Court of NSW Annual Review 2017, p14; Local Court of NSW Annual Review 2018, p19.

12 The percentage increase is calculated by reference to the difference between, on the one hand– the total of all New South Wales Court filings in 2005 (being 164,428) and, on the other hand, the total of all New South Wales Court filings as at 30 June 2018 (being 90,699).

13 The percentage increase of 13.1% nationwide is calculated by reference to the difference between, on the one hand the total of all Federal Court of Australia and Federal Circuit Court of Australia actions commenced nationwide in 2009 (being 89,626) and, on the other hand, the total of all Federal Court of Australia and Federal Circuit Court of Australia actions commenced nationwide as at 30 June 2019 (being 101,359).

14 Federal Court of Australia Annual Report 2009, p15; Federal Court of Australia Annual Report 2018, appendix 5; Federal Court of Australia Annual Report to 2019, p24.

15 Federal Magistrates Court of Australia Annual Report 2008-9, p16; Federal Circuit Court of Australia Annual Report 2017–18, Part 3; Federal Circuit Court of Australia Annual Report 2019, p9.

16 The percentage increase is calculated by reference to the difference between, on the one hand, the total of all New South Wales Court filings in 2009 (2008 for the Local Court by reason of incomplete data in 2009) (being 153,707) and, on the other hand, the total of all New South Wales Court filings as at 30 June 2018 (being 90,699).

17 Op Cit, Chief Justice of NSW.

The updated and enhanced sentencing statistics on the Judicial Information Research System

By Mark Zaki[1]

Sentencing statistics are one of many resources available on the Judicial Information Research System ("JIRS") to assist courts with the sentencing exercise: see www.judcom.nsw.gov.au. Informed use of statistics by practitioners optimises the assistance that counsel may provide to a sentencing court.

The JIRS statistics now contain penalties relating to the new community-based penalties which became available on 24 September 2018.

The Commission recently enhanced the statistics viewer to include a domestic violence offence case characteristic filter, improved communications tools, and access to relevant offence provisions and maximum penalties.

The Judicial Information Research System (JIRS) is an online database for judicial officers and the legal profession created and maintained by the Judicial Commission of NSW. It contains sentencing information and statistics, judgments and legislation, the Bench Books and other resources primarily relating to the criminal law and sentencing in NSW. Access to JIRS for legal practitioners in private practice and at the Bar is via paid subscription.

On 24 September 2018, the sentencing landscape in NSW changed with the overhaul of penalty options available to courts dealing with criminal matters. The *Crimes (Sentencing Procedure) Amendment (Sentencing Options)* Act 2017 (the Act) removed good behaviour bonds, community service orders and s 12 suspended sentences as sentencing options. The Act introduced conditional release orders and community correction orders, together with a broad range of conditions for sentencing orders better suited to the protection of the community and the rehabilitative needs of the offender.

The sentencing statistics available on JIRS now accommodate these new sentencing options in all relevant jurisdictions.

The statistics containing the penalty options available from 24 September 2018 are displayed separately to the penalty options available before that date. They are not able to be displayed together in the one graph however a link is available on each statistics page to toggle between them.

Recent enhancements to JIRS

The JIRS statistics viewer has also been improved as follows:

- A "domestic violence offences" case characteristic option to further filter sentencing statistics has been included.
- The ability to email or print filtered statistics, or create a link to them, at a click.
- The relevant legislation and maximum penalties are available on each set of statistics.
- Statistics may be viewed in a wall chart or circular chart, as well as a standard column chart.

The Judicial Commission implemented these changes to improve the usability and accessibility of the statistics for sentence proceedings before NSW courts.

The Commission is considering further enhancements to the JIRS statistics viewer, including additional case characteristic filter options.

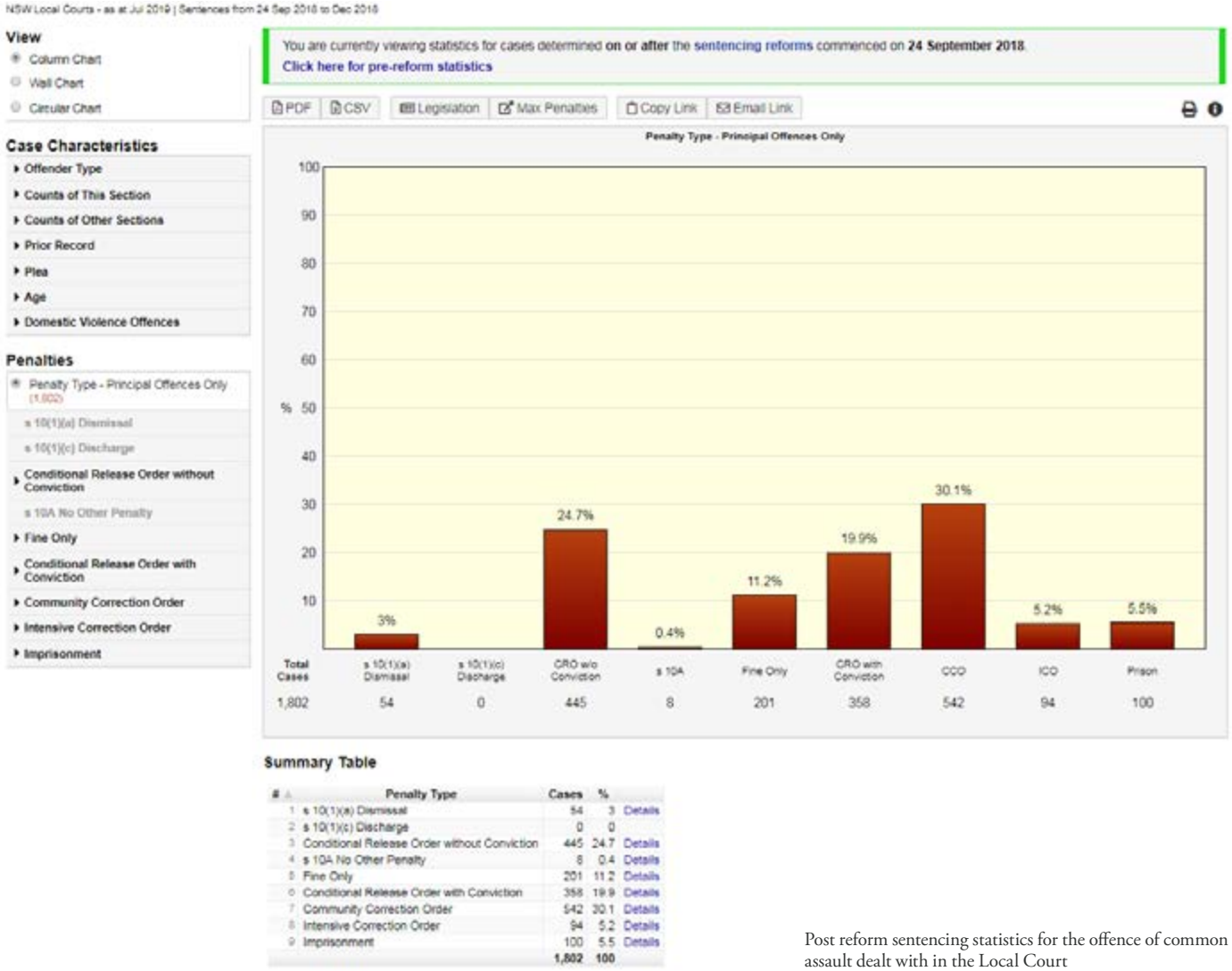
How to optimally use the statistics

Higher courts have regularly commented on the use of statistics in sentence proceedings and one should be aware of the limitations of their use in court. The plurality in the High Court decision of Barbaro v The Queen [2014] HCA 2, referring to Hili v The Queen [2010] HCA 45, said at [40]–[41]:

> *"The setting of bounds to the available range of sentences in a particular case must, however, be distinguished from the proper and ordinary use of sentence statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases. Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence … In seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect."*

In the recent decision of *Facer (a pseudonym) v R* [2019] NSWCCA 180

CRIMES ACT 1900 (NSW) S 61 COMMON ASSAULT



Post reform sentencing statistics for the offence of common assault dealt with in the Local Court

at [59]–[62], Leeming JA (with whom Davies and Button JJ agreed) indicated the aggregated statistics tended to confirm his initial impression regarding the sentence on appeal but that it was necessary to consider the facts of the cases underlying the statistics.

JIRS sentencing statistics form one component of the JIRS database. They provide a guide to the pattern of sentences that the courts impose for criminal offences. The statistics, together with the principles and practice, case summaries and judgments of the various courts, form a package of information intended to assist the courts to achieve consistency in imposing sentences.

The Judicial Commission plans to conduct a CPD seminar on JIRS in early 2020. **BN**

Other Features of JIRS

In addition to the bench books, a useful feature of JIRS for practitioners are the "Offence Packages", which compile relevant material such as recent case law, legislation and bench book references for some of the most common criminal offences. JIRS has also dedicated collections of resources on selected topics, including bail, evidence and the Land and Environment Court.

Within the "Publications" section of the website are the Judicial Officers' Bulletin and Recent Law Flyers, which are up-to-date resources on topical legal developments and research.

JIRS now includes podcasts on criminal law topics. The first two podcasts look at the practical operation of reforms to the *Crimes (Sentencing Procedure) Act 1999*, in conversation with the Deputy Chief Magistrate of the NSW Local Court, Michael Allen, and Rosemary Caruana, former Assistant Commissioner, Community Corrections.

ENDNOTES

1. Managing Lawyer, Research and Sentencing, Judicial Commission of New South Wales.

Revealing Secret Clerks' Business

The NSW Barristers' Clerks Association

Clerks from NSW, ACT, VIC and QLD in attendance at the 2019 Barristers' Clerks Conference at Manly on Friday, 18 October 2019

Front row third from the left: Conference MC; Andrew Hansen

What is a Barrister's Clerk? What do you do? Do you have a job description? Are all clerks the same? How do Floors operate? Why do you do it?

These are questions we are often asked by friends and family. They are questions we ask ourselves sometimes, and unfortunately, these are also questions asked by some barristers, regardless of whether they have been at the Bar 3 months or 10 years.

The NSW Barristers' Clerks Association ('NSWBCA') is pleased to provide a regular page in Bar News. Many of us are B Class members of the NSWBA, we serve on Bar and industry Committees, and we look forward to keeping you informed about the varying roles and functions of Barristers' Clerks in future editions. There are many tasks and attributes we have in common but there are other functions as unique as the personalities on of our floors; no two are ever the same.

Ours is not a new job title: the existence of the Clerk in its current form dates as far back as the early 1800's in England. Much, and some argue little, has changed since then, but others will argue everything has changed. The Clerks have embraced those changes and adapted as required to new and old demands. Some of our members remember Chambers without computers, fax machines, mobiles and emails, before a dishwasher, and the joy of being a one trolley floor. Or when the corridors of chambers clicked to the sound of many secretaries on noisy typewriters. The Chambers' environment has changed a great deal in a relatively short period of time.

Technology has been both friend and foe. Gone are the days of the 8-6pm clerk when switchboards were turned off with the lights. Now Clerks, like the barristers we serve, are always accessible.

But what do you do? Why were you selected?

That is an even greater mystery that only the Floor that employed a Clerk can answer.

The necessity and purpose of a Clerk is to manage Chambers so barristers can get on with the business of being an advocate. It is a difficult and demanding job with a political edge, social demands, and many logistical challenges. The position requires negotiation and mediation skills, compassion, resilience and most importantly a sense of humour.

Clerks support their barristers, often a large number of them; they are the managers, the administrators, the agents, the multi-skilled all-rounders who keep Chambers ticking at the fast-paced tempo it necessarily must go. All the while the Clerk is thinking about the big picture of their Chambers in the wider legal community, and the needs of those individuals. As legal historians have noted: Barristers' Clerks are 'the law's middlemen'1 in Chambers, although in current times the majority are "the law's middlewomen"

Clerking as a Profession

The NSWBCA is a professional representative body of 83 Barristers' Clerks, serving just over 2400 barristers in NSW, operating predominantly in a close huddle around Sydney's major court complexes. Other members in Parramatta, Newcastle, Lismore and Wollongong, operating with the same needs and demands as their CBD peers. The NSWBCA is a voluntary association of professionals facilitating raining and

2019 Barristers' Clerks Conference Opening Event for Clerks, Barristers and Judges held on Thursday, 17 October 2019 in the Supreme Court of NSW Banco Court; Level 13 foyer area

information seminars, and mentoring, and providing networking and communication between Clerks and Chambers. As many NSW barristers also practice interstate and overseas, the NSWBCA maintains strong links with our interstate and overseas colleagues, including offering membership to them. For this reason, some of our members also maintain membership of associations such as the Institute of Barristers' Clerks in the UK, which keeps us abreast of changes and ideas from their system.

The NSWBCA recently held their fifth biennial Barristers' Clerks Conference in Manly on 18 October, where a host of speakers from law firms, government, private sector agencies and a range of industry specialists gathered to discuss the important role of Clerks, their reliance on them, and how Clerks are adapting to respond to the needs of today's evolving legal market.

The President of the NSW Bar Association, Tim Game SC, at the recent Heads of Chambers evening noted *"the clerks are the central point of contact for chambers". Adding that he was "impressed by the Barristers' Clerks recent conference and its program, which was indicative of their professionalism and dedication to their role, given the varied responsibilities and duties they are required to perform".*

Executive Director of the NSW Bar Association, Greg Tolhurst has said; *"Clerks, how could the Association function without them? They are a two-way communication line to Chambers; they are a sounding board for ideas and they can be an army of volunteers when needed. The successful roll-out of many initiatives involves the Clerks. The recent launch of online renewals would not have worked smoothly without the Clerks. In 2020 it will be the escrow account. A particular highlight of our close working relationship in recent years has been the role played by Clerks in conjunction with the Practice Development Committee in educating in-house counsel and solicitors firms regarding how to brief the Bar. The Clerks have run a Briefing Roadshow, visiting various firms and government and in-house teams over the last year. The Clerks have also made an essential contribution through their presence at the ACC National Conference each year".*

2019 Conference Program – Clerking: Power of the past, force of the future

The Honourable T. F. Bathurst AC, Chief Justice of New South Wales Guest of Honour at the 2019 Barristers' Clerks Conference Opening Event held in the Supreme Court of NSW Banco Court; Level 13 foyer area

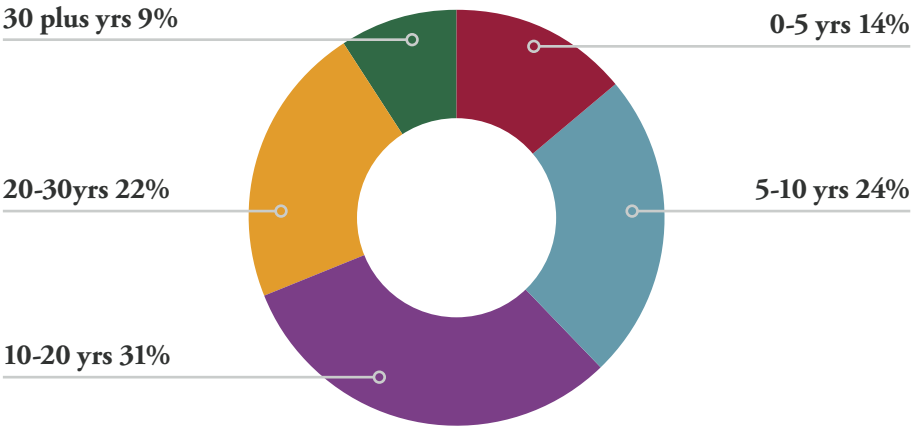
Left to Right: Tiffany McDonald, NSW Bar Association; Alistair Coyne, Clerk of Nigel Bowen Chambers and Bali Kaur, NSW Bar Association

Clerking is a career in legal services

The experience of current NSW Clerks varies from a few weeks to over 3 decades. The retirement of some senior Clerks in recent years has not diminished the wealth of our knowledge or expertise. Over 62% of the Clerks have more than 10 years' experience. It is not a career for the faint hearted: you either love being a Barristers' Clerk or you move on.

After specialising in this unique area of the legal sector the reach and database of a Clerk will run the full spectrum of service providers and members of the legal profession. The NSWBCA is committed to expanding the general community understanding about what Barristers' Clerks do in the legal industry, while helping to further educate and mentor those who choose to travel down this professional path. Like members of the Bar, the education the NSWBCA organises is ongoing.

YEARS AS A CLERK



Angela Noakes, the President of NSWBCA, reports *"The NSWBCA's aim is to promote the role of Clerks and assist in the understanding of our position in the profession."*

The Association facilitates several initiatives to assist Clerks, including a mentoring program for junior Clerks to 'buddy up' with senior Clerks. The juniors benefit from the sharing of knowledge with a more experienced Clerk, who can also help guide junior Clerks in managing the multitude of varying expectations from barristers within Chambers.

The NSWBCA is striving to strengthen the professionalism of the clerking industry, in order to help barristers adjust and keep ahead in today's highly competitive and ever-changing legal landscape.

Recently appointed Judge of the Land and Environment Court Justice Sandra Duggan, ruminated at her swearing in ceremony:

"The job of a Clerk is not an easy one, they are the frontline of a barrister's practice. Unfortunately, that often puts them in the range of both enemy and friendly fire. They do everything from keeping the lights on to keeping the diary ticking over.

They do this for multiple individuals who all expect individual attention. I do not know how they do it without regularly running into Phillip Street screaming.

Left to Right: Anna Moule (Clerk), Sarah Warren, John Turnbull SC and Brendan Jones of 9 Windeyer Chambers at the 2019 Barristers' Clerks Conference Opening Event

Left to Right: Jane Paingakulam of Denman Chambers; Marea Wilson of Denman Chambers; Melissa Brown (Clerk) of Maurice Byers; Manal Hamdan of Maurice Byers and Michelle Borg (Clerk) of Denman Chambers at the 2019 Barristers' Clerks Conference Opening Event

Left to Right: Simon Walker (Clerk), Michael Wells, Julie Granger, Eli Ball and Helena Mann of 7 Wentworth Selborne at the 2019 Barristers' Clerks Conference Opening Event

Whilst that list of horrors is the life of every clerk, my now former clerk also braves the pastoral care of her tribe: divorces; marriages; births; deaths; ill health; and late in life sporting ambitions (with the consequential medical attention that requires). Managed all of it with unquestionable loyalty, grace and care. … friendship and also stewardship of a career."

A typical day for many Clerks can be a very long one, spent switching roles at the drop of hat. These include managing the daily administration of their barristers' practices, attending to never-ending emails from solicitors, responding to calls to Chambers, all while multiple barristers task the Clerk with different job requests as they head to Court.

Within a short space of time the Clerk may have organised numerous diaries, accepted briefs and instructions, arranged conferences, negotiated fees, dealt with accounting, attended to Chambers' maintenance issues while somehow also being able to have simplified the onerous list of individual requests from barristers, dispersed trolleys and staff to tasks, and attending to marketing and organisation of upcoming Chambers events or functions and also attending to the personal and pastoral care needs of some, as required.

Clerks can be, and often are, the trusted advisers of barristers in the same vein that barristers are the trusted advisers of their clients. We share the highs and lows of every one of our barristers and our floors as a whole.

At the opening event of the recent Clerks' Conference, the Chief Justice of New South Wales, the Honourable T F Bathurst AC noted:

"Further, the technological changes that have disrupted the profession over recent years does not mean that clerks are becoming redundant. Quite the contrary. But there are large differences in the roles of a clerk between the time I commenced practice and today. First, clerks are operating in a far more complex commercial environment than many years ago.

"As chambers have grown their management has become more complex. Clerks remain responsible for promoting barristers, not in the same way, but in a more corporate sense, which will only continue if the experience in England and Wales is anything to go by. Barristers remain reliant on clerks for an assessment of the market in which they operate and for advice on matters ranging from whether their practice is heading in the appropriate direction to how much they should charge. They have a responsibility on behalf of their barristers for keeping abreast, not only of technological changes, but of other changes in the market and the attitudes of those who brief barristers".

In future editions the NSWBCA will introduce you to the various aspects of clerking today, the essential tools required to promote diversity and success of the modern, respectful, resilient barrister and the new terminology; 'knowledge holders'; 'soft skills; 'safe workplaces'; 'instilling equality'; 'mentoring for the whole profession'; 'a digital future'; 'competitive advantage'; 'marketing is not a dirty word'; 'young lawyers engagement', 'In-house with General Counsel'; 'Clerks roadshow; 'health and wellbeing in chambers'; 'STP' 'everything starting with e'; 'reconciliation action plans' and 'respect'.

The NSWBCA hopes to engage with and remind you that Clerks, are employees of our Chambers: we implement your policies and guidelines; we promote you; and we have your back. We also want to help our Chambers better balance the responsibilities and expectations of their Clerk, to capitalise on their talents and skills, and to support and recognise the value they add to the legal profession. We are partners in promoting Barristers and the NSWBA, working with our Floors and the Bar; we want to strengthen the wheel, not re-invent it.

The NSWBCA would like to thank the NSWBA for sponsoring the Conference Opening Event and for their ongoing support of the Clerks.

Our Association looks forward to providing you with a summary from the recent Barristers' Clerks Conference in the next Bar News. BN

ENDNOTES

1. J. Flood, Barristers' Clerks: The Law's Middlemen, Manchester University Press, 1983

The Constitutional Significance of the Australian Bar

By Walter Sofronoff[1] QC

2019 Maurice Byers Annual Lecture

I wish to state with precision the proposition that I seek to demonstrate as valid:

> The bar, as an institution, is an integral part of the system of administration of justice established by the Australian Constitution. As such, its continued existence, in its fundamental respects, is constitutionally guaranteed.

The community's acceptance of the legitimacy of governmental decisions lies at the heart of the ability of each of the three arms of government to function. When a Court resolves a dispute between citizens, or between a citizen and the State, the parties are not being rendered a dispute resolution service; they are being governed.[2] In this way, the judicial system is the third arm of government in reality. The result of that governance is a binding decision. Judicial decisions carry with them the implication of the use of force, or the actual and imminent application of force, whether by the actual arrival of prison wardens or by the potential for the arrival of bailiffs. Judicial decisions are accepted in Australia, despite their intrusive nature because they are accepted as legitimate. Their legitimacy depends upon the fairness of the process by which the decisions are made and by the perceived soundness of their content. For this reason, a decision reached by an unfair process will be set aside whether it is sound or not. A decision that is shown to be unsound will be set aside even if the process by which it was reached was fair.

Considerations of fairness and soundness arise when incompetence of counsel is a ground of appeal. Usually, the ground involves a contention that counsel has failed to tender some crucial evidence, has failed to cross-examine to elicit crucial evidence or has omitted to take a step to ensure a fair trial.[3]

However, this ground will fail if the appellate Court concludes that the step taken by counsel, although disadvantageous in hindsight, might have been taken by

Judicial decisions are accepted in Australia, despite their intrusive nature because they are accepted as legitimate. Their legitimacy depends upon the fairness of the process by which the decisions are made and by the perceived soundness of their content. For this reason, a decision reached by an unfair process will be set aside whether it is sound or not.

counsel deliberately in order to gain a perceived forensic advantage – even if, in hindsight, the client lost a chance of acquittal.

It is the duty of a trial judge to ensure a fair trial for the accused. Why do we not blame the judge for these mishaps? It is because neither the judge nor the jury has the authority to decide the issues that will be tried or the authority to tender evidence. It is within the independent judgment of the barrister, and within the barrister's sole discretion, to decide such matters. It was for this reason that, in *Giannarelli v Wraith,*[4] Mason CJ said that the administration of justice in our system depends in very large measure on the faithful exercise by barristers of their independent judgment.[5] His Honour said that the advocate is as essential a participant in our system of justice as are the judge, the jury and the witness.[6] Indeed, there are cases that simply cannot and will not be heard unless the parties are represented by counsel, as *Dietrich v The Queen* demonstrated.[7]

Criminal proceedings in civil law jurisdictions, like Germany, are based upon an entirely different assumption. It is that procedural fairness is best secured by the workings of a judiciary that has as an obligation to find the truth. It is assumed that an inquiring judge, who is not hamstrung by limitations imposed by the parties, is more likely to identify the relevant issues and to determine the truth. In common law countries judges and juries decide cases according to what the parties let them see; or, more exactly, according to what *counsel* lets them see.

Counsel's role is extraordinary. Although the barrister is the client's agent, the scope of authority is wider than other agents. Counsel has 'complete control over the way the case is conducted'.[8] Decisions about what witnesses to call, what questions to ask and not to ask, what lines of argument to pursue and what points to abandon are all matters within the sole discretion of counsel.[9] In an appropriate case, a decision by a barrister will prevent a case being brought at all, despite the client's wishes. There are, of course, well known and well understood instances when the client's decision is binding on counsel. The responsibility for deciding how to plead is that of the client, although the barrister's duty extends to advising on the matter, even in forceful terms.[10] Indeed, pressure upon an accused concerning the plea, if it amounts to intimidation, may amount to an offence.[11] Similarly, in a criminal trial, the decision whether or not to give evidence is one for the defendant alone.

There is a small and special exception to

the rule that a judge cannot call a witness. But it only applies when there has been a deliberate failure on the part of counsel to perform the barrister's primary duty to call a necessary witness. In short, it demonstrates that control really lies with the barrister.[12]

In *Strauss v Francis,*[13] Mellor J said:

> 'No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause . . . without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief.'

There is an anecdote about Sir Maurice leading David Bennett in a matter. A question of policy arose that could affect the litigation. Bennett suggested that they take instructions. Sir Maurice's response was, 'I don't take instructions. I give them.'[14]

However, this freedom of action comes coupled with duties. These are familiar. Counsel must not mislead the Court. Counsel must place all of the relevant law candidly before the judge.[15] There is an obligation to identify the relevant issues and a barrister does not owe any duty to the client to argue any matters just because the client desires it.[16] Very importantly, a barrister must not make submissions in a way that conveys the barrister's personal opinion about the merits of the case.[17] These are limitations upon the zealousness with which counsel can fight for the client's interests.[18] It can be expected that a litigant, advancing his or her own cause, will stop at almost nothing in order to prevail. A barrister's zeal cannot go nearly so far. There is, however, a famous statement made by counsel in the course of his defence of Queen Caroline in 1820 in the House of Lords:

> ' … an advocate, by the sacred duty which he owes the client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.'[19]

'The advocate endeavours to persuade; the judge must decide. For that they must share or achieve a perception of what the matter for decision is, though not, of course, of its resolution. The isolation of that matter is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy.'

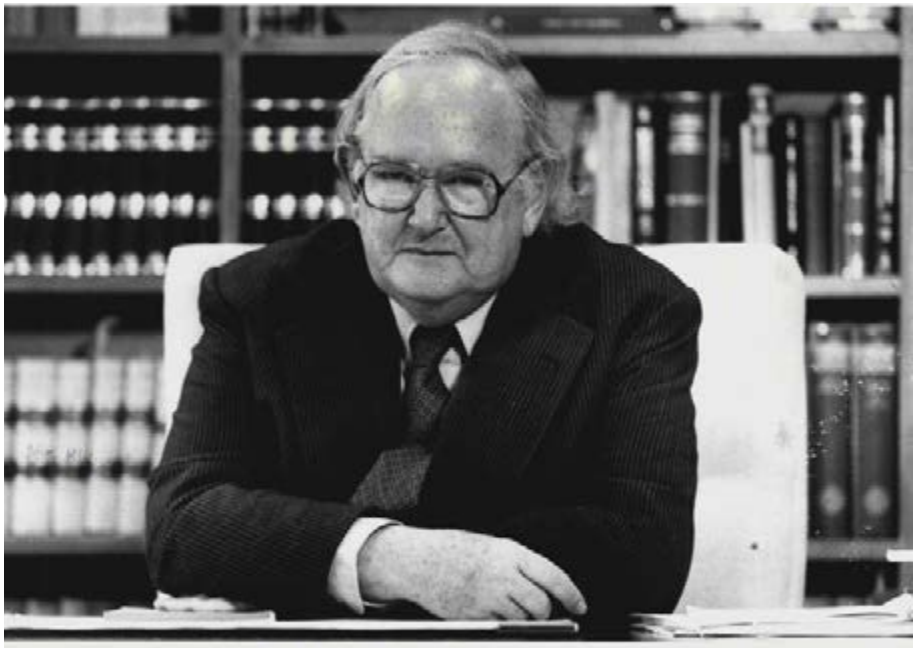
This statement has often been relied upon as a justification for an unbridled representation by counsel of a client's interests. An American commentator has relied upon that statement, and other things, to justify a conclusion that lawyers in an adversary system 'cannot be burdened with special responsibilities' and are mere agents who owe total loyalty and obedience to the client.[20] However, adherence to that statement as a standard of beheviour would lead swiftly to the barrister acting in accordance with it being struck off the roll in Australia. In fact, such commentators fail to appreciate that the statement was made in a wholly political context.

Mr Brougham, as Lord Brougham then was, spoke those words in opening his defence of Queen Caroline, the wife of George IV, in the House of Lords. The proceedings were, in formal terms, proceedings in the upper house of the legislature to enact a *Bill of Pains and Penalties.* If passed, the resulting Act would have resulted in effecting King George's divorce from his wife. In its terms, the Act would have held her guilty of adultery, stripped her of her royal title and effected a divorce. The proceeding was, therefore, entirely political in character. In a private letter, Brougham later explained why he had made that statement.

> 'The real truth is, that the statement was anything rather than a deliberate and well-considered opinion. It was a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington. I was prepared, in case of necessity, that is, in case the Bill passed the Lords, to do two things – first, to resist it in the Commons with the country at my back; but next, if need be, to dispute the King's title, to show he had forfeited the Crown by marrying a Catholic … What I said was fully understood by George IV …'[21]

The statement was a political statement, calculated to intimidate persons who, while not parties in any sense, were instrumental in provoking the proceedings. The result of the proceedings was, in fact, a political victory for Queen Caroline. Moreover, no attempt was ever again made in England to pass a bill of attainder or to institute proceedings for impeachment. In any case, Brougham's statement cannot possibly be relied upon as a statement about counsel's duty when acting as such in a Court of law.

So, the rules of the Bar operate to restrict the behaviour of barristers beyond the restrictions of general common law rules



Sir Maurice Byers CBE QC

about dishonesty. Why do we have these rules? Certainly, if a barrister were a mere agent, a mere marketer of the client's case, these rules would be unnecessary. To answer that question we need to look more closely at the actual functions of the Bar.

This is how Sir Maurice described the work of the barrister and the judge:

> 'The advocate endeavours to persuade; the judge must decide. For that they must share or achieve a perception of what the matter for decision is, though not, of course, of its resolution. The isolation of that matter is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy.'[22]

The result of this joint undertaking is a judicial decision and the reasons for the decision. The reasons, which are the product of this collaboration between Bench and Bar, articulate the law. Albert Venn Dicey sourced the very content of the British constitution in 'the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts…'[23]

The conclusion must be that the system of justice in Australia entrusts barristers with the duty to isolate with precision the matter that is essential for decision and to array before the judge all the necessary factual and legal materials pertaining to that matter. Then, Bench and Bar work together, performing their respective functions, to ensure that the judge will be in a position to arrive at a sound decision and that the process leading to that decision is fair.

In *Ziems v Prothonotary of NSW,*[24] Kitto J described the relationship between Bench and Bar is one of 'intimate collaboration'.[25] Together they daily engage in the administration of justice. Together, they create and articulate the law. In his inimitable way, Sir Maurice remarked that 'occasionally that partnership may be distasteful to both'.[26]

It is indisputable, therefore, that the Bar engages in the administration of justice just as much as the Bench. On his appointment to the High Court, Sir Owen Dixon said that the Bar 'formed part of the use and the service of the Crown in the administration of justice.'[27] In *Ziems v Prothonotary of NSW,*[28] his Honour said 'the Bar is a body exercising a unique but indispensable function in the administration of justice'.

To use the words of Sir Maurice, 'When we appear before the Courts we are engaged in the administration of justice …'[29]

That is why the first object of the New South Wales Bar Association, according to its constitution, is to promote the administration of justice. The Australian Barristers' Rules state that the Rules have been made in the belief that a barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.

This conception of our profession has ancient roots. The original nucleus of the English Bar was the order of sergeants. This order was established centuries before there even was a Bar. The Brothers of the Coif, as they were called, devoted themselves to the profession of the law, bound by a solemn oath to give counsel and legal aid to the King's people.[30] Recall that the original meaning of the word 'profession' is a 'declaration, promise or vow made by one entering a religious order'.[31] A profession is the act of declaring a belief or practice. The word 'sergeants' in this context is a corruption of the Latin '*servientes*', meaning 'servants'. The serjeants were *'servientes ad legem'.* They charged the rich and gave their services *gratis* to the poor[32] How much service they actually gave to the poor is a matter for speculation. Perhaps, like the notion that a barrister's fee is a mere honorarium, it is a fiction which serves as a good mnemonic device to remind us that public service, not profit, is our real *raison d'etre.*

The English were not unique in the development of a coterie of devoted professionals. The Romans and the French also developed a profession although their nature was different. The French, as always, expressed the stature of their Bar most elegantly:

> *Un ordre aussi ancient que le magistrature, aussi noble que la vertu, aussi necessaire que la justice.*[33]

The purpose of the Australian Bar is, therefore, to 'profess', as the chief function of its members, the administration of justice according to law. The trouble is, as the editor of *Justinian* has frequent cause to remind us, barristers can be as shabby in their behaviour as anybody else. It is for that reason that the members of the Bar are braced and upheld in their proper behaviour by their rules. The reason for the rules about honesty and fair dealing, greater than the community normally requires, are obvious. But other rules serve a different end. They serve to maintain a distance from the lay client. The prohibition against a practice in which a barrister is paid a wage ensures independence from any single litigant. The barrister is not allied with any enterprise whose aims might conflict with a barrister's obligation to conduct a case in a way that serves the administration of justice. The general practice of taking briefs only from a fellow professional secures against a too-great identification with the interests of the client. The prohibition against partnership avoids the conflicts of interest that could impair a barrister's freedom of action. The

cab-rank rule, which is rarely invoked because its very existence means that it doesn't have to be, frees the barrister from embarrassment and ensures that the Courts can depend upon the same detached and honest assistance whoever the client.

For these reasons, a barrister, whose actual moral fibre might not be up to it, finds it easy to accept sole and total responsibility for a matter. By dint of mere fidelity to common rules of practice with which it is easy to comply, the barrister becomes a person whom the Courts can trust.

The Court is vitally interested in the maintenance of these rules and practices and is a zealous guardian of standards of behaviour. In 1780, Lord Mansfield asserted that the power of the Inns of Court concerning the admission to the Bar is a power that was delegated to the Inns by the judges.[34] In 1830, Lord Wynford, speaking for the Privy Council, observed that, there being no Inns of Court in the colonies, and it being essential for the due administration of justice that some persons have authority to determine who are fit to practise, the same power must be taken to reside in the colonial Courts.[35] Consistently with that idea, Chapter 10 of the *Charter of Justice* of 1823 established a Supreme Court of New South Wales and authorised the Court to admit as barristers or solicitors persons who had been admitted in Great Britain and Ireland and gave a limited right of local admission. In 1848 the New South Wales Parliament enacted the *Barristers' Act,* which incorporated a board with administrative powers to govern the process of admission. Accordingly, the judges of the Supreme Court were *ex officio* members, along with the Attorney-General and two barristers.

The reason why judges are the ultimate guardians of the standards of behaviour of the Bar is because it is they who depend so much upon the maintenance of the fundamental characteristics of the profession.

The engagement of the Bar in the administration of justice is not limited to the provision of assistance to judges. It is the Bar itself that, on the whole, furnishes candidates who are qualified to fill judicial office.

In England, until 1873, the judges of the Court of Common Pleas were invariably selected from the brotherhood of Serjeants. That is why, even in Australia, until very lately, judges referred to each other as 'brother'. Even today, almost every judge is appointed from the Bar and judges of the Supreme Court are almost always appointed from the highest modern rank of advocates, the silks who are the successors to the serjeants. In its day, the practice of appointing solely from the rank of serjeants was regarded as vital to ensure against the appointment to the Bench of political flunkies.[36] When, in 1990, there were serious political initiatives to abolish Queen's Counsel, Sir Maurice lamented the proposal. He said that the appointment of Queen's Counsel by the government served as a recognition by the executive of the central part that lawyers play in the administration of justice.[37] That is why the process of selection of those barristers who will be appointed senior counsel is so important to the community.

'…we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom.'

This symbiotic and deep-rooted relationship between Bench and Bar is structural and not merely incidental. As a peculiar and remarkable phenomenon, it is very apparent to foreign observers. In 1894, an American observer of the English profession saw English judges as 'not a distinct branch of the profession, but … merely eminent members of it'.[38]

Judge Richard Posner, who had been Chief Judge of the US Court of Appeals for the Seventh Circuit, visited England and had a look the English profession. He delivered several lectures at Oxford that explained the results of his anthropology. He said that once you recognise that barristers are a form of judge, you can see that England has a career judiciary.[39] He said that this is bound to be unlike the 'lateral-entry, rather political, rather amateurish, high-variance, non-hierarchical judiciary that one finds in the United States. Advancement in a career judiciary depends on merit.'[40]

Judge Posner marvelled that :

> 'with the judges stripped of political functions, they are really technicians and it does not matter that they are un-representative of the population any more than it matters that engineers are un-representative.'[41]

One feature of this is the exceptional capability of Australian judges to fulfil the functions of their office. They have gained that capability by reason of their years of service as members of an ancient institution that was transported to our country and translated.

Let me turn to the Australian Constitution and its relationship to these matters.

I will begin by quoting something that Justice Jacobs said because it is relevant but, mostly because Sir Maurice relied upon this *dictum* in his oral argument in *Kable v The Director of Prosecutions of New South Wales.*[42]

> '…we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom.'[43]

Kable decided that the Constitution requires and implies the continued existence of a system of State Courts with a Supreme Court at the head of the State judicial system. Covering cl 5 of the Constitution, s 118, ss 51(xxiv) and (xxv) and s 77 imply the continuing existence of a system of State Courts declaring the legal rights and duties of the people of Australia.[44] No State or federal parliament can legislate in a way that might undermine the role of the Courts as repositories of federal judicial power.[45] In the case of State Courts, this means that they must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government.[46]

Let me invoke the spirit of Sir Maurice and put a rhetorical question in the way that he used to do in oral argument:

> 'And now one comes to the crucial question: if neither the Commonwealth nor the States can legislate so as to undermine public confidence in the impartial administration of the judicial functions of Courts, or legislate so as to impair their independence, how then could they legislate so as to undermine the independence and integrity of the Australian Bar?'

How do we answer that question?

In *Layne v Attorney-General of Grenada*[47] the Privy Council had to decide whether a person was fit and proper to be admitted to the Bar. Lady Arden sourced the requirement of good character in the fact that '[l]awyers play a critical role in sustaining the rule of law'.[48]

For the reasons that I have given, that is right. A legal profession that is subservient to the executive could not do so. A legal profession that was obliged by law to act below the standards expected by the Bench could not do so. A legal profession that was constrained by irrelevant requirements from doing its duty in its current form could not do so.

Let me answer that question in the way in which, I think, that Sir Maurice would have answered it.

The answer is that the Commonwealth and States *cannot* legislate to undermine the independence and integrity of the Bar. And the reason why they cannot is that the Constitution was framed in accordance with many traditional conceptions.[49] The grant of legislative power to a State legislature assumed the rule of law as a constitutional imperative. The grant otherwise would have been meaningless.[50] A State law that controls a State Court in the exercise of jurisdiction is invalid if it is inconsistent with the Court's possession of the constitutional characteristics. One of these characteristics is that, to do justice according to law, a State Supreme Court relies upon its association with Bar as it now exists.

Consequently, the perversion or distortion of the Bar as an institution would encroach upon this vital adjunct to the administration of justice and would constitute an erosion upon the rule of law itself.

There is no doubt at all that the eradication or enfeebling of the Australian Bar would impinge upon the maintenance of the rule of law. I have sought to demonstrate why this is so by reference to principle. However, there are historical examples available.

When the Constituent Assembly was formed in Versailles in June 1798 and arrogated to itself the powers of the State, one of its earliest acts was to abolish the French Bar.[51] When Napoleon came to power he was not inclined to make a decree to re-establish it:

> 'As long as I have a sword by my side I shall never sign such a decree. I wish that one could cut out the tongue of an advocate who employs it against the Government.'[52]

In Iran, the government which took power in 1979 moved swiftly to close down the Bar Association and to arrest and imprison the majority of the members of the Association's Board of Directors.[53] There are other modern examples.[54]

Here is a final look at the nature of the Bar through the eyes of a foreign observer, and one from a constitutional democracy. It truly illuminates what we are and why we should not change in any essential respect. Richard Posner, an American judge as I have said, saw this:

> 'Above all, the barristers marshal the facts and the legal authorities for decision, which is half the work of a judge. Judges can trust the barristers to play straight with them concerning the facts and the cases and the other materials for judgment. This is the general belief of the students of the English legal system, and it is also what the judges I spoke to in England told me and what my own observations of appellant argument in the Court of Appeal confirmed. Being drawn from the identical pool, moreover, judges and barristers can readily understand each other. They are on the same wavelength. As a result of these things, English judges are able to function without law clerks, who play an essential role in the American system with an open bar dominated by lawyers whom the judges do not trust. American lawyers are called 'officers of the Court', but this is said with a smile (or a sneer). Barristers *are* officers of the Court … The United States has one staff of lawyers that corresponds to the English bar, and that is the staff of the Solicitor General of the United States.'[55]

Sir Maurice would have been gratified that, at least, his American confrères in that office enjoy what we, as Australians, all take for granted. BN

ENDNOTES

1 Judge of the Court of Appeal of Queensland. I am indebted to Ms Katherine Lee of the Queensland Supreme Court Library for her invaluable research which contributed to this paper.
2 *The Idea of a Professional Judge,* PA Keane, Paper delivered to Judicial Conference of Australia Colloquium, Noosa, 11 October 2014, p 5.
3 *TKWJ v The Queen* (2002) 212 CLR 124; *R v Scott* (1996) 137 ALR 347; *R v Birks* (1990) 19 NSWLR 677.
4 (1988) 165 CLR 543; the basis for an advocate's immunity established by *Giannarelli* was rejected by the High Court in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1, but the validity of the statements made in *Giannarelli* about the status of counsel was not questioned.
5 *ibid.* p 556.
6 *ibid.* p. 588.
7 (1992) 177 CLR 292.
8 *Halsbury's Laws of England,* 4th ed (reissue), vol 3(1), par 518.
9 *R v Birks, supra,* at 683 per Gleeson CJ.
10 *R v Hall* (1968) 52 Cr App R 528.
11 *R v Meissner* (1994-1995) 184 CLR 132 at 143 per Brennan, Toohey and McHugh JJ.
12 *R v Peros [2018] 1 Qd R 1.*
13 (1866) 1 QB 379 at 383.
14 *Byers Lectures, supra,* p 5.
15 Rule 31 of the Australian Barristers' Rules.
16 Rule 41 and 42 of the Australian Barristers' Rules.
17 Rule 43 of the Australian Barristers' Rules.
18 There is a famous statement by Lord Brougham who, in .
19 *The Trial at Large of her Majesty Caroline Amelia Elizabeth, Queen of Great Britain, in the House of Lords,* 1821, Volume 2, page 3, Printed by T Kelly, London.
20 *Lawyers role, Agency Law, and the Characterisation "Officer of the Court",* James A Cohen, (2000) 48 Buffalo Law Review 349 at footnotes 13 and 14 and page 409.
21 *Hortensius, An Historical Essay on the Office and Duties of an Advocate,* William Forsyth, John Murray, 1879, at 389.
22 Speech to NSW Bar Dinner 1994, *supra,* p 285.
23 *Introduction to the Study of the Constitution,* AV Dicey, 8th ed, 1915, republished by Liberty Classics, 1982. p 115.
24 *Ziems v Prothonotary of NSW* (1957) 97 CLR at 286.
25 *Ziems v Prothonotary, supra,* p 298.
26 *Byers Lectures, supra,* p 284.
27 *Jesting Pilate, p 247;* see also *Ziems v Prothonotary of NSW* (1957) 97 CLR at 286.
28 *Ziems v Prothonotary of NSW* (1957) 97 CLR at 286.
29 Maurice Byers, Speech at 1994 NSW Bar Dinner, *The Byers Lectures 2000-2012,* Perram and Pepper, Federation Press, 2012, pp 294-295.
30 *The Order of the Coif,* Alexander Pulling, William Clowes and Sons, London, 1897, p 2-3.
31 *Oxford English Dictionary,* 2nd ed.
32 *ibid.* p 3 .
33 *Hortensius, supra,* p 1.
34 *R v The Benchers of Gray's Inn* (1790) 1 Doug. 353; 99 ER 227.
35 *Re Justices of the Court of Common Pleas of Antigua* (1830) 1 Knapp 267; 12 ER 321. The same view was taken in Queensland in 1882: *R v Byrne* (1882) 1 QLJ 66 at 67.
36 *The Order of the Coif, op cit,* pp 99-100.
37 Speech at New South Wales Bar Dinner, 1994, *supra,* at 295.
38 *The Law and Jurisprudence of England and America,* John Dillon, Little Brown and Co, 1894, p 28; *Law and Legal Theory in the UK and USA,* Richard Posner, Clarendon Press, Oxford, 1996.
39 *ibid.* p 30.
40 *ibid.* p 31.
41 *ibid.* p 33.
42 (1996) 189 CLR 51.
43 *The Queen v Quinn; ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11.
44 *Kable v Director of Prosecutions of New South Wales* (1995-1996) 189 CLR 51 at 110 per McHugh J.
45 *ibid.* p 116.
46 *ibid.* p 116.
47 [2019] UKPC 11 at [13].
48 *In re Rowe* 640 NE 2nd 728 at 730.
49 *cf. The Common Law as an Ultimate Constitutional Foundation,* Sir Owen Dixon, (1957-1958) 31 ALJ 240 p 245.
50 In fact, he said exactly that in oral argument in *Kable.*
51 *An Historical Sketch of the French Bar,* Archibald Young, Edmonston and Douglas, 1869, pp 79-80.
52 *ibid.* p 120.
53 Iranian Bar Association, Struggle for Independence, Iran Human Rights Association Centre, 2012.
54 The President of Pakistan removed Chief Justice Chaudhry from office. Lawyers mobilised themselves into a movement which ultimately prevailed but not before many of them were beaten and imprisoned: Pakistani Lawyers' Movement, (2009-2010) 123 *Harv.L.Rev.*1705; State of Emergency: 'General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan', Qureshi, (2009-2010) 35 *N.C.J.Int'lL & Com.* Reg. 485.
55 *Law and Legal Theory in the UK and USA,* Richard Posner, Clarendon Press, Oxford, 1996, pp 26-27.

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Library Databases

By Lyndelle Barnett and Lisa Allen

The NSW Bar Library, and the very helpful librarians at the Library, have provided great assistance to many members of the NSW Bar over the years. While most members of the Bar know that the Library exists and where it is located, there are a number of resources available that are generally underutilised. Lisa Allen, Librarian, provides this very helpful guide to some of the lesser known resources available.

The library has an eclectic collection of databases which members may access *from outside the library*. These include:

- **Lexis Red**, which is a collection of commentary titles that covers a wide range of practice areas. Individual titles may be borrowed by members;
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- **ASX Listing and Market Rules**, which is a point-in-time service of financial regulation documents published by Timebase. Versions of the Listing Rules from 1 September 1994 are available; and
- **Corporations law**, which is a point-in-time service on all materials related to the Corporations Law. It covers 27 June 1989 – Present.

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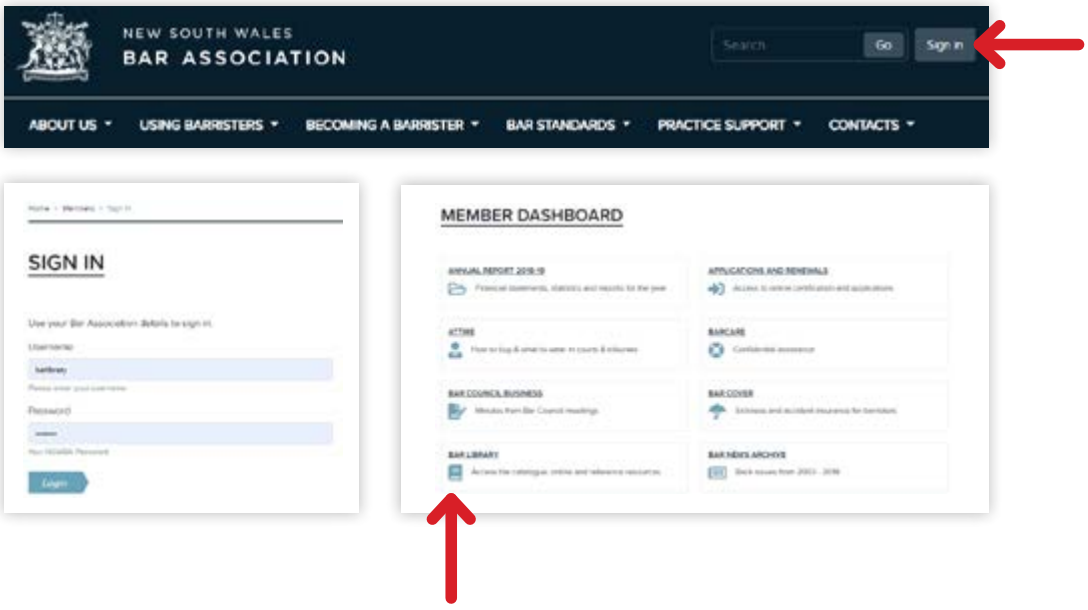

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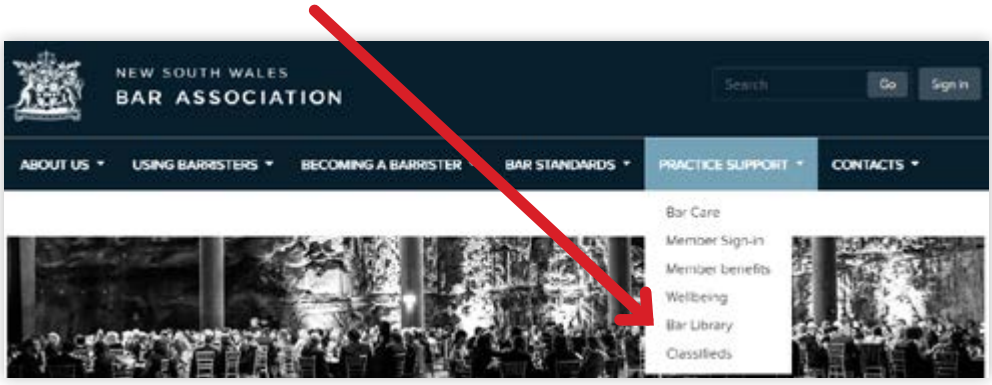

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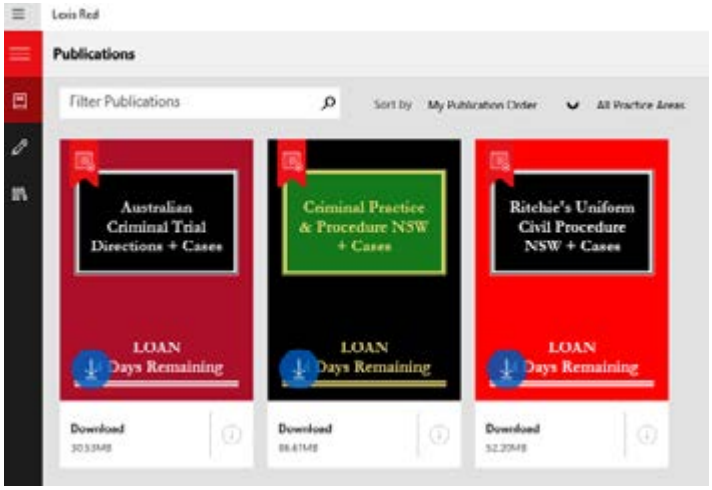

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Australian Administrative Law
Australian Commercial Arbitration
Australian Consumer Credit Law
Australian Corporations Law Principles & Practice
Australian Criminal Trial Directions
Australian Defamation Law & Practice
Australian Encyclopaedia of Forms & Precedents
Australian Family law
Australian Immigration Law
Australian Stamp Duties Law
Australian Tenancy Practice & Precedents
Australian Uniform Evidence
Austin & Black's Annotated Corporations Act
Bankruptcy Law & Practice
Building Contracts Australia
Civil Liability Australia
Civil Procedure ACT
Civil Procedure QLD
Civil Procedure SA
Civil Procedure TAS
Civil Procedure VIC
Civil Procedure WA
Communications Law & Policy in Australia
Conveyancing Service NSW
Copyrights & Designs
Court Forms Precedents & Pleadings NSW
Court Forms Precedents & Pleadings QLD
Court Forms Precedents & Pleadings VIC
Criminal Practice & Procedure NSW
Criminal Law WA
Cross on Evidence
Discovery & Interrogatories Australia
Federal Civil Litigation Precedents
Federal Criminal Law
Ford's Principles of Corporations Law
Franchising Law & Practice
Halsbury's Laws of Australia
Industrial Law NSW
Intellectual Property Precedents
Kelly & Ball Principles of Insurance Law
Law of e-commerce
Legal Costs NSW
Local Government Planning & Environment NSW (A, B, B1, C, D)
McDonald's Licensing and Gaming NSW
Motor Traffic NSW
Native Title
Occupational Health & Safety Law NSW
Personal Property Securities in Australia
Personal Injury Litigation NSW
Practice & Procedure High Court & Fed Court
Product Liability Australia
Patents Trade Marks & Related Rights
Ritchie's Uniform Civil Procedure NSW
Sentencing Law NSW
Solicitors Manual NSW
Succession Law & Practice NSW
Takeovers & Reconstructions Australia
Worker Compensation NSW
Workplace Law-Fair Work

Law Reports

Administrative Law Decisions
Australian Corporations and Securities Reports
Australian Family Law Reports
Australian Law Reports
Intellectual Property Reports
New Zealand Law Reports
NSW Law Reports
Victorian Reports

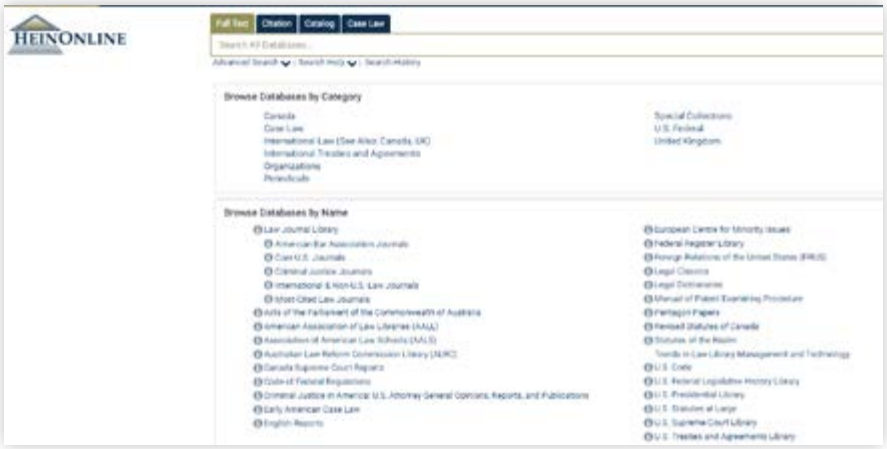
Heinonline

Heinonline's law journal library holds more than 2,700 journals. Most of the journals have up to date no delay coverage, but some have an embargo on the current year / volume of publication.

As well as US journal titles, the database includes the major Australian university law journal titles such as *Federal Law Review*, *Sydney Law Review* and the *University of Melbourne Law Review*.

It also has databases of the US and Canadian Supreme Court Reports (authorised PDFs); a complete set of English Reports, (1220-1867) and early American case law.

Statutes of the Realm is a collection of Acts of the Parliament of England from the earliest times to the Union of the Parliaments in 1707, and Acts of the Parliament of Great Britain passed up to the death of Queen Anne in 1714.

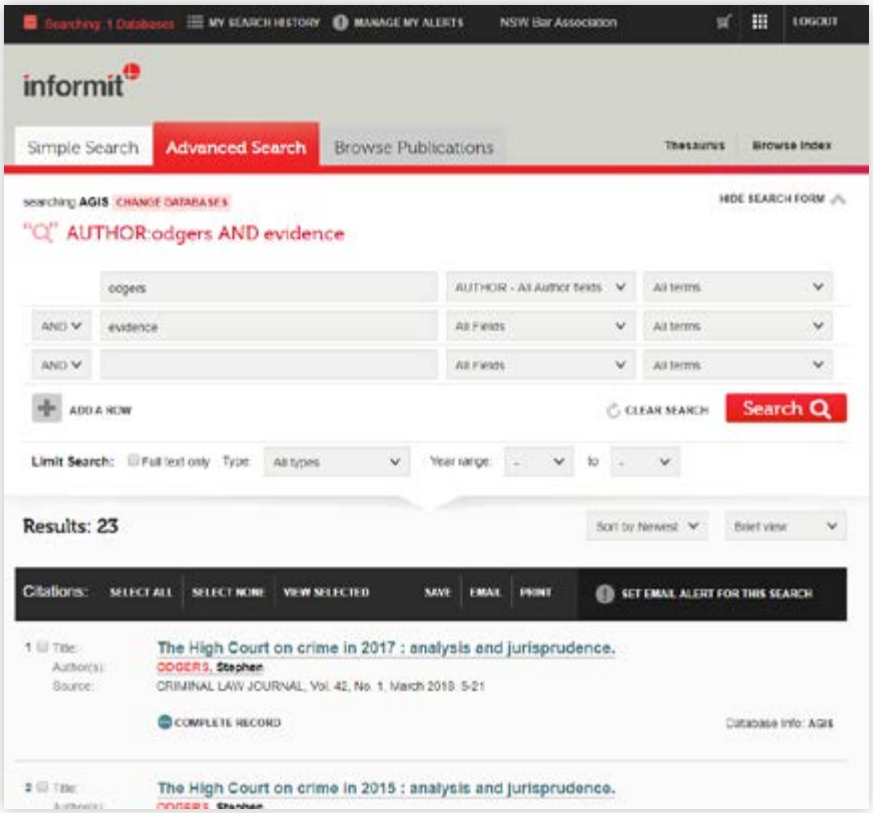


AGIS (Attorney-General's Information Service)

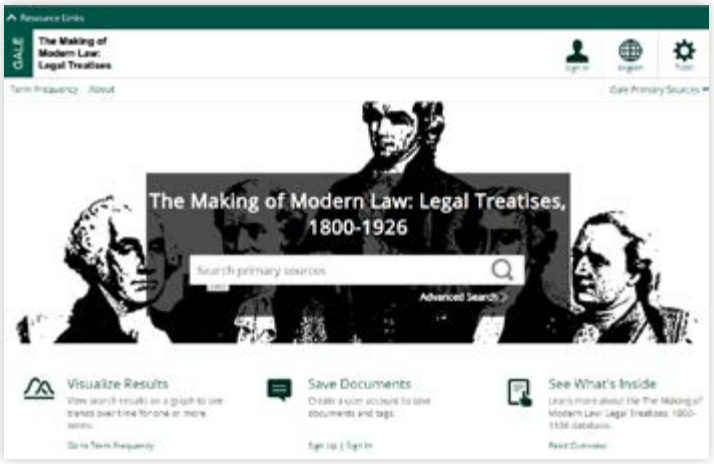
AGIS is a bibliographic legal database covering more than 140 journals. The majority are Australian journals but selected NZ, UK, Canada and US journals are also included.

The database provides index and abstract records for articles from 1975 onwards.

Major and emerging subject areas are covered including administrative law, banking, companies and securities, constitutional law, copyright law, criminal law, cryptocurrency, digital copyright, environmental law, family law, human rights, international law, legal aid, online privacy and trade practices.

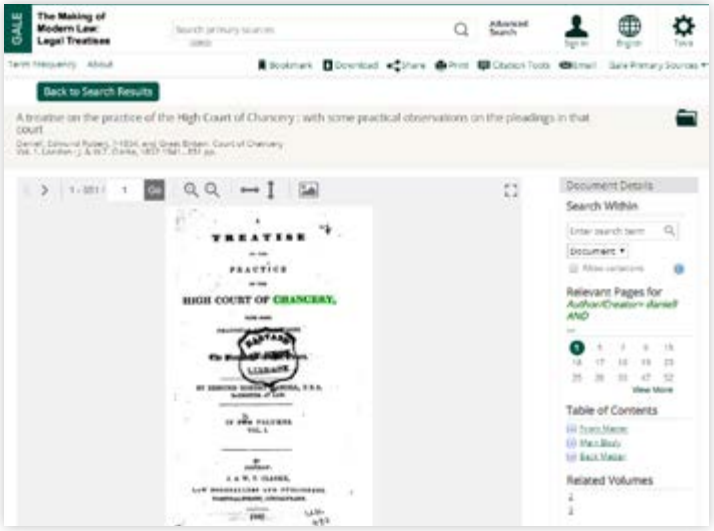


The Making of Modern Law: Legal Treatises, 1800-1926



The Making of Modern Law: Legal Treatises 1800-1926 has digital images of 22,000 legal treatises on US and British law. Full-text searching is possible over more than 10 million pages.

It includes works such as *Daniell's chancery practice* and UK and US editions of some of the most influential books such as *Blackstone's Commentaries of the Laws of England*.



The database also includes works of practical literature on subjects such as land titles, electricity and gaming in the form of casebooks, local practice manuals, trade publications, and materials on legal and general history.

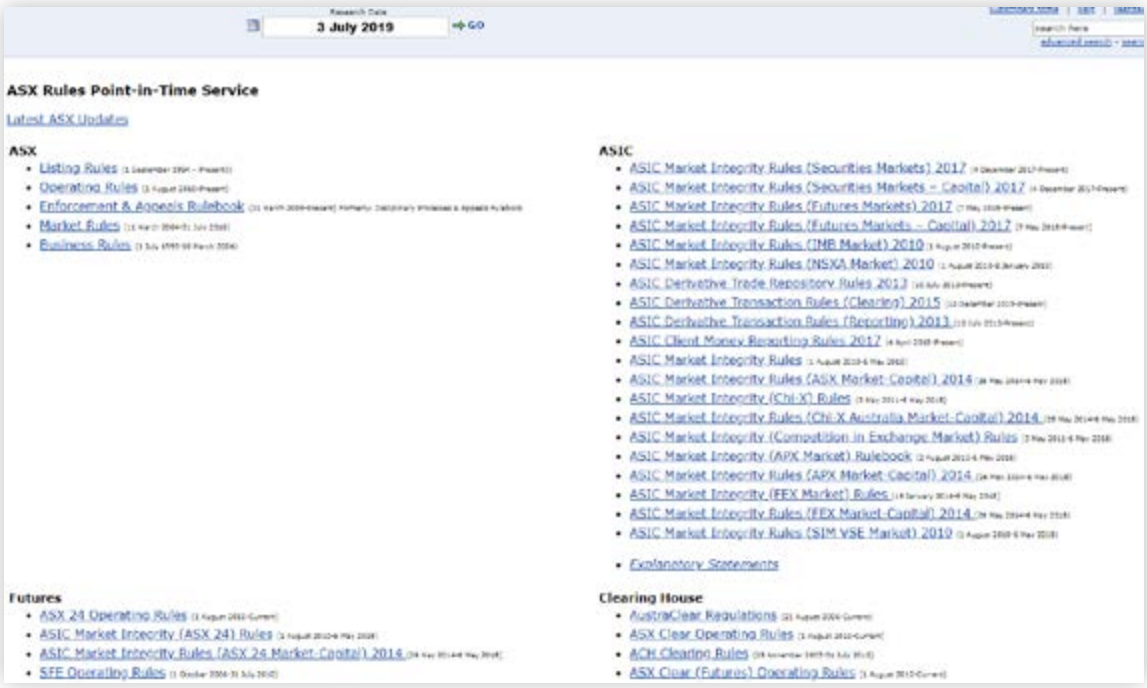
The database is organised into 99 subject classifications, or topics, such as copyright, patents and trademarks, natural resources, torts, public property and international law.

Point-in-Time Services from TimeBase

The library has subscriptions to two point-in-time services where the user can view legislation as it was at a specific date. It dynamically links to full text legislation, regulations, bills, explanatory memoranda and cases across a time period, The two databases are:

ASX Rules

This database is a comprehensive collection of ASX Listing, Market, Business and Disciplinary Processes and Appeals Rules including Waivers and Tribunal Determinations. Point-in-time service to ASX and ASIC Rules.



and the

Corporations Service

Consolidated corporations legislation including current and repealed Acts and Regulations. Users can view and search versions of legislation from 27 June 1989. Also contains Bills and Explanatory Memoranda, second reading speeches, commentary, case annotations and full text of relevant cases.

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Australian Racism:

The Story of Australia's First and Only Black Premier and Chief Justice – Sir Francis Villeneuve Smith[1]

By The Hon Michael Kirby AC CMG[2]

ABSTRACT OF THE LAUNCH OF THE BOOK *SIR FRANCIS VILLENEUVE SMITH* BY J BENNETT AND R SOLOMON

Sir Francis Villeneuve Smith was the third Premier and fourth Chief Justice of the British colony of Tasmania. He was born in Haiti and his mother, Josephine Villeneuve, was of African descent. His skin colour was dark. He migrated to Australia from England, where he had been educated and admitted to the Bar. His brilliance soon won him high public offices. However, his skin colour led to social isolation for his mother and denigration and insults intended to wound him. He was called 'Blackie Smith', 'Nigger' etc. But his talents overcame the racial taunts and the outrage that 'a coloured person is sitting in judgment upon the Anglican (sic) race'. His experience was accompanied by racist laws and policies in Australia against which we must be ever vigilant.

From the establishment of British colonies in Australia and arrival of people of British ethnicity, the country had to face three significant features of the place:

- The arrivals included comparatively few people in total number and almost all of them were 'white' in skin colour. Most of the population encountered relatively few Indigenous people or others whose skin colour was other than white. Theirs was a homogenous mainly Anglo Celtic community. People of colour were an immediately noticeable and tiny minority;
- Because the Indigenes of Australia were few and were not organised in cities and towns but mostly in coastal areas, virtually all of the interactions that the new arrivals and later settlers had were with each other and with new arrivals from overseas who were also of white skin colour and of British ethnicity; and
- Legally, the new arrivals and other people born in the Australian colonies were, like the Indigenous people, British subjects by nationality. They shared this status with the peoples of a huge global Empire that was multi-racial and dependent for their ultimate safety and defence on the loyalty (or at least the tolerance) of millions of other British subjects who were not white and many of whom were very sensitive to racial differentiation and disadvantage. The peace and safety of the British Empire depended, in part, upon the force of military and naval power; but also on the tranquility and submission to British rule of millions of subjects who were not white in skin colour.

In the Australian colonies, attitudes of imperial superiority and racial leadership led to intense scrutiny of 'coloured aliens' who were entering the country, especially in the north. Marriage and other unions between Aboriginal women and men of colour or other immigrants and the white majority in Australia were the subject of widespread disapproval throughout the 19th century. Thus, there was great civic anxiety over miscegenation.[3] Nevertheless, pastoralists experimented with importing free or indentured labour from India, Afghanistan, China and the Pacific Islander peoples and Maori from New Zealand. The farmers argued the need for such people to perform work in conditions inimical to most of the whites. On the whole, the British Colonial Office, local governors and a growing number of settlers opposed the 'admixture of races'. In consequence, from at least the 1850s the colonies in Australia began to adopt restrictive immigration policies. The tropical north of Australia was treated as an exception.

Nationalism in Australia was not revolutionary or inherently anti-British. It regarded eventual independence of the Australian colonies as a likely attribute of Britishness. National identity in the new land would be developed within the membership of the wider imperial family. There was a self-conscious sense of destiny among many of those who demanded self-government and eventually federation for Australia. They saw their destiny as being to develop societies and governance which copied those of England. A growing commitment to a 'White Australia' – meaning an Australia in which the Asian population, Chinese in particular, would be excluded and dramatically reduced, even to the point of non-existence, had been taking shape in the Australian colonies before the Federation movement got underway.

After the 1850s, all of the newly established colonial parliaments in Australia enacted laws to expressly limit Chinese immigration. These included the *Chinese Immigration Act 1855* (Vic) and the *Chinese Immigration Restriction and Regulation Act 1861* (NSW). Restrictions were also imposed on the employment of Chinese immigrants in identified industries. An Australasian Inter-Colonial Conference on the 'Chinese Question' in 1888 concluded with an agreed commitment to a common

restrictive immigration policy. By that time, the goal of a guaranteed Australian 'whiteness' was a powerful unifying factor in the Great South Land.[4] Virtually everybody supported it.

Sir Henry Parkes, five times Premier of New South Wales, declared that 'the crimson thread of kinship' ran through all colonial Australians.[5] This shared kinship was the reason for the insertion in the draft Australian Constitution of a power, granted to the Federal Parliament, to enact 'special laws' with respect to the people of any race.[6] Dealing with the Indigenous people who were black was identified as a particular local problem. It was thus a matter for the colonies, later the states, alone. But the power to control immigration from overseas, including potentially people of different dark skinned races, was viewed as a national problem. Hence the adoption of the constitutional power over immigration in s 51(xxvii) which promptly led to the enactment of the federal *Immigration Restriction Act 1901* (Cth).

The Imperial authorities at Westminster did not readily approve of the Australian colonial legislation insofar as it specifically restricted the entry of other British subjects by reference to their racial identity or appearance. Thus, the 1855 *Chinese Immigration Act* in Victoria was repealed under British pressure in 1863. However, by the 1870s colonial anxieties were freshly fuelled by the arrival of thirteen thousand Chinese gold diggers, first on the Queensland goldfields, later in Victoria and New South Wales. Reports from California told of an increasing Chinese presence there. This had resulted in the creation of a US congressional joint committee of 1876. It found:[7]

> 'There was danger of the white population in California becoming outnumbered by the Chinese; they came here under contract, in other words as coolies of a servile class; that they are subject to the jurisdiction of organised companies … The Chinese cheap labour deprived white labour of employment, lowered wages and kept white immigrants from coming to the State.'

The Australian colonists were fearful of the same developments happening here.

In the early 1880s in Australia, there was therefore mounting agitation in the colonies over the 'Chinese question'. The issue was posed whether the continent's future lay 'with Greater Britain or greater China?'[8] This concern was voiced throughout Australasia. Having recently established their own legal jurisdictions, the colonists were resistant to losing this to demographic expansionism from Asia. A great increase in the Chinese population in their own country in the 18th and 19th centuries had already led to large movements of 'overseas Chinese' into South East Asia where their progeny has remained behind to this day, often as vulnerable minorities. Recent research has shown that the Chinese in colonial Australia increasingly demanded recognition for what we would now view as their human rights. They did so in campaigns linked to international demands for an end to racial discrimination.

The British authorities in London were torn between loyalty to the settlers in Australasia and imperial pressure towards limiting the most objectionable features of laws involving racial discrimination. In Asia, the newly emerging Japanese Empire demanded the removal of immigration restrictions as applied in British colonies affecting them. Australian officials for their part repeatedly resisted imperial pressure to avoid or repeal discriminatory laws against migrants who were Indians and Japanese.[9] In 1897, a colonial conference was held in London to coincide with Queen Victoria's Diamond Jubilee. White colonial leaders agreed to adopt a so called 'Natal formula'. This provided for the use of a literacy test to achieve racial discrimination, but without the offensiveness of specifically naming unwanted races. A similar test had earlier been introduced in Mississippi in 1890 to disenfranchise African Americans and to discourage the arrival of more them.

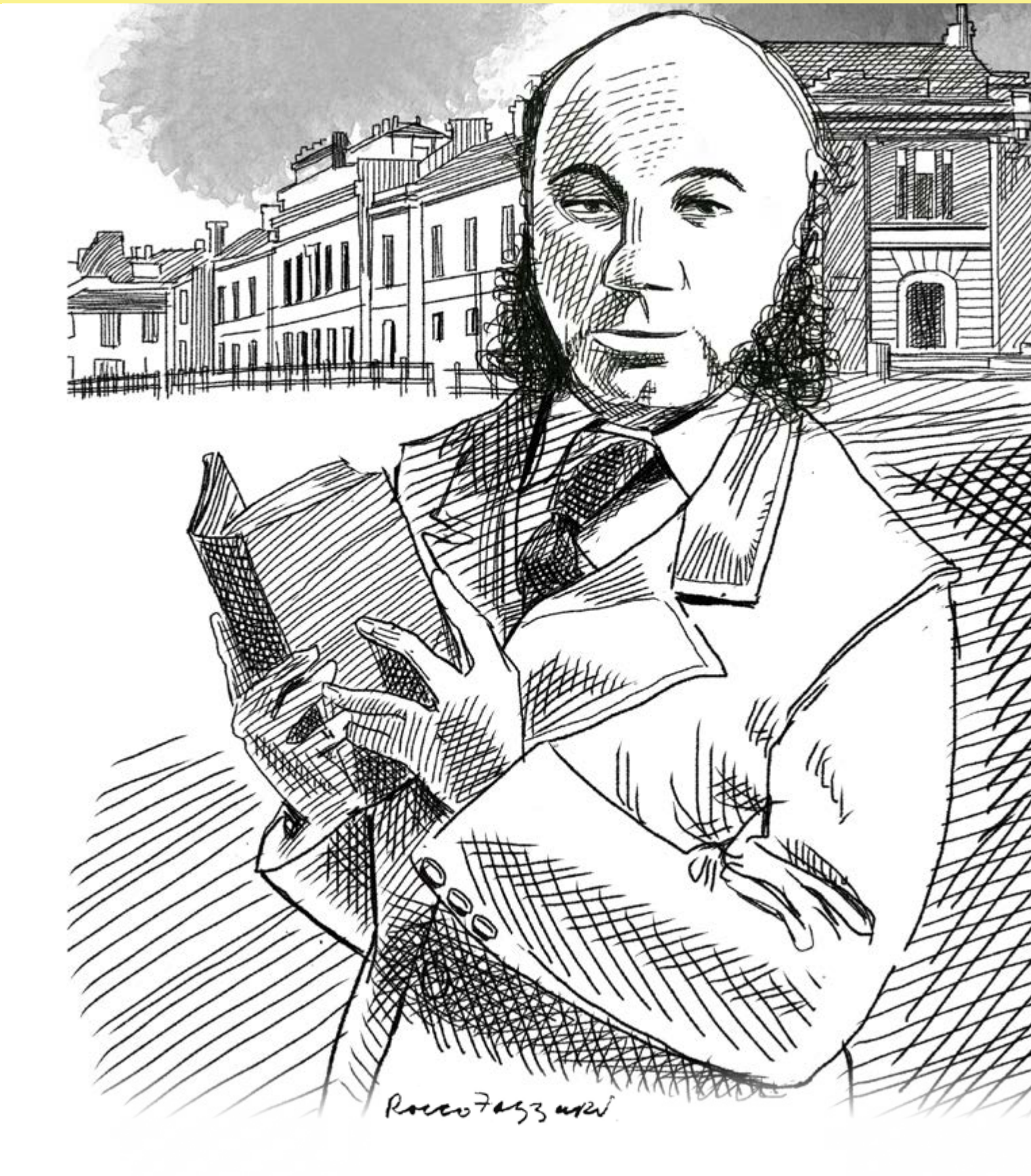
So it was that the *Immigration Restriction Act* of 1901 was one of the first statues enacted by the new Australian Federal Parliament. It incorporated a dictation test in a 'European' language. That law was enacted despite strenuous objections by Chinese and Indian spokesmen and by Japanese diplomats in London and in Sydney.

Ironically, the Japanese protested at what they saw as the undeserved 'insult' of classifying them with other Asians and Pacific Islanders. They pointed not only to their history but also to their 'national [skin] complexion'. Like the Chinese earlier, they had come to the conclusion that the real issue for the British colonists was not civilisation or economic prowess but race and skin colour. This they regarded as deeply insulting, possibly because they themselves sometimes shared a disdain for people of darker skin colour and regarded themselves as effectively 'white'. In the end, the British Imperial authorities gave way to the demands of the white leaders of the settler colonies. But the anger on the part of the Japanese continued to fester.

The *Immigration Restriction Act* was not the only new law of the Commonwealth addressed to strengthening the goal of White Australia. Even the *Post and Telegraph Act* sought to prevent employment of non-white labour, including on ships carrying mail to Australia. The *Pacific Island Labourers' Act* also provided for the deportation of Pacific Islanders who had earlier been imported to work in Northern Australia. Henry H B Higgins, one of the Founders of the Commonwealth and later a Justice of the High Court of Australia supported this legislation. He said that it was necessary to protect people who were used to a high standard of life and to good wages and conditions. They would not consent, he declared, to 'labour alongside men who receive a miserable pittance and who are dealt with very much in the same way as slaves'.[10]

Meantime, several developments began to get in the way of continuing the restrictions based on skin colour. One of these was the very effectiveness of Australian missionaries in converting thousands of Pacific Islanders to Christianity. They then drew the brutal treatment of the Christian Pacific Islanders in Australia to the attention of the authorities and the general population. Some even preached Christian messages of racial equality. Nevertheless, Australian governments began to assert what they called 'Australia's Monroe Doctrine'. This envisaged that the islands of the Pacific, and not just continental Australia, were to be held by the Anglo-Saxon race so as to belong to the 'people of Australasia'. Such intentions exasperated the Imperial authorities. They were also difficult to reconcile with an effective White Australia policy, except on the basis of the taking of profits from the work of 'coloured' people while excluding them as permanent immigrants. The same consequence was also to flow from the assumption by the Australian federal government of control over Papua in 1906 and over German New Guinea (later a mandated territory of the League of Nations) in the early days of the Great War.

Once the national project of the Commonwealth got started after 1901, the assertion by home politicians of adherence to a permanent white racial composition was virtually unanimous. It was to last for nearly three quarters of the ensuing century.[11] Japan had fought alongside Britain, Australia, New Zealand and their Allies in the First World War. Japan therefore earned a place at the table for the drafting of the *Treaty of Versailles* in 1919. Japan's diplomats again criticised the Australian *Immigration Restriction Act* and similar laws adopted in the United States and elsewhere. However, the chief Australian delegate at Versailles,



William Morris Hughes, stood out for his total opposition to any concession on such laws. He was unapologetically racist in outlook. His views were popular with the Australian electors.[12]

The *Immigration Restriction Act* was not a flash in the pan. Alfred Deakin offered an exalted explanation for such measures. They represented, he said, 'the desire to be one people and remain one people without the admixture of other races.' This had been 'the most powerful force in the making of Federation.'[13] This assertion by Deakin was historically dubious, there having been scant attention to the issue in the referendum campaigns over federation. However, from the 1890s on, the newly emerging Labor Party made White Australia central to their increasingly successful campaigns in Australia's federal elections.

British pressure for amelioration for the language of Australia's immigration legislation was eventually accepted by the Commonwealth. Edmund Barton pointed out that the exclusion of non-white immigrants was only really effective because Australia was protected by the Royal Navy.

It was therefore best, he suggested, to conform to British suggestions that a test for exclusion expressed in terms of facility in a European language should be used rather than by reference to race or skin colour as such. However, the ALP advertised itself as national and racial before anything else. Its first objective was 'the cultivation of an Australia sentiment based upon the maintenance of racial purity, and the development in Australia of an enlightened and self-reliant community'.[14] For most of the 20th century the maintenance of White Australia alongside loyalty to, and dependence on, the British Empire, the adoption of industrial arbitration, protectionism, tariffs and general isolationism were the common features of the core policies of all of Australia's major political groupings.

True to his ALP origins, Dr Herbert Vere Evatt, otherwise an important and liberal founder of the United Nations, defended Australia's racially restricted immigration policies in the conferences and negotiations that followed the end of the Second World War.[15] When Mr R G Menzies was returned to lead the federal government in 1949, he promised to soften the 'harshness' of ALP government's enforcement of racial immigration by avoiding family break-up in individual cases. With this compact White Australia then began to gradually recede from front page news.[16]

The core policy of White Australia endured throughout the long years of the Menzies Government. However, Australia's diplomats by the 1960s began to meet counterparts from newly independent countries of the Commonwealth of Nations who explained the serious insult that the White Australia policy involved for non-Caucasian neighbours and friends. Ironically, it was then that the ALP began to lead the internal Australian debates in favour of reform of the policy, a step that succeeded in the change of the official platform of the ALP at its 1965 Federal Conference. Substantial alterations of the still applicable federal laws had to await the departure of R G Menzies and the appointment of Harold Holt as Australia's Prime Minister. The growing international diplomatic campaign against South Africa's Apartheid regime spilt over to demands for changes from Australia. Prime Minister Holt led the successful campaign for the 1967 referendum to amend the language of the 'races power'. He did not seek to abolish it but to expand the power so as to include the enactment of racially-based federal laws with respect to Australia's Aboriginal people.[17]

In the end, it was the Whitlam Government after 1972 that terminated the remaining elements in the legal and regulatory infrastructure that had sustained White Australia. Thereafter, Malcolm Fraser's administration established the Institute of Multi-Cultural Affairs, promising a completely new unifying theme for the Australian nation. While, after 1996, John Howard was later much less comfortable with the idea of multi-culturalism, the notion survived all of the Governments that followed Malcolm Fraser's. The Aboriginal population was increasing in numbers and the earlier expectation that Indigenous Australians would die out became less acceptable or necessary in the post 'White Australia' era.[18]

Universal human rights as declared by the United Nations now most definitely include the entitlement of all persons to be free and equal in dignity and rights with no reference to such criteria as race, skin colour and Indigenous status as a cause for discrimination.

From the 1980s significant numbers of immigrants from Asia and other 'non-white' countries began to arrive in Australia to settle and make it their home. Across the continent, their children began to attend schools, especially public schools. Their families began to settle in suburban neighbourhoods. Acquaintance and familiarity played a big part in the acceptance of this very significant cultural change. This was reinforced by the enactment of the *Racial Discrimination Act 1975* (Cth), the creation of the Australian Human Rights Commission; of the Australian Law Reform Commission; and the appointment of the Racial Discrimination Commissioner.

Despite these advances, legal reflections of the long-held attitudes of racial superiority and hostility continued to persist until changed in Australia. A few obvious instances may be mentioned:

- The abolition of the legal rule denying Indigenous Australians access to the wealth and benefits of their traditional lands was not reversed, as it might have been, by parliamentary legislation. It was only eventually reversed by judicial decisions of the High Court of Australia in *Mabo v Queensland [No.2]*[19] and *Wik Peoples v Queensland*[20].
- The attempts to confine the actual operation of the amended 'races power' in the Australian Constitution to purposes beneficial to Indigenous peoples, and not adverse to their interests, failed in argument before the High Court in *Kartinyeri v The Commonwealth*[21];
- The national apology to the Indigenous people of Australia was given in the Federal Parliament in 2008 with bipartisan support.[22] However there has been no apology for those others who suffered from and under White Australia. While making an acknowledgement of country has now become a standard convention in Australia, converting such gestures to economic and other recompense has not yet occurred. On the contrary, in the Northern Territory of Australia a National Intervention took place in 2009, which (however well intentioned) was clearly discriminatory in its operation and involved differential application of laws based upon the characteristic of the Aboriginal race among those affected and without consultation with those so disadvantaged: These laws were upheld as valid by the High Court of Australia in *Wurridjal v The Commonwealth*[23] but not without a dissent from me;
- The number of Australians identifying in the national census as deriving from Asian origins is now approximately 9%. However, the numbers of judicial officers, senior counsel, partners in legal firms and legal academics who are Asian remains very small: unreflective of the shift in the composition of the general population. This fact led to the creation in 2014 of the Asian Australian Lawyers' Association, since which greater minority participation in all branches of the legal profession has begun to occur. Similar improvements are needed in respect of Indigenous Australians. The lead time for achieving such reforms is not short;
- A request by assembled representatives of Australia's First Peoples at Uluru in 2018 for a voice in the *Statement from the Heart*[24] into the Federal Parliament was immediately and peremptorily dismissed by the then Prime Minister Turnbull.[25] The request was even misrepresented as involving a demand (never made) namely for a third chamber in the Federal Parliament. The aspiration of constitutional recognition of, and respect for, the First Peoples remains to be achieved in Australia. Its fate now appears to be somewhat uncertain;[26] and

- So far as those who endeavour to come to Australia to claim protection as refugees, which Australia has promised to accord them in accordance with the *Refugees Convention 1951* and the *New York Protocol*, such people face highly discriminatory laws; banishment to off-shore detention centres in Nauru and Manus Island PNG; together with prolonged detention and other serious burdens that appear left-overs from the earlier way that Australia addressed unwanted and unwelcome people (mostly of colour) through dictation tests in unknowable languages; and prolonged incarceration to discourage the foolhardy who attempt to arrive as the first white people and early settlers had done, by small boats.

Of course, racial discrimination has never been confined to Australia. It is an infantile phenomenon common to the people of all races. It traces its origins to fear, distaste and rejection of the 'other'. It appears to be specially common among island people, like Australians, the British, the Japanese and others – although it is certainly not confined to them. It led to a life-long burden of social isolation borne in the British colonies in Australia by Josephine Villeneuve, a "very dark-skinned young woman" that drove her back to Britain which she found to be more welcoming. It was she who gave birth in Haiti in 1819 to Francis Smith. He was destined to become a remarkable leader of the executive and judicial branches of government in Tasmania.[27] Like his mother, he was also obliged to suffer calumny, racial slurs and discrimination in his chosen land of adoption. However, he won through to success and accomplishment by his sheer ability and personal industry. His very large talents were acknowledged by his appointments to high offices of state and to civil honours, including the imperial honour of knighthood.[28]

Alas, overcoming attitudes and laws that discriminated on racial grounds was to prove a very common source of injustice in colonial and post-colonial Australia. Such prejudices did not die out in Australia when the accomplishments of Sir Francis Villeneuve Smith were recognised for all to see. But in the end, parliaments and Courts addressed many of the injustices. Other institutions of government in the Courts and specialised commissions in Australia addressed the deep human feelings that lay behind the injustices. In *Mabo v Queensland [No.2]*[29], it fell to Justice F.G. Brennan in the High Court of Australia to explain, in the context of the denial of native title to the dark skinned Indigenous people of Australia, the offence that was involved in rejecting legal equality on the basis of race and racial characteristics:

> '… If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination … Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust discriminatory doctrine of that kind can no longer be accepted. The expectations in the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights … brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'

Universal human rights as declared by the United Nations now most definitely include the entitlement of all persons to be free and equal in dignity and rights with no reference to such criteria as race, skin colour and Indigenous status as a cause for discrimination. Moreover, it also now includes the right to equality by reference to sex, age, disability, sexual orientation and gender identity. Australia has experienced a long journey struggling with many of these forms of discrimination. The life stories of immigrant, lawyer, politician, Premier and Chief Justice Sir Francis Villeneuve Smith, and of his mother Josephine Villeneuve and of his wider family, are simply particular cases that illustrate this aspect of Australia's national story. They demonstrate that people should not suffer disadvantage and hostility because of some feature of their human nature that is part of them: that they did not choose and cannot change.

The triumphant and successful life of Sir Francis Villeneuve Smith indicates why Australian's must ensure that all forms of irrational prejudice must be banished. In Australia we constantly need to tackle such aspects of discrimination because, among the nations of the earth, we were early leaders in discriminatory laws and practices. For nearly 200 years we became experts in devising and enforcing laws and policies that enforced the discrimination and reinforced the attitudes of fear, loathing and hostility that lay behind such laws. The life of Sir Francis Villeneuve Smith demonstrates how wrong-headed such attitudes are. Fortunately most Australians have come to realise this. But Australia's lawyers were often foremost in enforcing, justifying and upholding the discrimination while it lasted. That is why this latest book by John Bennett and R C Solomon in the series on *Lives of the Australian Chief Justices* deserves special attention, even today. **BN**

ENDNOTES

1 Remarks made on the occasion of the launch in Hobart on 30 July 2019 and at the Bar Association of New South Wales in Sydney on 15 August 2019 of the book by J Bennett and R Solomon, *Sir Francis Villeneuve Smith,* Federation Press, Sydney, 2019.
2 Former Justice of the High Court of Australia (1996-2009); Co-Chair of the Human Rights Institute of the International Bar Association (2018-).
3 T Banivanua Mar and P Edmunds, 'Indigenous and Settler Relations' *The Cambridge History of Australia*, Vol. 1, Cambridge, Melbourne, 2013, 362-3 (hereafter *Cambridge History*).
4 H Irving, 'Making the federal Commonwealth 1890-1901' in *Cambridge History*, 242 at 248-9. See also Joseph Lee, 'Anti-Chinese Legislation in Australasia' (1889) 3 *Quarterly Journal of Economics* (OUP) 218 at 221-224.
5 H Irving (ed), *The Cambridge Companion to Australian Federation* (Cambridge, 1999), 355 citing Parkes.
6 *Australian Constitution*, s 51(xxvi).
7 M Lake, 'Colonial Australia and the Asian Pacific Region' in *Cambridge History, 535 at 542-3.*
8 B Moloughney and J Stenhouse, 'Drug-Besotten, Sin Begotten Fiends of Filth: New Zealanders and the Oriental Other' (1850-1920) (1999), 33, *New Zealand Journal of History*, 1 at 43.
9 M Lake, above, *Cambridge History,* 535 at 548-549.
10 H B Higgins in *Commonwealth Parliamentary Debates*, Vol. 5, 6815 (3 November 1901) cited Lake, *Cambridge History*, 549.
11 S Gageler, "A Tale of Two Ships: The *Tamper* and the *Afghan*" (2019) 40 (3) *Adelaide Law Review*, 360.
12 C McCreery and K McKenzie, 'The Australian Colonies in a Maritime World' in *Cambridge History, 560 at 567.*
13 H Irving, above, *Cambridge History, 242 at 246. See also M Lake, Cambridge History,* 535 at 559.
14 M Bellanta, 'Rethinking the 1890s' in *Cambridge History*, 218 at 231.
15 E Ede, 'Internationalist Vision for a Post-War World: H V Evatt, Politics and the Law', unpublished, University of Sydney, 2008, 73ff.
16 C Bridge, 'Australia, Britain and the British Commonwealth', *Cambridge History,* Vol. 2, 518 at 532-533.
17 J Brett, "The Menzies Era, 1950-66" *Cambridge History, Vol. 2, 112 at 129. See also P Strangio, "Instability, 1966-82" Cambridge History,* Vol.2, 135 at 136.
18 Strangio above, *Cambridge History,* Vol. 2 135 at 146 – 147.
19 (1992) 175 CLR 1.
20 (1996) 187 CLR 1.
21 (1998) 195 CLR 337.
22 Hon Kevin Rudd MP, Prime Minister, House of Representatives, 13 February 2008. The speech was supported by the Leader of the Opposition, Hon B Nelson MP.
23 (2009) 237 CLR 309.
24 *Uluru Statement from the Heart,* released on 26 May 2017 by delegates to the Aboriginal and Torres Strait Islander Referendum Convention at Uluru, Central Australia.
25 "Turnbull Government says no to Indigenous "Voice to Parliament"', *The Conversation,* 26 October 2017, online.
26 See Hon Ken Wyatt MP, 'An Indigenous Voice: Let's make it easier for the next Neville Bonner to be heard', https://www.smh.com.au/national/an-indigenous-voice-let-s-make-it-easier-for-the-next-Neville-Bonner-to-be-heard-20091029-p535br.html.
27 J M Bennett and R C Solomon, *Sir Francis Villeneuve Smith (Lives of the Australian Chief Justices),* Federation, Sydney, 2019 at 24-27.
28 Ibid, at 150 (1862). But in 1880, a proposal for promotion to a higher class was not successful. See ibid, 193.
29 (1992) 175 CLR 1 at 42.

Debtors' Prison and the Rules of the Prison

By The Honourable John P Bryson QC

In 1834 judgment debtors who were in prison in Sydney for not paying their debts could take up lodgings in Prince Street, a few streets away from the Gaol. On 1 March 1834 the Judges of the Supreme Court made a Rule which defined limits of the Public Gaol in Sydney. This Rule was part of a large and complex array of laws now vanished which dealt with imprisonment of debtors. Parts of this complexity were law and practices which allowed debtors to live within the Rules while notionally in prison. The Rule said '… it is expedient to enlarge the limits of the said prison, by appointing fit and suitable places in the vicinity thereof, to be within the rules of the same.' The bounds were: '… all that part of George-street, exclusive of the houses on each side thereof, which lies in front of this prison, and leads to Essex-street; so much of Essex street, exclusive of the houses on each side thereof as leads to Prince street; all that part of Prince street which lies between Argyle street at the one end and the space leading to Charlotte Place, at the other end thereof, together with so much of the open space, called Charlotte Place as leads to St Philip's Church and the Scots Church, and also all the houses (excepting public houses) on each side of Prince-street, and the said respective Churches.' The Rule went on to exclude ' … all tavern and victualling houses, and ale houses licensed to sell spirituous liquors, or of public entertainment …' Other provisions make clear that the prisoners referred to were prisoners in civil proceedings, not prisoners serving sentences or awaiting trial for crime. The Rule of 1 March 1834 became rules 15 and 16 of the Rules and Orders for the Regulation of the Sheriff's Office made later in 1834.

The meaning of 'Rules' as Rules of Court made by the Judges was familiar in 1834 as it is now, but 'Rules' had other meanings as well. The Rules were the places where debtors who were nominally in prison would walk abroad, and live in lodgings if they could find the means to do so. 'Rule' was also the formal name for a final order of the Full Court of the Supreme Court: this usage continued until 1972. Perhaps the word 'Rules' came to mean the limits within which prisoners could live because a Rule defined where each prisoner could live, or the terms on which prisoners could live there.

The area of the Rules has been greatly changed since 1834 by building the southern approaches to Sydney Harbour Bridge, and later the Cahill Expressway. There has also been some street-straightening, and Charlotte Place has been renamed Grosvenor Street. In 1834 the Public Gaol stood in George Street in a large tract owned by the Government bounded on the south by Charlotte Place, intersected by Essex Street and bounded on the west by Harrington Street. As well as the gaol there were several buildings used for the guard house and police activities. The Four Seasons Hotel, formerly the Regent Hotel now stands in this tract more or less where the gaol was; and some of this land was used to straighten George Street. The gaol was built in 1800 and was then described as a 'handsome and commodious stone Gaol … with separate apartments for the debtors, and six strong and secure cells for condemned felons.' Six cells for prisoners awaiting execution seem remarkably ample at that early stage. By 1833, when the population of the colony was many times that of 1800, the gaol was entirely inadequate, and Governor Bourke recommended the erection of a new gaol because of its ruinous state. He said '… the Gaol in its present crowded state, without classification or labour, is a moral pestilence …' and went on to speak of the likelihood of disease. There was no precipitancy but that gaol was closed in 1841 when a new gaol was available at Darlinghurst.

The debtors who did not live in the Rules were moved out to a Debtors' Prison at Carter's Barracks, Brickfields in December 1835, and their numbers were reduced when arrest on mesne process was abolished in 1839. Carter's Barracks were located south of Campbell Street roughly where the Capitol Theatre now stands. The Barracks stood between the cattle market and the burial grounds and had earlier been a reformatory for convict boys; and cannot have been a pleasant place. The Rules of Court did not deal with Carter's Barracks or establish Rules around them. It seems that Prince Street was still available for debtors to live in.

There must have been some practice or procedure by which a judgment debtor satisfied the sheriff or the Court that he should be allowed to leave the prison walls and live in the Rules: but nothing in the Rules of Court established what he had to do and there is no practice book for that period. Surely the prisoner must have been required give some security, or to give his parole in some way that he would not abscond: but what happened in detail is not known.

In 1834 as now Essex Street ran up-hill past Harrington Street and Gloucester Street. Essex Street then took a crooked course up hill and has since been straightened. Essex Street intersected Cumberland Street, which has since been greatly altered; its then southern end has become the northern end of York Street. York Street was extended northwards from Barrack Lane after 1834 by cutting through the site of the Wynyard Barracks on a path which had been part of the Barracks. Essex Street then met Prince Street, which began at Charlotte Place a little to the south and ran northwards along the ridge towards Dawes Point. Prince Street has vanished completely, covered by the southern approaches to the Harbour Bridge. It was a beautiful place to live, with splendid outlooks west, north and east over the Harbour. By 1834 it was probably

already a pleasant place to find lodgings, a great improvement on the pestilential gaol in George Street. Later in the 19th century Prince Street became the relatively grand and salubrious part of The Rocks, surrounded by sordor: poverty-stricken and unwholesome streets sometimes infested with bubonic plague. Argyle Street is still where it was but at a much lower elevation after the Argyle Cut was excavated, using much time and at great expense, over many years till 1868.

The name Prince Street has been variously and inaccurately rendered as Princes Street and Princess Street. Prince Street is said to have been named after the Prince Regent, and nearby streets were named after his brothers, Dukes of York, Clarence, Kent, Cumberland, Sussex and Cambridge and his sister Duchess of Gloucester. Charlotte Place was named after his mother, George III's Queen Consort; and then there is George Street. Charlotte Place was renamed Grosvenor Street later in the 19th century, when the Grosvenor Hotel had stronger claims than a deceased Queen Consort. '… the open space leading to…' Charlotte Place seems to have been the open space now Lang Park, where Grosvenor Street now meets York Street.

A debtor who could take advantage of the Rules could leave the gaol, walk south along George Street for a few steps to Essex Street, walk up the hill to Prince Street, then turn north and find himself lodgings, but only in Prince Street, avoiding taverns, victualling houses and ale houses, and also avoiding places of public entertainment if there were any. He could divert himself by walking up and down these streets or strolling in the open space at Charlotte Place, and he could seek spiritual consolation at Saint Philip's Church Hill which then stood on land now part of Lang Park, or in the Scots Kirk accessible from Charlotte Place. St Patrick's Church further down Charlotte Place was not constructed until 1840.

Arrest on mesne process had been part of the procedure of Common Law Courts for as long as the Common Law had existed, and reflected a perceived need to compel the defendant actually to appear before the Court if the Court were to determine the claim against him. If the defendant did not appear after being served with a writ the Court did not proceed to hear the case in his absence, but required the plaintiff to go to great lengths, sometimes extraordinarily elaborate, to compel the defendant to come to Court, arresting him if he could be found and following detailed process to outlaw him if he could not. Simple measures of hearing and determining the claim ex parte if the defendant had not entered an appearance, and of giving judgment by default in claims for money debts, were not adopted by legislation until the 19th century although they had been suggested hundreds of years earlier.

There came to be many classes of case where proceedings could be commenced by a judicial writ called capias ad respondendum known as Ca Re, which directed the sheriff to arrest the defendant for the purpose of entering an appearance. In untraceable strange ways practices arose which made the capias the first step in the litigation, and if anyone objected the record of the Court was written up to show that the defendant

had earlier been served with an original writ and failed to appear, although those events had never happened and the original writ was not issued until after the objection was taken. In claims for debt it became quite usual that litigation was commenced by a capias and the first the defendant knew of the claim was that he was arrested and taken to prison. The sheriff who made the arrest was answerable for damages if he did not bring the defendant to Court to enter an appearance, and would take bail for enough money to cover the sheriff's possible liability for damages for the plaintiff's not being able to enforce his claim; potentially the sheriff was liable for the whole amount of the claim, so he wanted security for that amount. A condition of granting bail was that the defendant enter an appearance. A defendant who could not raise bail would remain in custody until the sheriff took him to Court for the hearing.

As the centuries passed, a maze of legislation and King's bench practice arose which regulated the circumstances in which arrest of the defendant was available, the amount for which bail was required and whether special bail with sureties additional to the defendant himself was required for the whole amount claimed, or common bail was sufficient, given only by the defendant and sometimes in a small amount. Questions of what kind of bail was appropriate and for how much occupied significant time for judges, tiresome arguments on obscure law and ancient practices, contributing nothing to decision on the merits. A known contrivance was for the defendant to bring some true or invented claim against the plaintiff and have him held to bail, in the hope of an agreement in which each gave common bail in a small amount and was released.

By the beginning of the 19th century and probably much earlier it was widely recognised that arrest on mesne process was oppressive and open to abuses, in conflict with basic liberties and much more trouble than it was worth, and there were recurring attempts to get Parliament to reform or abolish it. First it was reformed: in 1827 in England, the Act 7 & 8 Geo 4 c 71 (Imprisonment for Debt Act 1827) allowed arrest only where the claim was over £20, and simplified processes including processes for bail. The application for a warrant had to be signed by an attorney, so that plaintiffs in person could not have people arrested. This Act was adopted in New South Wales by the *Arrest for Debt Act* 9 Geo 4 No. 2, 1828. Complexities remained. The *Debt Imprisonment Act* 3 Vic No. 15, 1839 followed an English reform of 1838 and abolished arrest on mesne process except on a judge's order based on proved intention to leave New South Wales or abscond to remote parts. After this, arrests on mesne process were rare.

Arrest on mesne process was a severe oppression and an extreme nuisance, but arrest for enforcement of judgment debts was far worse. It seems that in the time of Edward I Common Law judgments were enforced by writs of fieri facias known as Fi Fa which required the sheriff to seize and sell the judgment debtor's goods, and levari facias requiring the sheriff to take the profits of the debtor's land until the debt was paid. There was no process for seizing and selling the debtor's land which in feudal theory was not alienable, but a statute in 1285 authorised the writ of Elegit by which the creditor could occupy half of the debtor's land until the debt was paid. In England land could not be sold to enforce payment of judgment debts until 1838. Another statute of Edward I required a debtor to be imprisoned for statute merchant debts which had been acknowledged in an especially formal way, and the writ devised for enforcing those debts came to be used for enforcing all judgment debts. This was the judicial writ capias ad satisfaciendum, known as Ca Sa.

For centuries the usual and most effective method of enforcing judgment debts was to arrest the debtor and leave him in prison until he satisfied the debt. If he had resources he could arrange his affairs, sell assets and raise money to pay his debt and be released, but until he did, or unless he could, his creditor could keep him in prison for the rest of his days. He sat in prison until he remembered where he had left his money. If he had no resources he lived on charity or starved to death.

In late Stuart times legislation began to require the judgment creditor to pay maintenance at a very low rate for impecunious debtors whom they kept in prison for more than a few months. This was spoken of as the debtor's 'groats.' In 1729 this was fixed at two shillings and three pence per week, a little less than four pence or one groat per day. There was room for conflicts of wills in which a debtor might sit for days, months or years in prison waiting for his creditor to tire of paying his groats, while the creditor was convinced that the debtor could organise his affairs and pay the debt if he wanted to.

A judgment creditor who had arrested his debtor had no other remedies, and if he relented and allowed the debtor to be released all means and all hopes of enforcement were gone. The Common Law had no remedies which gave the judgment creditor access to choses in action such as debts due to the debtor, bank notes or money in bank accounts, income from trusts, government bonds or interest on government bonds: a judgment debtor who had assets like these could stay in prison and support himself there, perhaps at a high standard, for as long as he cared to. A prisoner who had means and an obstinate disposition could live with his family in lodgings outside the prison wall but within the Rules, attended by servants and with free access by his stewards and agents, and continue to do so indefinitely. It was a strange world where people chose to pay to live in lodgings in a confined area rather than pay their debts, but many did. On the other hand a debtor with no resources could be kept in prison for as long as his creditor chose to pay his groats; and this often happened, contributing some of the more maudlin passages in Charles Dickens' more maudlin novels. The process was on the whole futile in that it deprived most judgment debtors of the means of earning money: not always, as portraitists and authors could sometimes pursue profitable activities while living within the Rules, and cobblers could make shoes.

Imprisonment for debt gave people countervailing compounding perverse motivations. The absence of any detailed recourse against assets impelled the judgment creditor towards holding the debtor to ransom, a harsh thing to do and not a path to popularity. A creditor who could not pay his own debts was at risk of finding himself in prison. Imprisonment deprived the debtor of employment and earnings, the primary means of raising money. If the debtor needed maintenance the creditor had to pay his groats. The debtor who lacked common honesty and really had resources could mitigate his loss of liberty by living largely in the Rules, which watered the force of the remedy and enhanced the creditor's rage. The debtor who really had no resources was left in vile imprisonment which he had no way of ending. Some creditors gave up in despair and some gave up through mere humanity, but many became more determined or vengeful as time passed. The remedy created agony, bad feeling and hardship, and the countervailing advantages did not adequately correspond with these disadvantages. In the first forty years of the 19th century Parliament found its strength, approached reform with a new mentality and put justice and efficiency before custom and practice; the gale blew the old practices away and replaced them in ways which had long been obvious.

In 1824 Forbes CJ and the new Supreme Court inherited all this law when the reforms were beginning. At this time debtors were allowed to live in an area around the Marshalsea Prison in Southwark, South London, the prison of the Court of King's

Bench and its Marshall. This area had long been known as the Rules of the King's Bench Prison. Forbes' main guide for Common Law practice was the practice of the King's Bench, although he made some enlightened simplifications. Under his Rules of Court all Common Law cases were commenced by a simple form of summons, served by the sheriff or his bailiff, and the plaintiff had to obtain an order of the judge on issuing the summons if the defendant were to be arrested. However in claims for debts and in many other claims plaintiffs had a legal right to such an order. There were many such summonses: over a period of a few months when someone took out the figures they were issued at the rate of about one a day. What usually happened, probably in most cases, was that the sheriff's bailiff arrived to serve the summons and the defendant immediately paid the debt, so that he was not arrested and the litigation ended there. The proportion of lawsuits in which plaintiffs sought arrest on mesne process appears to have been much higher in Sydney than in London. Commercial morality in Sydney was so low that some people just waited for the sheriff before paying debts.

Legislation precursory to modern Bankruptcy Acts began in Tudor times, but only for the benefit of creditors of traders. The legislation was only incidentally directed at relieving traders who were insolvent and was more concerned with fair distribution of assets among creditors. Under early bankruptcy laws bankrupts could be handled quite severely, could be stood in the pillory or have their ears sawn off if they were truly recalcitrant, and could be hanged for concealing assets. In the wars of the 18th century temporary Acts enabled debtors to be discharged from prison if they enlisted in the army.

In the early 19th century parliamentary pressures for reform in the interests of creditors and debtors produced more readily available bankruptcy and insolvency and tended to make it possible for cooperative debtors to be released from prison after a few months and to be discharged from their debts, with exceptions for debts which were discreditable to them. There were great improvements in the enforcement of judgment debts. A surprising early improvement came in 1812 when the British Parliament enacted a law reform for New South Wales so that land here could be sold in execution in the same way as movable property. This was almost the only legislation of the British Parliament which had anything to do with Australia between 1786 and 1819, and the same reform was not made for England until 1838.

Provisions of the New South Wales Act 1823, 4 Geo 4 c 96, widened the means available for enforcing debts, including attachment of debts due to the debtor and a regime for administration of assets of insolvent persons which could lead to the insolvent being discharged from prison. In New South Wales the *Insolvency Act 1830*, 11 Geo 4 No.7, provided another regime for insolvency possibly ending in the release of the debtor (but not from all claims.) This was replaced by the *Debtors Relief Act 1832*, 2 Wm 4 No 11, with provision for release of a debtor who had been imprisoned for three months or more. This temporary Act was continued several times. Some kinds of debt could not be released under insolvency legislation: debts to the Crown, damages for malicious injury and damages for defamation. A larger reform was the *Creditors Remedies Act 1839*, 3 Vic No 18, which followed English legislation of 1838 and enabled the sheriff to realise assets such as bank notes, cheques, promissory notes and negotiable instruments, and enabled Court orders charging stocks and shares in companies. Imprisonment for debt was still an available remedy.

Provisions closer to modern bankruptcy Acts began with the *Insolvent Act 1841*, 5 Vic No 17, which enabled debtors who were not guilty of fraud or dishonesty to be protected from arrest or continued detention. Then the *Insolvent Act 1843*, 7 Vic No 19, stated that it abolished imprisonment for debt; the Bill was reserved by the governor and was given royal assent only after considerable hesitation and study by the Colonial Office. Section 26 enacted that no person should be arrested or imprisoned on any civil process in law or in equity in proceedings instituted for the recovery of money due under contract or for non-performance of contract: but the exceptions were extremely wide and the effect seems to have been that there was no imprisonment for debt but Ca Sa was available for damages. Section 28 authorised arrests under a judge's warrant on evidence of conduct directed at evading enforcement, and by section 30 a defendant who was arrested could be bailed, and could be released if he placed himself in insolvency.

The exceptions were so wide that the Act of 1843 can have done little good, and it was soon amended, and then repealed by the *Imprisonment for Debt Abolition Act 1846*, 10 Vic No 7. By section 3 no person was to be arrested on any writ of Ca Sa out of the Supreme Court: but a judge could order such a writ on evidence of fraudulent concealment or intention to leave the Colony. However abolition did not extend to actions for breach of promise of marriage, libel, slander, seduction, criminal conversation with the plaintiff's wife or any malicious injury. The *Judgment Creditors Remedies Act 1901* No 8 replaced the Act of 1846 with similar provisions limiting Ca Sa to damages for breach of promise of marriage, libel, slander, seduction or malicious injury. These provisions continued in force until repealed by the *Supreme Court Act 1970* with effect on 1 July 1972.

It seems that there were some imprisoned debtors later in the 19th century or even in the 20th, as prisons made provision for them: but there cannot have been more than a few. The attorney who issued the Ca Sa was at risk of being sued for damages for false arrest himself if the writ were for some reason not valid, and this must have been a discouraging element as practical experience of what was necessary receded into the past. The writer did not ever encounter any case in which a judgment debtor was arrested under a Ca Sa. At least in theory, damages for defamation could be enforced by imprisonment until 1972, but there was little room for this to have practical effect, especially after the Bankruptcy Act 1924 (Cth) section 63 gave a Court in bankruptcy power to discharge a debtor from imprisonment.

Dowling's Select Cases, drawn from the years 1828 to 1844, are scattered with reports of cases about Ca Sas and Fi Fas, insolvency and actions against the sheriff: some of these cases turn on very small points and fine details indeed. Debtors who complied with insolvency legislation seem to have been discharged from prison fairly readily. *Bensley v Stroud* (1829) NSW Sel. Cas. (Dowling) 734 was a hard-fought claim for damages for malicious arrest where the person arrested on a Ca Re had spent almost seven weeks in custody before the action against her came on for trial: her defence to that action was successful, but she lost her claim for damages because the person who had sued her had not acted maliciously but had acted on spectacularly wrong advice from his attorney. There is no reference in these reports to the Rules or to judgment debtors living in the Rules. In *In re Wilson v Still* (1830) NSW Sel. Cas. (Dowling) 463 a debtor who was ill and dying was released to his own house, to return to prison when recovered. Perhaps there were no Rules for judgment debtors to live in before the Order of 1 March 1834: or perhaps there was a Rule or Order dealing only with each debtor who was able to leave the prison and specifying where he was to live.

As you drive over the Harbour Bridge or visit the Four Seasons Hotel or the Capitol Theatre, give a thought to the judgment debtors of the distant past. Your thought need not be sympathetic. Some were overtaken by misfortune, but some were rascals. **BN**

Antipodean Advocacy: Queenstown 2019 joint conference

23-24 August 2019, Rydges Hotel, Queenstown, New Zealand

By Emily Graham

Attending an international barristers' conference as a 'baby' barrister can be somewhat daunting. Luckily for me, Queenstown was not 'my first rodeo'[1], having attended the 2017 London and Dublin Conference and the Sydney Rise Conference in 2018. Even if it had been my first conference, the friendliness of the delegates and welcoming hospitality of the New Zealand contingent would have removed any first-time jitters by the first morning tea session at the latest!

The conference sessions were held at the Rydges Lakeside Hotel which boasted a spectacular view across Lake Wakatipu to the snow-capped mountains. Had there been any dull moments in the conference sessions, it would have been quite cruel to have the view we had from that conference room. There was, however, no opportunity for daydreaming of shredding up the slopes[2] when the papers presented were so engaging.

There was a star-studded line up of speakers and after a welcome, introduction of sponsors and further introduction by the NZ Attorney General, we were welcomed further by the Chief Justice of the host nation, Dame Helen Winkelmann with a key note address on the Rule of Law. Dame Winkelmann then remained at the conference as a delegate and was often called upon to answer questions from the panel that had come from the audience, which I thought was quite a privilege!

Most of the papers were panel style which allowed for some diversity in opinion and also gave the opportunity to hear from both sides of the ditch! It was excellent to see the NSW Bar represented on these panels.

A further keynote address from Dr Anne Aly MP on Balancing National Security and Civil Liberties in Western Democracies was a highlight of the conference. It was particularly poignant to be having those discussions in the post-Christchurch massacre era in NZ and there was a recognition of the unfortunate shared experience of global terrorism and extremism even in the farthest reaches of the antipodes.

The stream B session on what criminal lawyers can teach civil litigators was instructional, informative and included many anecdotes from Kiwi and Aussie lawyers alike that reminded us that to be 'servants of all, yet of none' may require us to have an understanding of all aspects of the community and humanity.

Through the other conference sessions on Advocacy in Inquiries, the Rights, Responsibilities and Role of the Media, Indigenous Rights, Appellate Advocacy and the Culture of the Bar, it was clear that, notwithstanding the jurisdictional division (across Australian jurisdictions and between Australia and NZ), there are shared values and challenges facing our societies that the legal system is being called on to address. It occurred to me while hearing of the two separate inquiries currently being conducted in NZ: the Royal Commission of Inquiry into Abuse in Care and the Royal Commission of Inquiry into the Christchurch Massacre – that those inquiries will almost certainly have similarities to those conducted recently in Australia, such that the initial uptake of recommendations or findings from our inquiries may provide some guidance in NZ. Further, we may be able to learn from any additional or different findings that are made in the NZ inquiries.

The closing session of the conference was an entertaining and educational session all about the America's Cup. This was presented by Dr James Farmer QC and Dr Hamish Ross. Until this session, the only thing I knew about the America's Cup was that Australia won it and Bob Hawke said

'any boss…was a bloody bum'. As it turns out, the Cup was set up by a Deed and there was a lot of discussion about whether the original was actually the original and whether signatures were forged in creating the Deed. The session also included some videos of some people messing about on pretty cool boats. So, it was one of those rare moments where equity boffins and sports fans could unite!

Finally, in respect of the conference sessions, one of the comments that I think should be shared far and wide (not just in the antipodes!), was made during the paper on Harassment and Culture of the Bar. Kieran Pender of the International Bar Association provided some of the concerning results on the IBA's research on bullying and sexual harassment in the legal profession and then provided these choice words: 'to be a good lawyer and to be a good barrister does not require you to be a dickhead'.

After the final conference session, we were treated to various Queenstown activities. They ranged from the adventurous ziplining or mountain-bike riding (with wine tasting!) to the more sedate super yacht cruising. It was an absolutely glorious sun-drenched afternoon and there was not a single "dud" activity. Most of the activities allowed us to indulge in the region's excellent pinot noir, which of course assisted our enjoyment and collegiality!

The official close of the conference saw us ascend to a peak on the gondola to the Gala Dinner at the Skyline Queenstown. As I shared the cab of the gondola with my new Kiwi friends, I wondered whether a gondola ride after an all-inclusive drinks package would be considered a 'dangerous recreational activity' pursuant to s 5L of the Civil Liability Act 2002. Thankfully, we were in the land of the ACC (Accident Compensation Corporation), so my torts-lawyer mind could switch off! I can, however, report that I managed to board and disembark the gondola in ball gown and stilettos without incident.[3]

Ms Nomchong SC aka 'Our Kylie', was the MC for the evening's festivities and what a great job she did! Maybe it was the friendly and welcoming attitude of our Kiwi hosts (perhaps it was the altitude!), but Our Kylie ensured a jovial and enjoyable evening was had by all with humour that perhaps was assisted by being out of the jurisdiction. Our Kylie's MC role extended to moderating the Great Debate between Australia and New Zealand with the topic 'Bigger really is better'. For the Australian affirmative side, we had: Peter Dunning QC from Queensland and Ray Sharp from Victoria. For the NZ negative side: Simon Foote from Auckland and Kathryn Dalziel from Christchurch. There were many jokes made and laughs had (far too many about our recent Bledisloe loss for my liking)…and let's just say that the newfound friendship between the Australian and New Zealand Bars was the winner on the night! We danced the night away to a wonderful covers band – they even played *Slice of Heaven* as proof that we were in NZ – and then took our gondola back down to town.

I was lucky enough to stay a few extra days to enjoy some skiing and a famous Fergburger!

As an under 5 Barrister, I found the conference a most rewarding experience. I met some wonderful barristers from home and abroad and really enjoyed both the learning and collegiate experience. This was a particularly good conference because it did not require too much time away from chambers with a shorter program and a shorter distance to travel than some of the other overseas conferences. The ABA also provided a special discounted rate for junior barristers under 7 years which made it a more affordable conference than some.

I hear on the grapevine that there will be a 2020 conference on the Gold Coast. I will certainly be interested in attending the next ABA conference, wherever it may be!

Special thanks to Kylie Nomchong SC for some of the photographs and ideas for this article. BN

ENDNOTES

1 Similarities between Bar Conferences and rodeos: there are lots of chaps!

2 This trip to Queenstown was my first skiing experience since 2009 and only the third in my life, so I am sure I have not got the lingo!

3 I now wonder whether this should be an extra part of the Bar Exams or Bar Practice Course?

Keynote speaker Dr Anne Aly MP's paper on Balancing National Security and Civil Liberties in Western Democracies.

Conference selfie!

View over Queenstown from the chair lift at Coronet Peak.

Peter Dunning QC (Qld Bar), Rae Sharp (Vic Bar), Chief Justice Venning of the High Court of New Zealand, Kylie Nomchong SC (NSW Bar), Justice Niall of the Victorian Court of Appeal, Kathryn Dalziel (Christchurch Bar), Simon Foote (Auckland Bar).

Michael Robinson, Lionel Robberds and David Bennett

Honouring members with 50 years' service at the NSW Bar – Experienced Barristers Program

On 1 October 2019 the NSW Bar Wellbeing Committee launched the inaugural ceremony of the Experienced Barristers Program recognising senior members of the Bar who have held a Practising Certificate for 50 years or more. This is a significant achievement worthy of commemoration and reflection.

The evening recognised the distinguished and lengthy service of each member as a barrister at the Sydney Bar:

- Michael Robinson – 13 March 1959
- John Gleeson QC (in absentia) – 3 June 1966
- Lionel Robberds AM QC – 29 July 1966
- David Bennett AC QC – 12 May 1967

Each of the individuals has displayed all of the signal qualities of a fine member of the bar. Their continuing careers were recounted by Mr Robert Stitt QC of the 7th Floor of Wentworth Chambers. He introduced each person with recollections, stories and memories which illustrated their distinguished lives in the law.

In the coming year the Wellbeing Committee will host further events to recognise some 15 barristers who will be awarded such a certificate of recognition.

Tim Castle and Kylie Nomchong SC were present from the Wellbeing Committee and the event was well attended by family and friends of the barristers. There were many fond memories shared between the recipients. It was a memorable and special occasion to attend. In the context of barristers nowadays, service of such a kind will become increasingly rare. BN

Experienced Barrister Program

By Tim Castle[1]

Two of my favourite books about wellbeing are 'The 100-Year Life'[2] and 'Younger Next Year'.[3] Not surprisingly, the theme of these books, and others like them, is how one can progress from one's 50s to a healthy and fulfilling second half of life.

The implicit question underlying these books is no longer 'What do you want to be when you grow up?', but 'How do you want to be during the second half of your life?'. More specifically, one might ask, 'What can I be doing now to set myself up for my future?'

With these thoughts in mind, the NSW Bar's Wellbeing Committee in 2018 identified that one third of the Bar, with current practicing certificates, is over the age of 60, 20% are over the age of 65 and 10% are over the age of 70. One of the many projects being pursued by the Wellbeing Committee (emerging out from the Bar's Quality of Working Life Survey (QWLS)), was how to address the needs and interests of our older members.

Encouraged by Committee Chair, Kylie Nomchong SC, and supported by Chris Winslow of the Bar Association, I volunteered to take on the project which has now become known as the Experienced Barristers Program. The Program, which is specifically designed for the 250 barristers over the age of 70, was launched at the Bar Association by President Tim Game SC on 1 October 2019.

The title 'Experienced Barristers, reflects and represents the positive side of longevity in practice at the Bar. It is widely accepted that the more experience we have as barristers – good and bad – the better. At the Bar, older generally means wiser, which may explain why the older cohort of barristers in the QWLS stood out for having higher overall quality of life scores than the Bar average.

Whether or not we actually aspire to live to 100, there are two fundamental messages from the books I mentioned, which stand out. The first is that of physical fitness. This, of course, is an individual pursuit for each barrister and needs no rehearsing for those of us over 50. Regular exercise, diet, use of weights and moderation in relation to alcohol and the like are all well-known and should be heeded.

Of greater interest, for present purposes, is the following advice from Crowley and Lodge, 'We believe that getting out on the road in the Next Third means reconnecting and recommitting to other people…Get involved in groups and do communal things, whether work or play.' Their advice, without sugar-coating, is 'if we let ourselves become cut off and increasingly solitary as we age – we will become ill and die'.

Applying this advice to the NSW Bar, one of the core objectives of the Experienced Barristers Program, is to acknowledge those members of our Bar who have provided exceptional service over their careers at the Bar. A further objective is to create a social connection, and in many cases, re-connection, between our more experienced members through bi-monthly lunches and regular functions. A feature of these functions will be the celebration of milestones reached by our colleagues, such as the presentation of certificates for 50 years' service at the Bar. At our first function, the NSW Bar honoured Lionel Robberds QC, Michael Robinson and David Bennett AC QC.

Sarah McCarthy, the Hon John Howard & Tim Castle

The next function was a lunch, with guest speaker Hon John Howard OM AC. It was attended by over 80 Experienced Barristers and their partners at the Union, University and Schools Club on 20 November 2019, at which we honoured Anthony Bellanto QC, John Shaw and Dennis Wheelahan QC.

A further objective of the Program is to facilitate Experienced Barristers contemplating and making the transition from full-time work to a portfolio of work and work-related interests. Gratton and Scott identify all of us as having a stock of 'intangible assets' that we build up through our working lives. In the case of barristers, these assets include not only specific knowledge of the law, advocacy and how to advise clients in their time of need, but also our understanding of how the justice system operates on and impacts individuals and organisations.

The Wellbeing Committee believes that there is a great opportunity to engage these 'intangible assets', and deploy these skills to keep our minds active and to contribute to the community in new and useful ways. Collectively these intangible assets also provide an opportunity for the Bar to give back to the community in a wider context than simply providing more than pro-bono legal assistance.

Currently the Experienced Barristers Program co-ordinators are examining two possible ideas for providing work opportunities that benefit the community, and also benefit the individual barristers interested in transitioning their working lives from full time practice. The first of these is a program to support student mooting competitions, which are a mainstay of all university law school programs, by providing judges and advocacy coaches from our Experienced Barristers cohort. The second, and longer-term, project is the provision of volunteers to work overseas on aid projects providing legal assistance in developing countries. The Committee hopes to roll-out these initiatives during 2020, coordinated by the Bar Association, on a trial basis.

The response to the Experienced Barristers Program has been positive, both from individual members and from the Bar generally. We acknowledge the Bar Council and the Diversity and Equality Committee for their support of this initiative. Further, special thanks is given to Robert Stitt QC, John Maconachie QC and Paul Daley AM, who have helped shape the program and continue to provide guidance as the inaugural 'Steering Committee'.

The Bar is not the only profession to face the need to cater for our older members, with solicitors, doctors and dentists all facing similar challenges, and no doubt each of the professional groups will be able to learn from each other, as similar programs emerge, and the Bar's program evolves.

Gratton and Scott describe longer life as a 'gift of time'. Identity forged through work is an important, but not the only, source of individual pride and satisfaction. We hope that this program will ensure that our Experienced Barristers are properly acknowledged for their service. We are also determined to provide a Program that creates a genuine opportunity for collegiality for this cohort of our Bar and to utilise the 'intangible asset' base of their experience for the good of the community, as well as providing a fulfilling experience for our Experienced Barristers. BN

ENDNOTES

1 ENON Tim Castle, Wellbeing Committee and Coordinator of the EB Program together with Sarah McCarthy of the Wellbeing and Diversity and Equality Committees, and Chris Winslow, Coordinator of Services and Benefits, NSW Bar Association OTES

2 Gratton, L. & Scott, A., *The 100-Year Life: Living and Working in the Age of Longevity*, Bloomsbury, London, 2016.

3 Crowley, C. & Lodge, H., *Younger Next Year: Live Strong, Fit and Sexy – Until You're 80 and Beyond*, Workman, New York, 2007.

National Indigenous Legal Conference 2019

This year the 14th National Indigenous Legal Conference and the 1st Indigenous Health Justice Conference was held in Darwin on 13 & 14 August.

The Indigenous Barristers Trust the Mum Shirl Fund again sponsored indigenous law students from across NSW to attend the conference. This year the trust had the pleasure of sponsoring 22 students, as well as 4 who were sponsored by their individual university trusts, which meant the NSW Bar Association were able to send 26 students to Darwin.

This year a number of members of the NSW Bar were either speakers or panel members. Those members were Phillip Boulten SC, Tony McAvoy SC, Chris Ronalds SC and Arthur Moses SC.

Again the students who attended were incredibly grateful for the opportunity and sent some lovely messages of thanks, included below:-

I was one of the students at the NILC 2019 and wanted to say thank you for the opportunity

My background is pharmacy prior to starting my law journey and the amalgam of health and law that was portrayed at the conference showed me another area that I would love to be involved in.

From an indigenous perspective it was great to go to Darwin because it felt like home and the land spoke to my soul.

I am also talking to some contacts up there, particularly Adam Drake, yo see how we can work together to grow and reach more indigenous youth with his program.

Thank you again for the opportunity and can you please pass on my thanks to everyone involved.

Daniel Cahill
Southern Cross University

I just wanted to email you to formally thank you for giving me the opportunity to attend the National Indigenous Legal Conference in Darwin just over a week ago.

I wanted to let you know of the incredible impact this conference and opportunity, given to me by the NSW Bar association, has had on me. Not only has this inspired me to pursue a career in law and finish my studies but also emphasised the importance of having an Indigenous voice in our legal system and society as a whole. It also gave me the inspiration to know that I can succeed and help make this world a better place. Darwin itself was beautiful and I met many lifelong friends and hopefully, the future changemakers of society.

I will leave you with a quote that has stuck with me since the conference said by the very inspiring Linda Ryle, "If we as Aboriginal people do not hold ourselves above the label and standard given to us, then we are not only intellectually but also culturally lazy."

Thank you again for this amazing opportunity, I will cherish the memories made and the ability to mingle with the most inspiring Indigenous lawyers, commissioners and students.

Ky Stewart, Macquarie University

I just wanted to sincerely thank you and the NSW Bar Association for the opportunity to attend the 2019 National Indigenous Legal Conference. It was truly an invaluable experience that deeply inspired me and allowed me to gain a great deal of clarity about what I would like to do with my Law degree in the future. Meeting and hearing the notable speakers, other law students and Chris Ronalds SC herself, was such an honour and is something that I will be truly grateful for the rest of my life.

Laura Montague, UNSW

Just thought I'd let you know I had a student tell me how appreciative he was of the conference. It was his second time but it was great meeting up with those students he made friends previously, and to be able to exchange stories about their studies and the plights they have had since they last caught up.

It has helped him build good support mechanisms outside of his general circle and learn many things. He also expressed the importance of having the conference in different locations as he also got to hear first hand the issues that our people are having around the country. Hearing first hand and speaking with people from the territory really put things into place from all he has read and heard. Coming from Tassie he felt far removed from such issues. He also mentioned that meeting the ilk of people like yourselves has driven him to really try harder with his studies.

Thank you both for your vision.

Eddie Cubillo
Senior Indigenous Fellow
Melbourne Law School

I wanted to reach out with a personal thank you for your support of our students at the National Indigenous Legal Conference in Darwin. Rhiannon and Thomeissa had a fabulous time, and speak so very highly of you. They feel as if you made their attendance not only possible, but a highlight of their lives. They have agreed to share their experience in our next School of Law and Faculty newsletter. If you like, I can add you to the email list for this newsletter. We'll also submit the story for inclusion in the UOW publication, Universe. If accepted, I'll forward you a copy of that also. Many thanks and warmest wishes,

Dr Kylie Lingard
Lecturer | School of Law,
University of Wollongong

Students attend National Indigenous Legal conference

The NSW Bar Association's Mum Shirl Fund recently sponsored two UOW law students, Rhiannon Auld and Thomeissa Mason, to attend the National Indigenous Legal Conference in Darwin. Here is their recap on their journey and experience:

"Our time in Darwin began with a cultural tour led by two Larrakia and Warumungu men, Richard Fejo and James Parfitt (Fejo). On the tour, we explored Darwin city, participated in a Welcome to Country ceremony on the beach, and engaged in an exercise on skin names and kinship laws. The tour ended with a sunset networking event on Mindil Beach. We then attended the National Indigenous Legal Conference from 13-14 August 2019. One of our key take-aways from the Conference was the need for an established framework of genuine participation and involvement of First Nations peoples in the decision-making processes that impact First Nations people.

The Conference concluded with a gala dinner at PeeWee's at the Point. This event showcased local talent, presented prestigious awards and was an opportunity for attendees to form connections and partnerships. We would like to thank the NSW Bar Association and the Mum Shirl Fund for the valuable opportunity to form many connections and learn from advocates in the fields of health and justice. We would also like to thank the Larrakia people for welcoming us on their land and hosting this event".

BN

2019 Senior Counsel

Congratulations to those appointed 2019 Senior Counsel. On 24 October the Hon Chief Justice TF Bathurst AC presented each of the new Silks their commemorative scrolls in a ceremony attended by family, friends and members of the profession.

Left to right (front row): Tiffany Wong, Richard Pontello, Elizabeth Raper, Stephan Balafoutis, Steven Golledge, Jennifer Single, Ross Foreman
Right to left (second row): Christian Bova, James Sheller, John Catsanos, Elisabeth Peden, David Chin, Tanya Smith, Patrick Flynn, Jason Lazarus, Craig Lenehan.
Left to right (back row): Michael O'Meara, Christopher Wood, Terrence Mehigan, William Fitsimmons, Richard Wilson

BN

The NSW Bar Association: Website renovation

The NSW Bar Association's renovated website went live at the end of September, and now gives members online access to a growing cluster of services and sources of information.

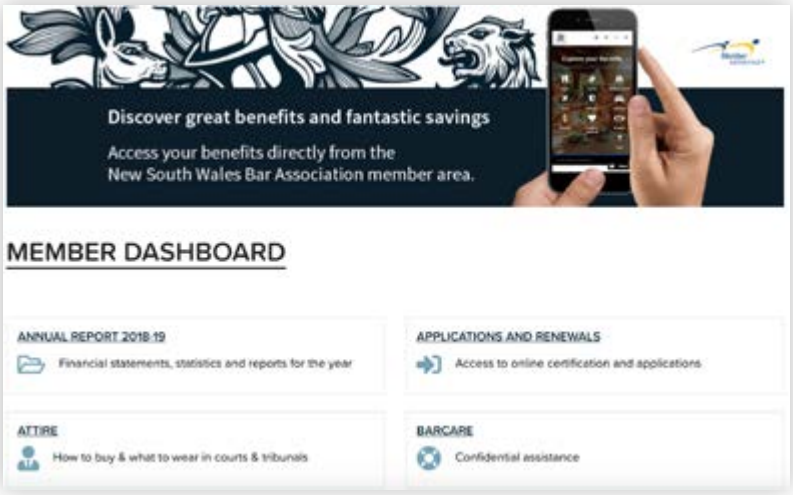
The Bar Council has long recognised the importance of the website to independent, sole practitioners and to the relatively small professional body that represents them. The vision is for nswbar.asn.au to become the indispensable platform for practising barristers to:

- access the Bar Library, download costs and fees precedents or obtain the necessary documentation for receipt of fees in advance;
- catch up on CPD seminars or enquire about ethical guidance;
- renew their practising certificate, peruse the approved PII policies or apply for mediation accreditation;
- enhance their professional profile and promote their skills to potential clients via Find a Barrister and BarADR;
- view archives of *Bar News* editions, annual reports and Bar Council minutes; and
- register for a social event or visit the co-branded Member Advantage site to obtain competitive deals on insurance, travel, retail discounts and more.

This was recognised in the Bar Association's Strategic Plan 2017–20, which includes improvements to the website and creation of a member-login section as one of its core objectives. These value-added services and functions have been collated on the Member Dashboard. Much like the personal banking or customer account sections on the website of your bank or utility company, the Member Dashboard is designed to become an everyday, online workspace for barristers. BN

Feedback about the website is encouraged. Constructive suggestions that will improve the site are particularly welcome. Shoot an email to the co-ordinator of services and benefits, Chris Winslow, via cwinslow@nswbar.asn.au

Visit nswbar.asn.au and click on the sign-in button on the top right corner of the screen. If you have forgotten (or don't know) your login or password, click on 'Forgotten password?'. You will receive instructions on what to do next. Once logged in successfully, you will 'land' on the Member Dashboard.



Continuing Professional Development has a new, more accessible and informative calendar of events, which will enable members to arrange their CPD attendances well in advance.

'Find a Barrister' was reviewed and overhauled by the Innovation and Technology Committee, under the chairmanship of Michael Green SC. FAB's innovative search facility presents users with rich data on areas of practice, cross-referenced to seniority and gender.

Bar Practice Course

01/2019

Back row
James Braithwaite
Charles Street
Alistair Oakes
Miles Foran
Oliver Jones
Brendan May
Nathan Li
Daniel Reynolds
Steven Doupe
Matthew Robinson
Ryan Coffey

3rd row
William Buxton
Simon Grey
Mark Darian-Smith
Hugh Atkin
Tim Rogan
Angela Djukanovic
Robert Hussey
Nicholas Seow
Steph Lind
Justin Peach
Peace Decle

Front row
Emma Blizard
Kon Stellios
Janai Tabbernor
Renae Kumar
Gabrielle Scott-London
Sara Gul
Alex Hill
Jill Caldwell
Tammy Wong
Brad Dean
Sarwa Abdelraheem

4th row
Kirralee Tennant
James Thompson
Sarah Danne
Tom Grimes
Michael Whitbread
Katherine Hopper
Frank Tao
Ashely Cameron
Travis Jackson
Edward Thompson
Jethro Horowitz
Ariel Galapo

2nd row
Talal Krayem
Lara Gallagher
Emma Sullivan
Nell Bennett
Fleur Sullivan
Alison Hammond
Stephanie Gaussen
Michael Dalla-Pozza
Harriet Lenigas
Megan Evetts
Robert Pietriche
Benjamin Goodyear

02/2019

Back row
Riyad El-Choufani
Brett Stevens
Ben Hart
Alex Brown
Brendan Searson
Matthew Varley
Christine Ernst
Matt Fordham
Nathan Willoughby
Lorne Havenstein
Tim Kent

2nd row
Sage Leslie
Rebecca Mitchell
Leah Reid
Rebecca McEwen
Connie Picos
Tom Bateman
Michael Noakhtar
Katherine Sutton
Catherine Newman
Mirren Waters
Bachier Mawassi

3rd row
Oliver Berkmann
Keith Francis
Rossi Kotsis
Carl Young
Michael Hazan
Chris Dobbs
David Lloyd
Harry Black
Andrew Emmerson
Damien Toohey

Front row
Julian Brezniak
Maria Voleynik
Jordan Widjaja
Faheem Anwar
Lucinda Opper
Anca Costin
Tatyana Virgara
Claire Roberts
Karen Kumar
Patricia Muscat


His Honour Judge R H Weinstein SC


Edward Muston SC


Grace Keesing, Michael Izzo SC


Simon Grey, Benjamin Goodyear, Charles Street, Robert Pietriche


Charles Street, Amy Douglas-Baker, James Emmett

Tutors & Readers Dinner

The 2019 Tutors and Reader Dinner was held in the Establishment Ballroom on Friday, 14th June 2019. The Guest of Honour was The Hon Judge Richard Weinstein SC and the Reader speaker was Jonathan Adamopoulos.


Angela Djukanovic


Kate Boyd


Shelly Scott, Melanie Cairns, Patrick Homes Sarah Danne


Jonathan Adamopoulos, His Honour Richard Weinstein


Mark Anderson, Alex Hill


????, Robert Hussey

Swearing in of

Sandra Anne Duggan SC as a Judge of the Land and Environment Court of New South Wales

On Tuesday, 10 September 2019 Sandra Duggan SC was sworn in as a Judge of the Land and Environment Court by Justice Brian Preston the Chief Judge. The Banco Court was full of members of the Bar, colleagues, solicitors and family members for this ceremonial sitting. Her Honour was visibly moved by a tide of emotion which pervaded the proceedings that morning.

The Attorney General spoke on behalf of the Bar and Ms Espinosa, the President of the Law Society NSW spoke on behalf of the solicitors.

It was a celebratory day when her Honour's family witnessed the proceedings. A most esteemed welcome was extended to her Honour's mother Wendy, her sister Kathy and nephew Oliver, her brother Sean and her niece Evangeline. Sean's son was sitting university medical examinations and could not attend.

Her Honour's childhood years were spent on the upper north shore at Wahroonga. Her late father John worked at DFAT and her mother managed the records at government level. Her earlier education was at Loreto Normanhurst followed by Barker College. Her Honour gained admission to Macquarie University where she studied Law and Arts. Her Honour continued postgraduate studies at ANU undertaking a Master of Archaeological Science.

Her Honour was admitted as a solicitor in 1988. She practised in the sphere of local government and planning law at McDonell Moffitt Dowling Taylor, which became Abbott Tout.

In 1995, her Honour was called to the Bar and she read with John Webster, Peter McEwen and Dennis Wilson on 6 and 7 St James' Hall. She was, at the time, the only female barrister as a reader in those chambers.

In 2003 with a band of like-minded colleagues, Martin Place Chambers was established, which specialised in the Court's jurisdiction. Establishing of the chambers began the MPC family as such – the support and extensive friendships would flourish. Her professional life was exacting, busy and most enjoyable. Her Honour knew no other chambers during her years at the Bar; she would eventually rise to being Head of Chambers with the added distinction of being the first female Silk to occupy that role. She followed closely the examples of Craig QC and McEwen SC, her predecessors. During these years, members' well-being was one of her Honour's top priorities. Her devotion to MPC and its members and staff was boundless, influential and complete.

As head of chambers, her Honour was instrumental in taking First Nations Law students in floor junior roles. Her Honour supported the Toongabbie Legal Centre, Arts Law and the Jessie Street Trust.

Chambers activities have been a reflection of her Honour's favourite things in life – travel and champagne.

Mention was also made of the lengthy list of significant cases in which her Honour was briefed in her career as a barrister such as *Inner West Council v Findlay* the case regarding a horse, *Echt v Ryde City Council* (2001) led by the great Tobias QC and more recently in *Mulpha v The Hills Shire Council* (2012). All of which confirmed her pre-eminent status at the Bar as a specialist advocate.

More recently her status as a barrister was confirmed by Infrastructure New South Wales which briefed her in the case concerning the demolition of Sydney Football Stadium at Moore Park.

As a member of the inner bar, her Honour was a much-admired mentor and a fierce champion of the progression of women in [the] profession.

While at the Bar, her Honour participated in many committees and special interest groups: The Silk Selection Committee, Practice Development Committee, Professional Conduct Committee, Committee for Equal Opportunity and the Environmental Law Committee. She

is also a past editor of the Environmental Law Reporter and a past president of the Environment and Planning Law Association of New South Wales (EPLA), and was also a member of the Women's Barristers Forum.

Ms Espinosa observed that her Honour's practice areas were in fact more extensive, and this was due to her capable and skillful nature as an advocate. She emphasised her Honour's accommodating, kindly nature but razor sharp mind and firm attitude. It was elegantly put by one solicitor: Her Honour was able to slip easily between the velvet and leather glove.

Duggan J expressed a sense of privilege to be undertaking judicial office. She observed that the business of the Court concerned the way people live, their experiences within their communities, and the future we leave those who come after us. This was a fine and elegant summary.

The Judge remarked further on her stark realisation on that very morning – she would no longer be a barrister. She said that it had been a great privilege to be part of the profession that participates in the proper administration of justice in such an immediate way.

Her Honour made specific reference to Tobias QC a mentor, friend and teacher from her earliest years at the Bar and who had been one of her loyal supporters for many years; and mentioned Justice Brian Preston from whom she learned so much as a junior counsel. Her respect was boundless for them both.

Her Honour also paid tribute to the many people in chambers who play a crucial role in the life of a busy barrister. She thanked the floor receptionists and her assistants of many years. Their contribution, she remarked, was invaluable.

Her Honour expressed a notable debt of gratitude to Michele Kearns her faithful clerk for almost three decades and whom she dubbed 'the best clerk ever'. It was an epic moment to realise how much she had done for her Honour.

Her Honour is well known for her wit and masterful use of the English language as a barrister, and she noted the two elements of her speech writing for this occasion. First the edict to keep such a speech short and succinct. Second, to use the non-word 'irregardless', no matter what, so as to honour the memory of the late John Webster SC who used the word with disturbing frequency.

Lastly, her Honour promised to strive to be worthy of the faith and trust placed in her, and she pledged to serve the people of New South Wales to the best of her ability.

Kevin Tang

Swearing in of

Richard Cavanagh SC as a judge of the Supreme Court of NSW

On 16 September 2019 Richard Cavanagh SC was sworn in as a Judge of the Supreme Court by the NSW Chief Justice TF Bathurst AC in a ceremonial sitting. The ceremony took place in the Banco Court with the Attorney General Mark Speakman SC MP speaking on behalf of the Bar and Ms Elizabeth Espinosa, President of the Law Society who spoke on behalf of the Solicitors of NSW. It was a joyous, formal occasion amid the throng of members of the Bar and solicitors in the public gallery wishing the Judge well.

His Honour was born to Kevin (deceased) and Mary, and the family lived on the North Shore. He is the middle child of five – Peter, Judy, Susan and Joanne, all of whom were in Court that morning. Mrs Mary Cavanagh who is aged 90 years witnessed the day. His Honour's wife of 36 years Francine, was in attendance, as were his sons Tom (a lawyer) and Harry. His daughter Rose was unable to attend due to acting studies in New York. Special mention was made of the newest member of the Cavanagh family, baby Isla, his Honour's granddaughter who was in attendance.

The Judge attended the well-known Jesuit school St Aloysius College Milsons Point in the years 1967 – 1976. The school's motto had certain prescience for his honour on this occasion, it is *"Ad Maiora Natus"* – born for greater things.

His Honour studied law at the University of New South Wales and graduated with degrees in Arts and in Law. In that period of radicalism, his Honour recalled having teachers David Brown and John Basten (now a Judge of Appeal). He also recalled being in the first batch of students to work in the Kingsford Legal Centre when it opened in 1981. He was admitted as a solicitor in 1982. His first job was at Henry Davis York (HDY) with Tom Goudkamp mainly in personal injury. His Honour then worked for a time in various other practice areas: Family law; and in commercial litigation under supervision of James Stevenson (now Judge of the Superme Court). By 1988 Cavanagh J became a partner in the firm formerly known as Henry Davis York. It was there, that he became a pre-eminent solicitor in the field of insurance. For close to a decade he was the partner in charge of that practice group. He built a fine reputation as a solicitor and a burgeoning practice of note in the city. The Judge remembered those years fondly.

After practising for a number of years with loyal clients, he was admitted to the Bar in 1998. As a barrister his Honour's practice was an immediate success. In time he would become a fine advocate. He made the transition to the Bar easily. His Masters were James Stevenson and Jack Callaway whose acquaintance he had first made at HDY.

Special mention was made of Tony Edwards (deceased), formerly a member of the Newcastle Bar, who was the Judge's brother-in-law, married to his sister Judy. Edwards died unexpectedly in 2014. Edwards had moved his Honour's admission as a solicitor. He was a great supporter and promoter of the Judge when newly a barrister. Mention was also made of the TPD cases in which the Judge appeared stemming from the assistance he gave to Edwards' practice after his untimely passing. It was a mark of duty and abiding respect for Edwards. The Attorney evoked Edwards' memory on at least two occasions in his speech and this served to remind all of how deeply he is missed by the Cavanagh family.

Cavanagh J took silk in 2010. His practice areas increased to include complex insurance cases, personal injury, property, construction and professional indemnity. A notable case which his Honour conducted as Silk included cases *MX v FSS Trustee Corporation*, a total and permanent disability case. His mastery of the common law trial meant that he was able to unravel an opponent's case in cross examination by taking a single thread of evidence and running with it.

The Attorney also made mention of his Honour being a favourite among junior barristers, that his Honour was a pleasure to appear with before the Courts. It is known that apart from his generous self-effacing attitude, his Honour is well known for his modesty and kindly disposition. A solicitor who recently briefed his Honour referred to him as a 'super lawyer': the solicitors of NSW will be looking in vain for a replacement with such qualities.

Among his Honour's other achievements at the Bar were lecturing in the Bar Readers Course, presenting at countless Bar Association CLE seminars and serving as a director of Bar Cover.

The Judge made particular reference to the guidance and sound advice of Larry King SC over the years. He had appeared with and against King SC and had the highest regard for his skill and learning as a member of the inner bar and a custodian of the values and traditions of the Bar. The Judge expressed his gratitude for his supervision from the earliest times, his invaluable advice and mentoring which he received in navigating the world of the Bar.

In this way, it was observed by the Attorney, that the Judge had indeed lived out his old school's credo – creating a man for others. The credo speaks to an outward-looking life of service and of commitment to justice for other people. This ethos had been a guiding light in the Judge's life. His service has to date been unassuming as it has been generous and human-centred.

The Attorney General also remarked upon the Judge's quiet service for charitable and community based organisations. For many years the Judge has served breakfast to the homeless or distressed individuals at the Matthew Talbot Hostel. It was known also that the Judge participated in establishing and nurturing a mentoring program for less privileged school students to make contact with successful professionals. Four students per year benefit from his Honour's mentoring through their secondary school years – the crucial years in which to learn by example. He has also been a known supporter of Kick Start Kids which was established to assist children and youth in Kenya. The Judge is also a supporter of the Cancer Council.

Ms Espinosa emphasised the Judge's personal qualities and traits of humility and his strong sense of service to the community and society. They are recurring motifs in the Judge's personal and professional life. The Judge placed much emphasis on his late father Kevin instilling in him good values which he believed had placed him in good stead throughout life. The Judge vowed to work hard and to do his best in his new role.

Outside of the law, Cavanagh J is an avid golfer on weekends and maintains a respectable handicap. Other forms of physical activity are also an outlet for the Judge's hectic professional life – swimming and participating in the Big Ocean Swim from Palm Beach to Whale Beach. For many years his Honour braved the Sydney morning traffic and cycled into the city each morning.

His Honour remarked on the challenging and stressful work of active legal practice.

He observed that it was a privilege to have worked in a role that involved a continuous process of learning, particularly learning about why things happen and more importantly about human frailty and the challenges that people sometimes face. This has been a constant source of fascination and stimulation for him.

The Judge observed that it was an honour to be replacing the Honourable Justice Monika Schmidt who served some 27 years, having first sat in the Industrial Court, and who had not yet reached retirement age. The Judge expressed his hope that he might emulate her Honour's fair patient but firm manner in Court. Allied with the personal qualities of Justice Cavanagh, the Common Law division of the NSW Supreme Court has gained a fair, humane and learned judge by this appointment – of that, we have no doubt.

Kevin Tang

Final Sitting on the occasion of the retirement of

The Honourable Justice Terence 'Terry' Sheahan AO

Judge of the Land and Environment Court NSW

On Friday, 16 August 2019, the Land and Environment Court farewelled Justice Terence William 'Terry' Sheahan AO, one of its longstanding judges. It was the Judge's final sitting in Court 12A, the Court in which he was sworn in on 9 April 1997. The public gallery was packed with well-wishers, members of the Bench and of the Bar who commemorated the Judge's significant career of public service and the 22 years on the bench during which he administered justice for the people of NSW.

Ms Gabrielle Bashir SC spoke on behalf of the NSW Bar and reminded those in Court of the ample and wide-ranging contributions of the Judge to the Court and indeed outside of his career in the law. Justice Sheahan's contributions spanned the legal system generally from the administration of justice and improvements to Australian society. The significant public dimension will no doubt continue in the Judge's post judicial life.

The Judge was awarded an AO in 1992 for services to the law, particularly ADR and services to the NSW Parliament and to the Community through organisations concerned with health, aged care, human rights and the environment.

Before judicial appointment, his Honour was the State Attorney General in the mid-late 1980s and was notable, in any event, having been member for Burrinjuck since the early 1970s. His political career saw him in the office of minister of several major portfolios over time. His Honour's CV reads like a review of the pivotal matters affecting law and society in the 20th century. The public dimension of his work in politics can only be described as significant

As far back as 1986, as Attorney General, he took a leading role in establishing the Australian Commercial Disputes Centre – one of the first real proponents of ADR and out of Court dispute resolution in the Australian context.

By 2001, he led a move to reform the old Workers Compensation System in NSW. This was a momentous time. It is recalled that the rules, practice and procedure of the Land and Environment Court were to light the way of the Workers Compensation Commission. It became a body which dealt with disputes by the conciliation- arbitration approach which gave rise to the notion '[of being] focussed on the end from the very beginning' a slogan dating from the Sir Laurence Street years.

Furthermore, under the auspices of the Judicial Officers Bill, his Honour was instrumental in establishing the NSW Judicial Commission. This was no casual act of law reform – it was ground-breaking at the time, if not revolutionary. As an unknown entity at the time, it became the envy of the common law world.

There was a certain blaze of publicity which surrounded the Judicial Officers Bill which would ensure a checking and regulatory mechanism for the judiciary, public accountability of judges, scrutiny of decision makers and facilitate further education of judicial officers.

This reform became the envy of the common law world.

His Honour established the Office of the Director of the Public Prosecutions, as a politically independent office by the *DPP Act* 1985. This had a significant impact on the Attorney General's office and role, which had, since the inception of the colony in Australia, brought prosecutions in its own capacity. It was the guiding notion that criminal justice be administered free of political interference and influence by an impartial office. This was another major reform in the legal history of Australia.

The formidable legacy of reform derives from a significant family history. The Judge's late father was William Francis Sheahan QC or 'Bill' Sheahan QC was also a member of the Legislative Council and Attorney General of NSW. In his day, Sheahan QC was credited with bringing about major reforms such as the abolition of the death penalty, the promulgation of the *Mental Health Act* 1958 and the *Clean Air Act* 1961. Sheahan QC also held the seat of Burrinjuk, the seat seamlessly passed to his Honour by vote.

As is readily observed, whether in Burranjuck, the Gundagai Races or in Macquarie Street, his Honour is always attended upon by former constituents as well as friends and colleagues who greet him. This popularity and advanced sociability is a hallmark of his Honour's personality. It explains his extraordinary trajectory through politics and life in the law.

His Honour was the Member for Burrinjuck for 15 years and held notable ministerial portfolios spanning Housing, Transport, Energy, Finance, and of course, Planning and Environment. In addition, he was the President of the ALP in NSW from1989 to 1997.

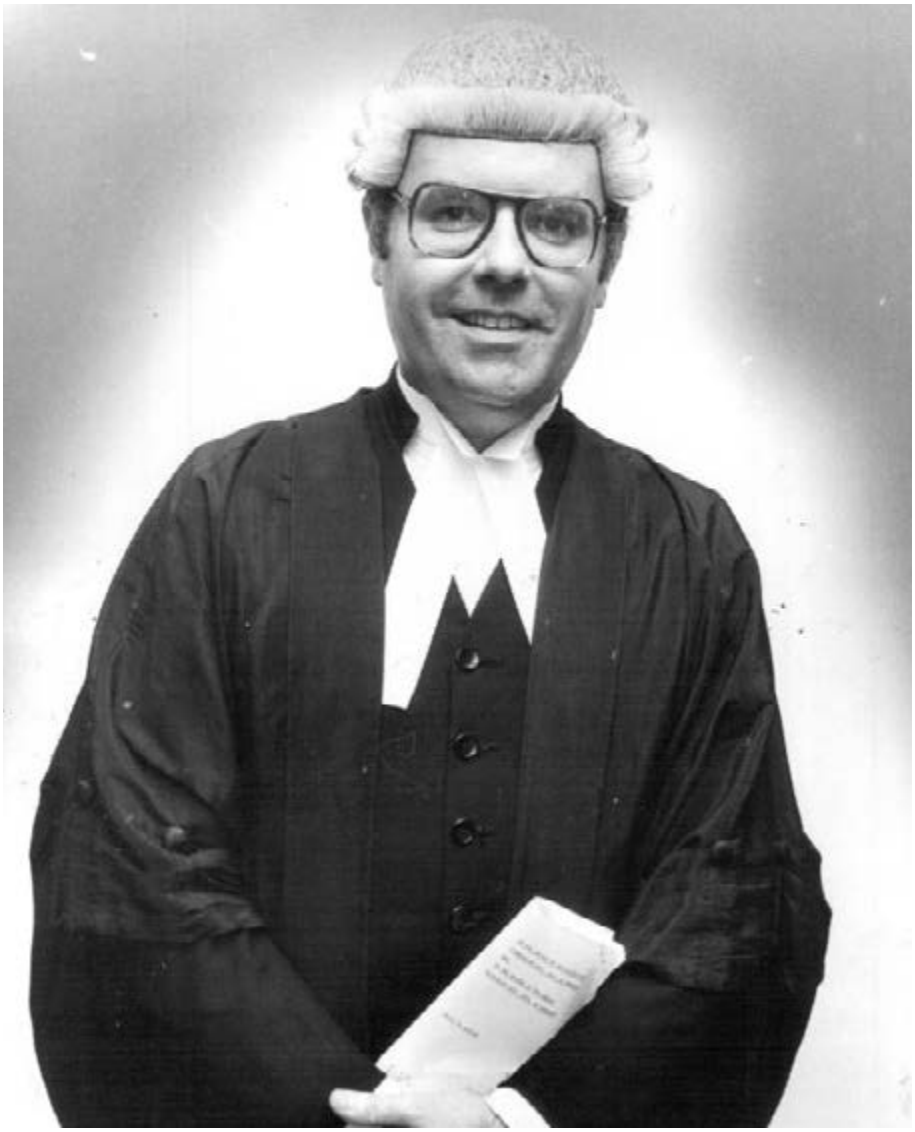
Ms Bashir SC mentioned that Sheahan J has had such a trajectory in the law and politics chiefly because of his eminent personal qualities – he was an active Member of Parliament who made friends across party lines – a quality of the highest order. The list of personal qualities most admired about Sheahan J counts a wonderful personality, an irreverent sense of humour, ample generosity and unmistakable genuineness.

More than 500 judgments of his Honour have appeared on Caselaw since 1999. It should be noted also that during 2001 to 2007, his Honour was President of the NSW Workers Compensation Commission, and 94 of those cases have been reported in notable reports. The subject matter and the locations about the above cases were across the jurisdiction and are too numerous to list – a magnificent track record.

In retirement, his Honour and his wife Dr Jennifer Hardy hope to experience a more leisurely pace, but one no less community minded. As the father of eight children and multiple grandchildren his Honour's extensive family no doubt will occupy a significant amount of his post judicial time.

On 9 August 2019 the Environmental and Planning Law Association of NSW held a dinner in recognition of the contribution made by his Honour to the jurisdiction. Members of Judiciary, the Bar and solicitors (city and rural), colleagues, family and friends celebrated his Honour's lengthy and remarkable service. It was observed that the wrench of his Honour's retirement would be a loss felt by the profession. His Honour had been a forerunner and major ally in the development of this jurisdiction and his Honour's vivacious nature will be greatly missed by all.

Kevin Tang



851203. ex Blacktown. Pics. John Nobley. Story. R.Macey. S.M.H. NEWS. Pic shows Attorney General Terence Sheahan announces the seeting up of a model court at Blacktown Court. With him are L-R John Aquilina, Member for Blacktown and Ian Pike Director of Local courts administration.

The Honourable Jane Hamilton Mathews AO

(1940 – 2019)

Barrister, Judge & Patron of the Arts

The pioneering former judge, the Honourable Jane Mathews AO has died aged 78 years after a year long battle with cancer. She had been a solicitor, barrister and a judge over a period spanning 60 years. In addition to leaving a formidable judicial legacy, Mathews was part of a small group of women who in no small way changed the legal profession forever.

Mathews was the daughter of Frank Mathews, the Chief Engineer of the BHP Steel Works at Port Kembla. Her mother was a classically trained pianist and taught many leading Australian musicians. Mathews was born in Wollongong and attended the Frensham School at Mittagong. She was academically gifted and was one of only two in her class to gain admission to university, studying law at the University of Sydney Law School. For two of her years at Law School – 1958 and 1959 – she resided at the Women's College.

Mathews commenced her Articles with Messrs Dawson Waldron Edwards & Nichols. After working for a small Wollongong firm for a number of years, in 1965 she was employed as a solicitor at Allen Allen & Hemsley where she worked on defamation matters when it was the preferred firm of Sir Frank Packer.

In 1969 Mathews was called to the Bar. In 1977, she was appointed a Crown Prosecutor, the first female ever to be so appointed. Mathews was for some time a member of the Bar Council. In those days it was a male dominated world. Her leaders included JW Smythe QC. She was one of about ten women at the Bar but only a handful were actually visibly in practice – Janet Coombes, the Hon Cecily Backhouse and the Hon Mary Gaudron QC among them. Mathews is a link to that time, when in the law, the female presence was rendered almost invisible.

In the early 1970s, Mathews maintained chambers for a time on the ninth floor of Frederick Jordan Chambers, then located in Macquarie Street. It was a civil liberties floor and counted among its members of the NSW Council of Civil Liberties (NSWCCL) a distinguished roll: Jim Staples, Jeff Miles, Paul Stein, Rod Madgwick, Ken Shadbolt, and Ken Horler were fellow social justice fighters. Mathews was also a friend of Bob St John QC the founder of the NSWCCL. For a time, she was married to the UNSW inaugural Dean of Law, Haldan 'Hal' Wooton AC QC.

As a prosecutor Mathews became well known for her prosecutorial fairness. She appeared regularly in sexual assault cases, in which juries were often all male. The Judges were exclusively male. As she recalled it, there was an atmosphere of discrimination and prejudice – spoken or unspoken. The Hon Ruth McColl (former Judge of Appeal) observed "It [was] hardly surprising that such painful experiences would focus [Mathews'] mind acutely on the role, place and acceptance of women in the Law."

The Governor of NSW, the Hon Margaret Beazley AO QC (formerly President NSW Court of Appeal) was a close friend of the Judge. She recalled Mathews' words when she herself was appointed to the Federal Court *'Margie, you have no choice'*. Mathews was concerned about the need for women to be visible in the judiciary, just as she remained concerned about the small population of women at the Bar.

The number of Indigenous women at the Bar remains scandalously low, and this was a matter which Mathews also sought to rectify.

Mathews' interest and enthusiasm for the Bar was undiminished. Earlier this year, she was the guest of honour at the Annual NSW Bench and Bar Dinner. Even in failing health and with limited mobility, Mathews attended with her typical ebullience and good grace.

After only three years as a Crown Prosecutor, the Attorney General Frank Walker offered Mathews a judicial appointment to the District Court, again a female first. With this appointment the tables had at long last been turned and she would be unstoppable. She was 39 years old at the time. She was a trailblazer. Her appointment was a paradigm shift in consciousness of the female role in society.

Mathews would devote the rest of her professional life to the proper application of the law in the cases over which she presided and to the interests and values of the women in the law. Everything she undertook in the years after her first appointment, advanced the position and power of women in society.

In 1987, Mathews became the first female NSW Supreme Court Judge. In 1994 Mathews became the President of the Administrative Appeals Tribunal. She then sat as a Federal Court Judge for some years. In the latter part of her professional life, she was a regular Acting Justice of the NSW Supreme Court conducting criminal trials and sentence matters with the fairness for which she was renowned.

In her capacity as Patron of the Women Lawyers' Association, Mathews worked tirelessly to champion an inclusive vision of the legal profession for women practitioners whether at the Bar or in the solicitors' profession. Experienced practitioners in Court noted that Mathews was polite and always very respectful to the parties [in Court]. She gave [parties] a fair hearing. She was always very welcoming to practitioners and did not take herself too seriously. She had an inimitable style as a Judge as she did in life.

Outside of the law, 'Justice Jane' was a music and opera enthusiast. Her efforts in offering patronage and significant financial support were considerable. She travelled around the world to attend Wagnerian music festivals including her notorious attendances at the Ring Cycle. On those trips she encountered many barristers and judges. She was a former president of the Wagner Society NSW.

The Judge hosted intensive listening sessions at Woolloomooloo and at Kangaroo Valley; Ring Cycle weekends which were cleverly orchestrated, each participant being assigned various responsibilities from food to the cleaning up. She was constantly finding fresh surprises and joy in the same 16 hours of opera and she loved sharing that joy with others. To Mathews, it was a sheer delight. She was an eclectic collector of people, art, knitting patterns, creative as well as traditional recipes, wine and books. The societies she loved included the Sydney Symphony, the Australian Festival of Chamber Music, the Pacific Opera Company, Musica Viva, Opera Australia and many others. She never lost sight of her ability to encourage, and transform the lives of others – many fledgling artists were mentored and befriended by the Judge. She promoted and supported Australian composers, including Carl Vine, for whose premieres she would travel across Australia to attend. She was also an astute collector of Indigenous Art.

In 2005, Mathews was made an officer of the Order of Australia (AO) in recognition of her contribution to the judiciary, to the profession, to UNSW and to music. Other appointments she held over the years included: Deputy Chancellor of UNSW, President of the International Association of Women Judges and the Women Lawyers Association (WLA) (Patron). Also, Mathews was instrumental in establishing the Law Faculty at the University of Wollongong.

Mathews was given a State Memorial Service on Friday, 18 October 2019. It was well attended by the legal profession with many lawyers, judicial colleagues, other dignitaries and talented friends from her life in the arts.

Life had come full circle. Mathews accepted her fate with equanimity. Her journey had been eventful with a stunning denouement in the Opera House.

The law has lost a learned, humane and cultured women.

Numquam obliviscenda

Kevin Tang

The Bar News Committee wishes to thank her Excellency for her amiable collaboration and assistance in all the material regarding the late Honourable Jane Mathews AO for inclusion in this edition.

The Hon James Henry Staunton CBE AO QC

(1922–2019)

Barrister, Silk, Chief Judge of the District Court

James Staunton QC, or "Jim" as he was known, was a senior member of the NSW judiciary for the better part of 25 years when he sat as the first Chief Judge of the District Court NSW. Staunton QC led the Court *mutatis mutandis* at the culmination of a great career at the Bar. His star rose even further as the head of the District Court. Undoubtedly, Staunton's deft hand evolved the jurisdiction into what it is today.

During his time as the Chief Judge and well into his retirement years, Staunton conducted numerous high-profile Inquiries and Royal Commissions. The disasters which marked our times included the Granville Train Disaster in 1977, the sinking of the Ferry MV Karrabee 1984, the air crash Seaview 1994, and the Gretley Colliery disaster near Newcastle in 1996 to name but a few.

James Henry Staunton was born in 1922 to Christopher and Charlotte at North Sydney. He had three sisters and the family lived in McMahon's Point in his formative years. He loved the Blues Point Wharf and grew up in and out of the water there. He attended North Sydney Boys High.

In 1943, aged 18, Staunton QC was enlisted in the Australian Army and spent most of the War in Port Moresby PNG where he worked in Intelligence for the US Air Force and Australian troops in PNG.

Staunton QC, after discharge and upon return with the rank Sergeant, went almost immediately to Sydney University where he read Law. Staunton was precocious as a student and he took articles with the well-known solicitor at the time Abe Landa.

It was also at Sydney Law School where Staunton's skill as a poker player emerged to the surprise of his fellow students – it earned him the moniker 'Lucky Jim'.

In the early 1950s, he married Elizabeth Haselhurst an economics student and shortly after that he was called to the Bar. The Bar was composed at that time of a milieu less scholarly and more practical, it was an age of re-establishing life after the deprivations of the War. Work for barristers was hard to come by at that time. Barristers had often seen military service. The 1950s were filled with the promise of hope and prosperity and as the economies of the world improved so did the Bar. Staunton QC became a fine leader of the bar.

At the Bar, Staunton was adept at common law work and general commercial cases. He was precociously clever in the earlier part of his career. He had a ponderous and weighty way of speaking, betraying a maturity which defined him in practice and on the Bench – it also repelled the gormless.

Eventually, Staunton practised from the Eleventh Floor of Wentworth Chambers and Paul Daley was his ever-faithful clerk. In 1966 Staunton was appointed Queen's Counsel and he had been a member of the Bar Council for some years at that point having risen to be vice president.

Staunton QC was appointed directly from the ranks of the inner bar to the chief judge of the District Court in NSW. That Court sat for some time in the infamous Hospital Road Court complex where the gatehouse to the Mint was the List Clerk's Office. He often sat in the upper level of the Hospital Road Court, in Court 5A – the atmosphere was one of solemn speed and efficiency. That District Court circa late 1970s was well-known for its judges which included Peter Ayton Leslie QC, John Bowditch Sinclair QC, Marcel Pile QC, Desmond Ward QC, Tony Collins QC, Adrian Rodin QC, Brian Herron QC, Alistair Muir QC, Alf Goran QC, Ray Loveday QC, Alistair Cameron-Smith QC, Barrie Thorley and many, many others.

When Staunton QC took appointment to the Court there were only 24 judges and by the time his Honour retired it counted more than 58 sitting judges and had become the busiest trial Court in the southern hemisphere. This was testament to his careful and gradual innovation.

Under Staunton QC, the District Court became the hub of the criminal jurisdiction in the southern hemisphere. He transformed it from a Dickensian court jurisdiction to a well-regarded and highly respected jurisdiction. Staunton QC was ever mindful of the words attributed to Magna Carta 1215 *'Justice delayed is justice denied'*.

The significance of Staunton QC's contribution followed closely the rise of technology and the new computerised world. Staunton QC started on the Court in the age before the internet. Together with the

Chief Justice Sir Laurence Street, Staunton QC transformed and recast the old Court of Petty Sessions to the NSW Local Court. Another significant matter in which Staunton QC was instrumental was the establishment of the State Judicial Commission. It was the first tribunal/body of its time which purported to and actually did, review judicial conduct and it served as a model for the rest of the Common Law world.

Staunton QC was awarded the CBE in 1978 and then an AO for his services to the Judiciary in 1995. Staunton QC emanated great authority and his demeanor in Court was more often than not stern, formidable and dour. He was tireless in his work to reform Courts as an institution. He was tireless and spry in nature and spirit. He was the ultimate administrator of the Court. A chief judge of the old world who had significant regard to the notion of practice and procedure in Courts. In fact the government changed the statutory *non compos mentis* age from 70 years to 72 years in a bid to keep Staunton QC at the helm of the District Court. It was widely known as the Staunton Amendment, (at very least implemented for him to complete his commissions of inquiry). Well into the 1980s, Staunton QC always wore a homberg hat and a heavy coat redolent of the times and the age from whence he came.

In retirement, Staunton QC could often be seen at Pymble Golf Club at the standing Tee Time 7.07 am without exception. His friends from all walks of life (among them were inevitably a few lawyers and judges) enjoyed his company. Staunton QC was always dressed in golfing attire with a colourful collection of bow ties. He was also fond of angling and loved seafood.

Tragedy touched the Stauntons in the 1980s. Their eldest son Jamie died suddenly in his youth in an accident while on New Zealand's Mount Cook. The body was never recovered, due to the location of the accident and the conditions. Staunton QC and Elizabeth would travel there annually to throw a wreath over the Pass. In later years, the grief was never far away from them.

Some years passed and the Stauntons' other son Richard met his future wife on a holiday to California and the West Coast of the USA. Richard moved there in 1988. He was an entrepreneur and successful businessman. Staunton QC and Elizabeth would visit California annually and they loved travelling to see their three grandchildren. It was a wonderful period in their retirement. However, Elizabeth died in 2010, and thereafter her husband was rarely seen in public but remained fiercely independent. Staunton is survived by Richard, his spouse Cammy and three grandchildren, all of whom live in the United States.

Kevin Tang

In Memoriam

Epitaph for Four Ladies

Lady Patricia Therese Byers (1925 – 2019)

Lady Pat Byers was the widow of the late Sir Maurice Byers CBE QC (1917-1999), one of the great Constitutional Lawyers of the 20th Century in Australia. She was the mother of Barbara, Mark, Sue and Peter. Lady Byers had a distinguished career in her own right, having been for some years the Matron of St Vincent's Hospital Darlinghurst. She is remembered as a great humanitarian, a soothing yet efficient nurse, a formidable hospital administrator who was respected by the Sisters of Charity and the Medical specialists alike. Generations of Nurses were mentored by Lady Byers. Throughout the career of Sir Maurice, as a most distinguished QC, she was well known to many practitioners of the Bar and the Judiciary. Sir Maurice and Lady Byers were from another time. She was a delightful, friendly and welcoming presence even in advanced retirement to all those who remembered the Bar between 1950s-1980s. Lady Byers' funeral took place at St Mary's Church North Sydney on 3 September 2019.

Lady Patricia (Nee O'Hara) Brennan (1928 – 2019)

Wife of the former High Court Judge Sir Gerard Brennan.

Lady Patricia Mary Mason (1925 – 2019)

Wife of the former High Court Judge Sir Anthony Mason.

Lady Winifred Grace (Nee Bonnin) Stephen (1916 – 2019)

Widow of the late Sir Alastair Stephen (1901 – 1982).

Atque in perpetuum, […] ave atque vale.

Catullus Carmina 101

In Memoriam

Natalie Zerial

(22 March 1984 – 2 August 2019)

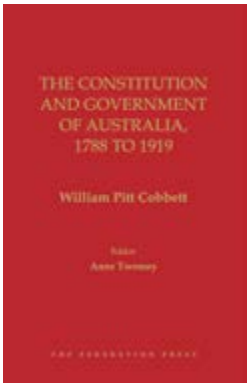
Born in Stanmore to a family of three children and educated at The University of Sydney and Harvard University, Natalie Zerial was called to the Bar in 2012. Prior to that she worked as Mr Justice Windeyer's tipstaff in the Supreme Court of NSW. For a time she practised as a solicitor in the environment and planning group at Mallesons Stephen Jaques then in the Commonwealth Attorney-General's Department in the International Law section. For a time she also worked for the Refugee Advice and Casework Service including a taskforce to Christmas Island.

From late 2014, Natalie was based in New York City with her husband Matt Dobrin. There she transferred her advocacy skills to the UN Global Compact and advised in Human Rights Law. This was a wonderful period in Natalie's life where she was able to transfer her Australian lawyering skills into an international context.

Testament to Natalie's versatility and creative intelligence, the law would not be her sole area of expertise. In 2017, Natalie was diagnosed with stage IV bladder cancer. Thereafter began a period of treatment and a courageous personal journey. Some of that time is chronicled in a personal blog which Natalie kept – a personal and creative diary of her experiences during the illness which ultimately claimed her life two years later. In services in Brooklyn and Sydney, Natalie was farewelled by her Australian and American families.

Natalie's blog is a moving account of a personal struggle. It is an insight into the particular way that Natalie was able to face life with equanimity. Natalie was a talented writer and a keen observer of the human condition, psychology and the world around her. Her blog titled *Being in New York* records the reality of her life latterly. Her writings can be found at Being in New York – https://beinginnewyork.com/.

BOOK



The Constitution and Government of Australia, 1788 to 1919

William Pitt Cobbett (edited by Anne Twomey with Amanda Sapienza) (Federation Press, 2019)

Pitt Cobbett was born in Adelaide on 26 July 1853, but grew up in England where his father had taken up a position as vicar. He attended University College, Oxford where he graduated with a BA, BCL, MA and DCL before being called to the Bar in London in 1878, although he remained focussed on academia, publishing an internationally renowned text on international law in 1885.[1]

Upon the establishment of the Sydney Law School from the bequest by John Henry Challis in 1890, Cobbett was chosen to take up the Chair of Law and the Position as Dean of the Law School. He was the only full-time lecturer, teaching jurisprudence, constitutional law, Roman law and international law. Otherwise, the other lecturers were prominent practitioners of the day. In what was perhaps an early indication of a contrarian nature, he campaigned for changes to the University's by-laws to enable him to teach practical legal subjects in the tradition of the American law schools.

During the 1890s Cobbett played a peripheral role in the formation of the Australian Commonwealth. He provided advice to the NSW Government suggesting amendments to the draft Constitution Bill. He vehemently disagreed, however, with fundamental aspects of the Federal structure, such as the equal representation of the States in the Senate and the power granted the Senate in relation to financial matters, which he regarded as antithetical to the principles of responsible government. His disagreement with the Bill saw him addressing public meetings to rapturous applause. So concerned was Sir Edmund Barton about the populist interference by Cobbett that he sought the opinions of leading constitutional authorities from the UK to counter Cobbett's influence.

Cobbett retired from the University in December 1909 due to ill health. After travelling to London to secure publication of his latest work on international law and for medical treatment, he returned to Australia, settling in Hobart, where he devoted the remaining decade of his life to working on what was originally to be a two volume work on 'The Government of Australia'. Unfortunately, due to his deteriorating health, he was only able to complete the first volume, which focussed upon Australia's constitutional history, the federation movement, the Commonwealth Constitution, and the operations of the Commonwealth Government (the second volume was intended to be an analysis of the Constitutions and Governments of each of the Australian States).

In his will, Cobbett requested his trustee consult Jethro Brown, formerly a Professor of Law and then President of the Industrial Court of South Australia, with a view to completion and publication of his manuscript. It was, however, not published because the change in the High Court's jurisprudence following its judgment in the *Engineers Case* would have required substantial revisions to the manuscript to be of any currency.

The editors have taken up the task of preparing Cobbett's manuscript for publication. The original consists of small, loose pieces of paper covered in minute handwriting, with numerous deletions and annotations, text indistinguishable from footnotes, and the occasional missing page. The published edition corrects typographical errors, in some cases dissecting long incomprehensible sentences, and the enormous task of correcting and completing footnotes.

One might ask what is the utility of a work that was out of date almost as it was being written? As the editors note:

> Cobbett's work … is of particular interest because it covers the initial period in which [the 'original intent' of the Framers of the Constitution] was put into practice and faced all the operational difficulties of a new federal system of government and the strains of a World War. It shows, for example, how dependent the operation of the Constitution was on doctrines such as the immunity of instrumentalities and reserved State powers, which were swept away by the *Engineers Case* shortly after Cobbett's death. This renders hollow any modern attempt to apply original intent in interpreting the scope of the Commonwealth's legislative and executive powers, without doing so in the context of these abandoned doctrines.

The interpretation and implementation of the Constitution in the initial years of the Commonwealth was predominantly undertaken by those who had debated and drafted it. What is interesting is the analysis of the Constitution by a recognised intellect who was largely an outsider to its creation, providing a unique perspective as to its meaning and effect.

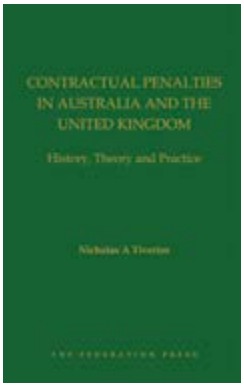
Federation Press, and the editors, are to be congratulated for bringing this interesting historical work of scholarship to life.

Dominic Villa

ENDNOTES

1. William Pitt Cobbett, *Leading cases and opinions on international law collected and digested from English and foreign reports, official documents, parliamentary papers, and other sources* (Stevens and Haynes, 1885).

BOOK



Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice

Nicholas A Tiverios (Federation Press, 2019)

Commercial contracts commonly include provisions by which the parties agree upon the remedy that an innocent party may claim against a defaulting party. The central concern of the penalties doctrine is: when will a Court refuse to enforce a term of a contract because it impermissibly penalises a party to that contract?

In this latest work from Federation Press Dr Tiverios provides a detailed historical, doctrinal and philosophical analysis

of the foundations of the prohibition against contractual penalties. The central thesis is that the Australian penalties doctrine concerns agreed remedies that are characterised as being in the nature of security rights and prevents such rights from being enjoyed beyond the function or purpose of security, thereby preventing the imposition of an unjustifiable detriment or punishment on a contracting party. On the other hand, the English penalties doctrine regulates the parties' ability to determine the quantum of a secondary obligation that arises upon breach of a primary contractual obligation. The English rule prevents agreed remedy clauses which derogate too far from the state's jurisdiction to impose a remedy for breach of contract.

The book begins with an historical overview of the development of the law of penalties from its progenitor rules in the 14th century through to the present day. It then provides a comparative analysis between the penalties doctrines in Australia (following *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205) and in England (following *Cavendish Square Holding BV v Makdessi* [2016] AC 1172). In doing so, Dr Tiverios demonstrates the sharp divergence between the approaches adopted in those two cases notwithstanding that the jurisdictions share a common starting point. That then leads into a more philosophical consideration of the underlying moral justification for the law of penalties in both England and Australia which accounts for the key differences.

Finally, the author bridges the gap between theory and practice, and the second half of the book looks more closely at the directly applicable legal rules to illustrate how the different penalties doctrines function in particular circumstances. Here Dr Tiverios breaks the analysis up into three stages: does the impugned clause attract the operation of the penalties doctrine; is the impugned clause in fact punitive; what are the remedial consequences of a finding that a clause is penal.

Perhaps bravely, the book concludes with what is described as a 'Codified Guide to the Penalties Doctrine', intended to be a restatement of the penalties doctrine (there is one for each of Australia and England) which provides an overview that can be worked through in order to identify the issues that arise at each stage of the penalties inquiry. Usefully, this codification is cross-referenced to the main body of the work, directing the reader to the more detailed commentary considering each of the issues in the restatement.

The scholarship of this book is evident, and while some of the introductory chapters will hold little interest for the busy practitioner, the bulk of the book provides a clear and concise description of the penalties doctrine in each jurisdiction. While the parts of the book dealing with the English doctrine will be of little direct relevance, they nonetheless assist (if only by way of contrast) in providing a thorough understanding of the practical operation of the doctrine. As Justice Edelman records in his Foreword, 'its clear and concise style and sections concerning the practical application of a doctrine based upon slippery foundations … make it essential reading for all commercial lawyers in Australia and England.'

Dominic Villa

BOOK

Fleishman Is In Trouble

Taffy Brodesser-Akner
(Wildfire, 2019)

Toby Fleishman awoke one morning inside the city he'd lived in all his adult life and which was suddenly somehow now crawling with women who wanted him.

So begins Taffy Brodesser-Akner's witty first novel *Fleishman Is In Trouble.* Fleishman is a neurotic, 41 year old, Manhattan liver specialist who, after 13 years of marriage, is estranged from his wife Rachel with whom he has two small children. And he's in trouble. Why? Because Rachel dropped off their children to his apartment unexpectedly in the early hours one morning and now won't return his calls and he doesn't know where she is. And if an uncontactable, estranged wife isn't bad enough when you are trying to juggle two children and a senior position in a hospital, Fleishman is also in trouble thanks to his recent foray into the world of online dating. Bewitched by the apparent avalanche of women in New York who are suddenly keen to date him and bewildered by the unprompted, explicit photos they send him, Fleishman is a man in uncharted waters. Then there's the fact that he is also in trouble professionally. He just doesn't know it yet.

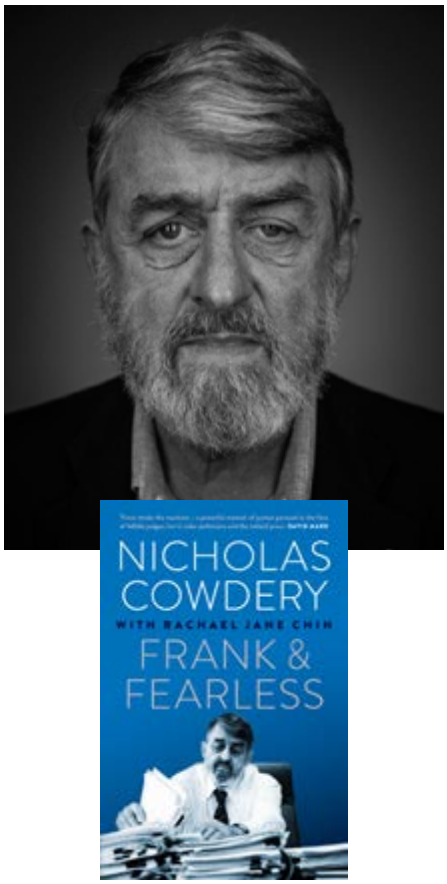
We learn of Fleishman's various troubles – and his often hilarious meditations on them – through his college friend Libby, a former staff writer for a men's magazine (as was the author before she became a staff writer at *The New York Times Magazine*). As she observes: 'Life is a process in which you collect people and prune them when they stop working for you. The only exception to that rule is the friends you make in college.' Libby dips in and out of the narrative, providing a suburban foil to the affluent, class-conscious, athleisure-clad social circles in which Rachel moves and against which Toby (who is hepatologist-rich, not financial-district-rich) constantly rails. Through Libby we are reminded of the fact that there are two sides to every coin – something which, after experiencing Fleishman's highs and lows and neuroses so intimately, is surprisingly easy to forget.

This is a sassy, sometimes brash, entertaining novel; I sent several friends quotes from it, and some of the scenes still make me giggle inwardly when I think of them (such as Fleishman's invocation of the Hippocratic oath in an awkward moment during a date). At other times it is extremely poignant; it makes you wonder about a society in which earning USD275,000 per year is seen as not really 'making it', and what 'making it' actually means. The fact that this is a story ostensibly about a man's experience of marriage, estrangement and single parenthood yet it is written – and narrated – by a woman, adds another dimension to it again.

This book is undeniably, unapologetically, a book for and of our times. And in the days before Kindle you would have seen it rapidly multiplying on your daily commute. If you are looking for something to read on the beach, poolside or in a hammock this summer, that will keep you engaged and entertained without being either too lightweight or too heavy; add this one to your list.

Sarah Woodland

BOOK



Frank & Fearless

Nicholas Cowdery
(with Rachael Jane Chin)
(NewSouth, 2019)

Nicholas Cowdery AO QC was Director of Public Prosecutions in NSW from 1994 to 2011. The Office of the DPP was responsible for the prosecution of many high profile cases during this period, including the prosecutions of Gordon Wood for the murder of Caroline Byrne, and Keli Lane for the murder of her daughter, Tegan. Decisions not to prosecute are also important parts of the work of the Office. During his tenure as the DPP Cowdery presided over the decision to drop charges laid against The Chaser team over their 2007 prank during the APEC Conference, and not to prosecute Bill Henson for indecency following the raid upon the Roslyn Oxley gallery in Paddington in May 2008. In the following extracts from *Frank & Fearless*, Cowdery discusses the challenges presented by the absence of laws regulating voluntary assisted dying, and navigating the politics of the office.

'EXTRACTS FROM FRANK & FEARLESS'

Shirley Justins and the need for assisted dying laws

The criminal law is primarily intended to prevent harm to individuals and the community. Just like DPPs, judges are bound by the law and the facts of the cases in front of them, no matter how personally upsetting the outcome may be. But what happens when the law is dangerously inadequate?

One clear example of such a situation during my time as the DPP was the lack of voluntary assisted dying laws. Not long before my tenure ended, this dangerous state of affairs forced three Court of Criminal Appeal judges to resort to confusing and risky arguments in an attempt to bring about a reasonable and just result. However, the cleverest of legal reasoning is not enough to make up for parliament's failure, which puts the police, the prosecutors, the defence lawyers, the judges, the jury, everyone in the process, in a very difficult quandary even today.

In 2010 Shirley Justins decided to appeal her manslaughter conviction for providing the Nembutal that killed her partner Graeme Wylie after he drank it from a glass she left in front of him.

She hadn't helped Graeme die just to rid herself of the burden of caring for someone whose mind had deteriorated so much that he couldn't remember whether he had children. Even though Graeme had changed his will in favour of Shirley only a week before he died, it became clear during her trial that she hadn't helped him die for financial gain. She did it because she honestly believed that was what he wanted.

By 2011 Shirley had finished her prison time. For two years she had spent every weekend in jail. Nonetheless, in 2011 Shirley again found herself facing a trial over the death of the man she loved.

Six months earlier, having considered Shirley's appeal against her manslaughter conviction, the Court of Criminal Appeal had handed down the decision that sent her back into the dock. The three appeal judges appeared concerned about the state of the law that could lead to other loving carers taking desperate measures and then facing serious criminal consequences. Their task was to do justice in an area of somewhat uncertain law that appeared to operate unfairly, which led to this confusing turn of events that saw Shirley back in the dock for a crime for which she had already served her time.

Despite the purity of Shirley's motives in helping Graeme die, the law offered no clear way for her to get rid of her manslaughter conviction. Two of the appeal judges ordered a new trial. One of those expressed doubt that manslaughter should be prosecuted again. The third judge, who would have ordered an acquittal, held that another prosecution for manslaughter would be an abuse of process.

In the present criminal law regime, the offences of murder, manslaughter and (especially) aiding suicide arise for consideration whenever voluntary assisted dying may have occurred or have been contemplated.

There is probably a legitimate social purpose in seeking to discourage people generally from killing themselves and so the law against assisting suicide has a role to play in modern society. But the question is whether it should apply to all cases of suicide, including voluntary assisted dying carried out in carefully controlled circumstances with adequate protections in place.

'EXTRACTS FROM FRANK & FEARLESS'

Challenge – speaking out about the dangers of mandatory sentencing laws

I think there are at least three ways of doing the job of DPP. One is to go to work each day, roll the arm over and professionally attend to what is necessary and go home. Another is to do that job and also apply oneself diligently to improving the way we do things, but to carry out the processes of reform without public exposure, in the corridors of power. (I suspect that my predecessor operated that way, and very effectively.) A third is to do all that but also to agitate the reform process in public, in view of the community. I tried to do that – and I think succeeded, by and large (although not every reform was achieved). And I am not saying that there is anything wrong with doing the job in the other ways.

Why should I have chosen to make life difficult in that way? I think it began in reaction against the 'law and order auction' that accompanied the 1995 state election, soon after my appointment as DPP – each side preying on the community's fears by talking up law and order issues and pretending that the answers lay in ever more draconian law enforcement and punishment. Then later there were threats to introduce mandatory sentences or some form of grid sentencing, and it seemed to me that somebody should be publicly putting forward the opposing view. These wouldn't be the only times that I and other senior members of the legal profession had to battle over issues of principle, and the contest continues.

New South Wales politicians weren't the only ones to regularly promise and attempt to pass such laws. Politicians in two other states knew that shopkeepers were sick of shoplifters and the general public were sick of nuisances committed by the town drunks. In the late 1990s, those states had passed laws that forced judges and magistrates to impose more, and longer, jail sentences for petty theft and property damage.

The effects of these new sentencing laws in those two states were immediate. A 24-year old Aboriginal mother was sentenced to the mandatory 14 days in prison for receiving a stolen $2.50 can of beer. A 20-year-old man with no prior convictions was sentenced to 14 days in prison for the theft of $9.00 worth of petrol. Two 17-year-old girls with no previous criminal convictions were each sentenced to 14 days in prison for the theft of clothes from other girls who were staying in the same room. Two young apprentices were each imprisoned for 14 days for first offences. One of them broke a window and the other broke a light worth $9.60. Legal observers noted the mandatory sentencing laws were harshest on the young and vulnerable and Aboriginal persons, particularly those who stole food and clothes because they didn't have families who cared for them. What's more, the effect of the mandatory sentencing laws on the crime rate was zero.

BOOK

Hammerschlag's Commercial Court Handbook

David Hammerschlag (LexisNexis, 2019)

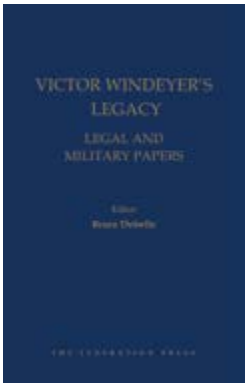
LexisNexis promotes this book as 'intended to be a practical tool for the benefit of those who practise in the commercial jurisdiction.' The brevity of the work (88 pages of commentary and 54 pages of reproduced Practice Notes, including two that have been re-issued since publication) is what provides its utility as a 'practical tool'. It provides a convenient summary of the relevant provisions of the UCPR and the Practice Notes, and is referenced to the leading cases on particular aspects without descending into detailed discussion of them. It also provides useful guidance as to the expectations the commercial Courts have of practitioners and parties that are not necessarily apparent on the face of the rules themselves.

This is a book that warrants personal inspection before purchase. Experienced practitioners in the area are likely to have a working knowledge of the practice of the commercial jurisdiction commensurate with the content of the book. On the other hand those who are new to the jurisdiction may find the commentary altogether too brief. For example, the author refers to the prohibition imposed by SC Eq 11 upon making an order for disclosure of documents before the parties have served their evidence unless there are 'exceptional circumstances'. This will be unsurprising for frequent flyers in the commercial jurisdiction, who will similarly be familiar with the cases that discuss what are 'exceptional circumstances'. For newcomers, while the author notes that this has 'been the subject of extensive judicial comment' there is no explication of what might amount to 'exceptional circumstances', and instead the practitioner is left to their own review of the caselaw, although the author has helpfully footnoted the leading cases.

This work achieves its goal of being a 'practical tool'. It provides a quick ready-reckoner for practitioners new to the commercial jurisdiction, and a useful refresher for those who only infrequently deal with particular parts of that jurisdiction.

Dominic Villa

BOOK



Victor Windeyer's Legacy – Legal and Military Papers

Edited by Bruce Debelle, 2019, Federation Press, 299pp.

He was, at least in many respects, a realist or a pragmatist, whereas his colleagues were for the most part apostles of legalism. This characteristic of his judgments serves partly to explain why it is that his reputation as a jurist stands higher today than it did in his own time and why, in the minds of many informed commentators, his reputation ranks second only to that of Sir Owen Dixon.

When a jurist is described in these terms, attention to his legacy is demanded. When the descriptor is Sir Anthony Mason, attention is commanded. Mason writes these words in his foreword to a miscellany of speeches, reviews, obituaries and other reflections by Victor Windeyer, soldier, historian and judge.

This "Legacy" has been compiled by Victor's former associate and soon-to-be biographer, Bruce Debelle. Debelle has also acted as judge in two States of the Commonwealth. (Victor preferred the pre-Cromwellian glory of "Commonwealth" over the place-name user-friendliness of "Australia".)

Charles Windeyer, a parliamentary journalist and contemporary of James Dowling, arrived in 1828. He and his wife duly produced an Australian born son. However, his eldest son Richard had remained in England with an eye to the bar there. Richard married Maria and produced William before himself arriving in 1835. All of which Victor recounted with colour and occasional diversion into feudal law before the historical societies of the Hunter River.

Richard was a prototype for the Sydney bar, successful but want to go too far. There was an incident involving sometime Solicitor General John Bayley Darvall, I think ancestor of the late bankruptcy silk Chum Darvall. The circumstances are addressed by Victor in a sober address to Australian judges on the topic "Contempt of Court". Elsewhere and away from judges, Victor permitted himself a family loyalty, complaining that Stephen CJ locked up Richard for 20 days while John Bayley received only 14. Richard "had apparently been the provoker, though perhaps not the aggressor."

Richard was not the first barrister and certainly not the last to confuse a cashflow founded on personal ability and a capital founded on the shoals of the Australian property market. Over-extended, he died at 42. This is a pivotal event in Victor's story - and, relevantly, for his writings - for three reasons.

First, the ability of widow Maria to navigate herself and her son around and past the eddies of genteel poverty. The strength of women in an age when legally superior men could well die young or become infirm was a common enough tale in many early families. The Macarthurs come to mind. The strength left a particular mark in the Windeyer line, where women tended to bluestocking and men tended to read JS Mill, still the world's most prominent male feminist.

Maria's success creates the next two reasons. First, there is nothing in Victor's writing which suggests a want of caution. That is not to say that Richard was reckless or anything other than unlucky, but it is clear enough that Victor was not going to risk unduly. He summed up his own attitude by recording the words of his boss at El Alamein. Soon after the turning point, General Montgomery wrote "Always operate from a firm base. The more uncertain and indefinite the situation, the more necessary it is to observe this rule."

Secondly, Maria was the parent who raised Victor's grandfather William. William was a central theme of Victor's life. Like his grandson, he was a judge with lifelong interests in Sydney Grammar School and the University of Sydney. More importantly there was a solid overlap of character, and I note Henry Parkes's remark about (his sometime employee) William, "He would have made as good a soldier as he has made a sound judge."

It is worth emphasising that Debelle has produced a legacy of "legal and military papers". The relationship between the military and the law is close. No few male and female members of the Sydney bar have served, and the Windeyer family is only one of many exemplars. As to the similarities between the disciplines, the binding nature of precedent and of orders and the role

and significance of symbolism in both professions are only two of many examples.

Victor himself also illustrated the neat paradox that the best of our leaders often comprise those who understand best the commonality in all of us. The author of this note's father served as a junior officer under Victor in North Africa and New Guinea, and the author can confirm via paternal hearsay what Professor Gummow made clear at the miscellany's launch: Victor related to his troops; he ate the food of his troops; he relied on his troops; his troops followed him.

Debelle has made good use of a number of Victor's commentaries on matters military, and it is a privilege for the reader to have the benefit of Debelle's success in tracking down Victor's address upon the victory of the second battle of El Alamein. Incidentally, bearing in mind that Victor's predecessor was Dudley Williams MC and without in any way diminishing the courage of the common law bar, does any member of the Association know why the High Court has a penchant for warriors from the whispering jurisdiction?

As to matters legal, Victor wrote as a common lawyer. I mean this in the widest sense: while he accepted and indeed welcomed the supremacy of parliament, his true faith lay in the culture of the common law, a set of rules moulded by countless generations to impose limits and to protect and develop freedoms.

As to the limit of legal knowledge, Debelle has recorded Victor's advice to 1952 graduates:

The Chancellor has admitted you lawyers as bachelors of laws, not of law - plural, not singular. This it seems is because it is assumed - quite erroneously of course - that you are learned in the canon as well as in the civil and common law.

As to the limit of the common law, Victor was a man of his time and his upbringing. For him, empire was an opportunity "to remember the peace, and welfare and progress that British rule, by example and authority, gave in so many parts of the world".

Rather than look to differences between his way of thinking and more modern ideas, Victor himself would have encouraged looking to similarities. A modern observation of Victor's words might be that he ignored or was indifferent to the many times British rule's example and authority badly misfired. Perhaps. But my own sense from reading through the miscellany as a whole rather than taking isolated words tailored to particular audiences is that he was patently aware of and supportive of the need for the common law to develop and not to fossilise and that any representative democracy had to have inclusion and not exclusion as a primary social goal. For Victor, empire came with the common law: "It is a common wealth [two words] of doctrine and custom in which we share."

Victor looked to Plato, to Bacon and to Edmund Burke as thinkers with solutions for current problems. He noted - surely correctly - that Bacon was "a man of wider interests and ampler mind" than Coke, and the only error I found in his work was his reference to Nathaniel Bacon as Francis's half-brother. Frances did have such a half-brother, but the Nathanial to which Victor was referring was a nephew prominent in the (other?) Commonwealth. The doctrine of the fertile octogenarian cannot save the day.

Sir Anthony Mason closed his foreword by comparing this miscellany to that of Lord Radcliffe, "Not in Feather Beds". The title may have been informed by the fact that Radcliffe had one of the more unpleasant gigs of modern times, the drawing of the boundaries for the new nations of India and Pakistan, and see Auden's "Partition" for a vicious dig. Actually, the title came from William Roper's biography of a fine equity judge, Thomas More:

We may not look at our pleasures to go to heaven in featherbeds; it is not the way, for our Lord Himself went thither with great pain, and by many tribulations, which was the path wherein He walked thither, and the servant may not look to be in better case than his Master.

It is neat that the penultimate paper of this collection is Victor's obituary for the highly regarded David Roper, also well-measured to the chancellor's foot.

In the end, Debelle's biography will tell us more about Victor Windeyer the man. In the meantime, this collection can be read merely because it is interesting and well-written. The reader will learn something of Windeyer's times and as much again of their own. It is a fine memorial of a warrior and scholar.

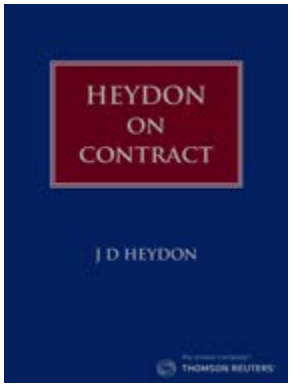
David Ash, Frederick Jordan Chambers.

Victor Windeyer's Legacy: Legal and Military Papers

On 20 August 2019 Federation Press hosted the book launch of *Victor Windeyer's Legacy: Legal and Military Papers*, edited by the Honourable Bruce Debelle AO, QC. The event took place in the Banco Court in Queens Square and in attendance were the Windeyer family, the Lockhart and Lehane families, among many other distinguished judges and even some former Associates of Sir Victor.

The Guest of Honour was the Honourable W M C Gummow AO QC who launched this fascinating collection of disparate papers, speeches and notes which illuminate the contribution of a great Australian to not only the law but also to Australian society in the 20th Century. Most fascinating were the references to the late Sir Victor's military career. The event was well attended by members of the Bar and Australian history enthusiasts.

BOOK



Launch of Heydon on Contract: The General Part

The Hon Justice A S Bell
President, New South Wales
Court of Appeal
5 September 2019
Banco Court

The author spent all of his distinguished years at the Bar as a member of the Eighth Floor of Selborne Chambers. It was to Eight Selborne that he returned following his distinguished years of service first as a judge of the New South Wales Court of Appeal, then as a justice of the High Court of Australia, and then as Royal Commissioner. There often sits on the reception desk of Eight Selborne a vase of flowers. The vase never contains violets. Violets can shrink. There is no room for shrinking violets on Eight Selborne, and never has been. This is a theme to which I shall return.

Another characteristic of Eight Selborne is that, when that Floor comes to celebrate a member's achievement, it never meets in a restaurant which serves fusion cuisine. Fusion is not a popular word on Eight Selborne. Resistance to fusion, however, does not mean that an acclaimed master of equity cannot at the same time be a master of the common law, and in truth, one cannot be a good contract lawyer without also having a sound grasp of equitable principle – and there is far more reference to and discussion of equitable doctrine in *Heydon on Contrac*t than in most contract law texts. There is, for example, a whole chapter on 'Unconscientious Conduct', as well as a detailed treatment of equitable assignment of benefits under contracts.[1]

The author of the book launched tonight deprecates the use of sobriquets such as 'master of equity' or 'master of the common law' but, as TEF Hughes QC must have said on thousands of occasions, the facts in this case are "stubborn and impressive".

The facts reveal the author's first foray into the common law occurred almost 50 years ago, in 1971, with the publication of the first edition of *The Restraint of Trade Doctrine*. 1973 saw the monograph on *Economic Torts* published. It was republished in a second edition in 1978, shortly before the author came to the Bar. In between editions, in 1975, came a Casebook on Equity, now in its 8th edition. Coinciding with the second edition of *Economic Torts* in 1978 was the first edition, with Bruce Donald, of *Trade Practices Law*, of which there have been many subsequent editions or manifestations, published in the financially crippling loose leaf format! There then followed, in 1979, the commencement of an association with the Australian edition of *Cross on Evidence* which has lasted for 40 years, spanning 10 editions. Later works, of course, include two editions of Meagher Gummow and Lehane (the 4th, in 2002, with R P Meagher and Justice Leeming, and the 5th, in 2015, with Justice Leeming and Dr Turner) and two editions of *Jacobs' Law of Trusts* (the 7th and 8th editions in 2006 and 2016 respectively), both with Justice Leeming. *Restraint of Trade* is now in its fourth edition.*2* Not to be overlooked in this extraordinary record are the 20 years spent editing the Australian Law Reports[3] and 20 years as editor of the New South Wales Law Reports,[4] collectively resulting in the publication of exactly 200 volumes of law reports.

The work which it is my very great pleasure to assist in launching tonight is one of quite extraordinary scholarship and erudition. It displays many of the characteristics that Chief Justice Spigelman highlighted upon the author's elevation to the High Court from the New South Wales Court of Appeal in 2003: "prodigious energy", "inexhaustible relish for work", "vivid prose style", and "systematic arrangement and presentation" in which "[n]o corners were cut" and "[n]o issues were dodged".[5]

The work is ominously entitled *Heydon on Contract: the General Part*. It echoes, in this regard, Professor Glanville Williams' classic 1953 text *Criminal Law: The General Part*.[6]

That work aimed to "search out the general principles of the criminal law, that is to say those principles that apply to more than one crime."[7] Just as Williams distinguished between the general part of the criminal law and specific crimes,[8] so too does Heydon distinguish between the general part – that is, "the basic doctrines of contract formation, third party rights and dealings, contractual invalidity, termination and remedies for or affecting breach of contract" – and "*specific contracts*, like contracts relating to the sale of goods".[9]

Only time will tell whether the present work will have the same influence as Williams' 1953 text but I strongly suspect it will. It most certainly should. It has already been cited in numerous decisions of the New South Wales Court of Appeal.[10] One Federal Court judge has also been wise enough to cite it[11] and, as the author himself might say in one of his more mordant moments, many others are no doubt giving some thought to the prospect of doing so. Now that there has been a further print run, which almost inevitably will also be shortly exhausted, its reach will continue, and rightly so.

In this context it is, I think, apt to recall the words of an early reviewer of Glanville Williams' text who wrote that "the best tributes to this work will be not so much what reviewers say of it but what teachers and practitioners will do with it."[12] There is little doubt that *Heydon on Contract* – which outrageously exhausted its first print run within a matter of weeks, if not days – will soon be on the shelves and trolleys of teachers, students, judges, and practitioners throughout the country, and indeed beyond. It would be an act of gross professional negligence to be without a copy at work, as well as one at home, if for no other reason than that its weight alone will exceed your luggage allowance or your strength at the end of a wearying day in court.

This book is weighty in both senses of the word. It stands out for many reasons.

First, it is written with all the benefit of more than 50 years of full engagement with the law, from a variety of perspectives: as an academic lawyer, as an advocate, as an intermediate appellate judge and as a judge of an ultimate appellate court.

Pausing there, the difference between these last two positions is one that assumes no little importance in the author's opinion but not, in his opinion, in the minds of at least some intermediate appellate judges.[13] This topic is one upon which the author dilates in forthright style in various parts of the text.[14] The New South Wales Court of Appeal's decisions in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; [2009] NSWCA 407 (**Franklins v Metcash**) and *Mainteck Services Pty Ltd v Stein Heurtey* SA (2014) 89 NSWLR 633; 310 ALR 113; [2014] NSWCA 184 come in for criticism.[15] That is not to say, however, that generous acknowledgement is not made elsewhere of decisions of intermediate appellate courts. The scholarly decision of Justice Joe Campbell, for example, in *Ryledar Pty Limited v Euphoric Pty Ltd* (2007) 69 NSWLR 603; [2007] NSWCA 65 (**Ryledar v Euphoric**) concerning whether it is a requirement for rectification to be granted that the parties' common intention

be evident by "some outward expression of accord", and the same judge's decision in *Franklins v Metcash* in relation to the form of a decree for rectification (although not that aspect of the decision dealing with *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 24), are singled out for praise.[16]

As to *Ryledar v Euphoric*, Heydon describes it as a "most fundamental analysis" which "merits quotation" as "a summary does not do it justice".[17]

The author's own decision, when a member of the New South Wales Court of Appeal, in *Brambles Holdings Limited v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 also highlights the significant role that decisions of intermediate appellate courts can play in the faithful and clear distillation of the principles of contract law. The decision of Murray Gleeson, when Chief Justice of the Supreme Court of New South Wales in the *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, that of Michael McHugh in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 97,326, and the joint judgment of Meagher, Handley and Cripps JJA in *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 provide other examples.

But to return to the text and my first observation, the key point is that it is rare indeed for a textbook on such an important topic as the law of contract to be written by an author with such a wealth of practical experience, and the wisdom and insight born of that experience and the various perspectives that experience has afforded him. One distinguished exception, of course, is the trilogy of texts written or revived by the author's erstwhile colleague on the New South Wales Court of Appeal, the Hon KR Handley QC, whose works on res judicata,[18] actionable misrepresentation,[19] and estoppel by conduct and election[20] have been generously acknowledged and praised by the author, both in *Heydon on Contract*[21] and elsewhere.[22] Those works, as with *Heydon on Contract*, demonstrate not only the enormous importance for practitioner and judge alike of excellent legal textbooks per se, but the value in having principle distilled by authors whose lengthy and distinguished professional careers have demanded and nurtured not only forensic insight, but the highest degree of rigour in the identification, formulation and application of legal principle.[23]

Such authors also appreciate that the law cannot in practice be pigeon-holed. Thus where, for example, principles from the law of trusts and assignment must be understood fully to understand a contractual topic such as privity, those principles are discussed. As Heydon says, "purism" – which may otherwise have led to the exclusion of non-contractual topics in a textbook on contract – is not to be exalted over practicality and convenience.[24]

By way of contrast to the present work, most legal textbooks start their lives as the work of a young academic. Sir Guenter Treitel, for example, was 34 when the first edition of his classic *The Law of Contract* (**Treitel**) was published in 1962, some two years before Dyson Heydon went up to Oxford. But not all academic texts are of such quality as Treitel. As Heydon JA said, in response to an argument I made as a junior in *Union Shipping New Zealand Ltd v Morgan*,[25] in which (I suspect) I had not spared reference to the academy:

> "[A]cademic literature is, like Anglo-Saxon literature, largely a literature of lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to."[26]

Whether or not that observation was wholly fair (and I recall having some thoughts about that at the time), it is a memorable example of the author's literary style and felicity of language.

The second general point I would make is that much of the law of contract is well settled. That is a good thing and what sophisticated economies require for the efficient functioning of trade and commerce. In those areas where the law is relatively settled, *Heydon on Contract* sets out with great

clarity the relevant principles, provides ample citation in support of them and frequently descends from the general to the particular to highlight, in typically epigrammatic style, the way in which the established principle has been held to operate in particular factual circumstances. The discussion by the author of what acts may amount to an affirmation of a contract following an act or conduct by the counterparty that would have entitled the first party to rescind is a case in point.[27]

But there are areas of the law of contract where either the law is not fully settled or it is vague in its ambit,[28] where difficult cases have made bad law,[29] or where some major or subtle or insidious doctrinal divergences have emerged in common law jurisdictions. In these areas, the text adopts a very different style. It is a style which gives great insight into the author's mind and forensic personality. The learning underpinning that style has been described by Associate Professor Lee Aitken, a boon luncheon companion of the author, as "dodecohedral in the Daubian sense".[30] Whilst I must confess to lacking Professor Aitken's commitment to plain English language, the observation is apposite.

The third broad point to be made in relation to *Heydon on Contract* is that this is a book on the *Australian* law of contract first and foremost. This is not because the author is a republican, and there is no threat that he will join Mr Peter FitzSimons on the hustings in a red bandana (although it is an intriguing image). Rather, it is because the law of contract in Australia is undoubtedly distinct from the law of contract in England in a number of important and indeed fundamental respects.

Just because the text is avowedly one concerned with the Australian law of contract, however, it would be wholly erroneous to think that it does not deal with the English law of contract. It does – and at great and illuminating length – but this is not done as an act of slavish adherence; quite the opposite. It is to expose and explain the key differences which have emerged. These differences exist, for the most part at least, not because Australian law has diverged from English law as traditionally stated but because English law itself has moved in conspicuous ways. *Heydon on Contract* is essential reading for the "many [who] think that Australian law conforms with the modern English approach" and "others [who] think that Australian law should be made to conform with the English approach".[31]

The differences that have emerged are most fundamentally (but by no means only) associated with the law in relation to contractual interpretation and the law in relation to the rectification of contracts and other instruments.[32] The exposition and exploration of these differences in *Heydon on Contrac*t is informed at a human level by a dialectical engagement that began more than 50 years ago. Let me explain.

In 1966, Lord Franks, the legendary British civil servant, post-war Ambassador to the United States and philosopher, chaired a commission of inquiry into the University of Oxford. The Commission said that the famous Oxford tutorial system:[33]

> "[a]t its heart is a theory of teaching young men and women to think for themselves. The undergraduate is sent off to forage for himself… and to produce a coherent exposition of his ideas on the subject set… In [the tutorial] discussion the undergraduate should benefit by struggling to defend the positions he has taken up…"

Two years before the Commission's Report was published, a young but tall Rhodes Scholar from New South Wales had made his way down the Oxford High Street, turned right into the entrance to University College, then in its 715th year, and presented himself for tutorials in the undergraduate law course in a dank room near Magpie Lane. His tutor was a slightly older but equally tall South African Rhodes Scholar who had won the Vinerian Scholarship in 1957. This was the future Lord Hoffmann. Thus two towering – I was going to say "titanic" but that is not all that portentous – two towering intellects were thrust together in the unique and robust environment of

the Oxford tutorial. Heydon himself would become the Vinerian Scholar in 1967.

In moving the vote of thanks to Lord Hoffmann following the Fifth John Lehane Memorial Lecture in 2010, the then Justice Heydon recalled their first meeting:[34]

"It was a dark October night in 1964. We sat in his rooms in a part of the College called "Kybald", distinguished for gloomy Victorian architecture. There, solemnly and seriously, calmly and quietly, he explained how the system worked."

The lively debates between the two as to legal principle and philosophy and judicial method and technique that began that dark but auspicious October night in 1964 continue, more than 50 years later, in the pages of this book, for it is largely if not exclusively to Lord Hoffmann and the influence of his decisions in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *The Starsin* [2004] 1 AC 715,[35] and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (**Chartbrook**) that Heydon attributes the divergence of English contract law from orthodoxy. This is done with force but, at the same time, much admiration. Thus he writes:[36]

> "Lord Hoffmann's exposition of the modern English approach is striking, brilliant and seductive. W B Yeats said that Bishop Berkeley's prose dripped with suave glittering sentences. Lord Hoffman's certainly does. In part those sentences highlight with extraordinary freshness some profound aspects of the traditional law. In part they go well beyond them."

The reader of *Heydon on Contract* is left in no doubt, however, where the line between insight and heresy lies. Take the discussion of Chartbrook.

The difference between the approach in Chartbrook and that under Australian law is that, for the purposes of rectification, Australian law concentrates on the actual mental states of the parties as opposed to what a reasonable person might have conceived to be the common intention of the parties. This is a major doctrinal distinction. Under the heading "Australian and English Positions Contrasted"[37] the author "warms up" by describing academic discussions of *Chartbrook* as being "in their remoteness from forensic realities, … reminiscent of the constitutional schemes of the Abbé Sieyès". He was, of course, and as you would all recall, one of the chief political theorists of the French Revolution, famous for saying of France to Mirabeau that it was "a nation of monkeys with the throat of parrots". It could have been worse: as George W Bush reportedly said more than 200 years later, "[t]he problem with the French is that they don't have a word for entrepreneur."

But to return to *Heydon on Contract* and the assault on the law of rectification, the author writes that:[38]

> "English authorities since 2009 reveal the English position, even if clear in principle, to be very obscure in practical application. And even if one considers that it can be rendered clear in application, one may not like it. The persons in that frame of mind may console themselves. Like the weather in Melbourne, it will soon change."

Such change in England has, in fact, begun to happen. In delivering the 2017 Harris Society Annual Lecture at Keble College Oxford where, of course, Dyson Heydon had been a tutorial fellow, Lord Sumption said that:[39]

> "rather more than thirty years ago, the House of Lords embarked upon an ambitious attempt to free the construction of contracts from the shackles of language and replace them with some broader notion of intention. These attempts have for the most part been associated with the towering figure of Lord Hoffmann. More recently, however, the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive, to what I see as a more defensible position."

His Lordship also said on that occasion, in words with which Dyson Heydon would, I expect, fully concur, that:[40]

> "Judges are fond of speculating about the motives and practices of businessmen in drafting contracts. It is a luxurious occupation. The rules of admissibility protect them from the uncomfortable experience of being confronted by actual facts."

Returning to Mr Heydon and Lord Hoffmann, after his meteorological allusion to the weather of Melbourne, there then follows an extended and what may fairly be described as "Heydonesque" demolition of the *Chartbrook* decision and its forebears. It is a matter of note that in this discussion there is an interesting defence of Lord Denning and his decision in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 which was heavily relied upon in *Chartbrook*. In short, the author considers it unfair to place the blame for the *Chartbrook* heresy on this decision. Thus he says:[41]

> "In point of principle, it is not enough to stigmatise what Denning LJ said because of the mere fact that it was he who said it. It is true that glory has departed from his reputation. The 'cloud-capp'd towers and gorgeous palaces' of the energetic judicial legislation he perpetrated over four decades have slid into ruins. But he had, with respect, exceptional legal learning and acuity. In this instance, and for his time, it is not his words in themselves that are wrong but what has later been made of them by numerous modern lawyers."

"Modern" is not a term of approbation in the Heydon lexicon.

The discussion and critique of *Chartbrook in Heydon on Contract* is illuminating on a number of levels. It draws out a fundamental difference between Australian law and English law on a centrally important topic. It tracks through what the author considers, rightfully in my opinion, a fundamental departure from orthodoxy. It does this by a close analysis of the cases which preceded *Chartbrook* and it highlights how a lack of rigour is apt to create doctrinal chaos. In all of this we see, as in other parts of the work, the stringent attention to detail, the closeness of the analysis and reading of the relevant cases and the depth of the author's scholarship and historical grasp. It was these characteristics which marked him out as a fine advocate and as a fine judge.

One other area in which there has been doctrinal controversy and indeed movement at the level of ultimate appellate courts relates to the doctrine of penalties. If I may say so, the discussion of the penalties doctrine in this text is the clearest I have ever read. That discussion includes but is by no means confined to the decisions in *Andrews v Australia and New Zealand Banking Group Ltd* (2016) 247 CLR 205; [2012] HCA 30, *Cavendish Square Holdings BV v Talal El Makdessi* [2016] AC 1172 and *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28.

In relation to that trilogy of decisions, the author notes (at [26.970]) that "the law has, at least superficially, travelled into a time of turbulence and disputation" and that these three decisions have attracted a vast amount of critical commentary "varying greatly in angle, tone and detail". The author calls out exaggeration of the extent to which the law in its practical operation has been unsettled by those decisions as well as "the allegedly unedifying character of what the Supreme Court and the High Court said about each other". Pouring cold water on what has excited many academics, he advises that "those who go to the cases in the hope of a titillating experience are doomed to bitter disappointment".

There is an interesting and diverting reflection on judicial technique manifested in the three decisions.[42] The discussion which follows then takes the reader clearly through *Andrews*, then *Cavendish*, then *Paciocco*, teasing out the differences both between the individual judgments in *Cavendish* and *Paciocco* as well as the differences between the three cases. There is then an invaluable analysis of the status in Australia of the four key propositions associated with Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 in light of *Paciocco*.

The final point I would make is that *Heydon on Contract* is written with such inimitable style and flourish that consulting it is far more than a routine matter of professional engagement as a starting or end point for research. It is a pleasure to read. Throughout, there are insights and reflections on themes not necessarily confined to contract law but about which the author has often spoken. These include the merits or otherwise of joint judgments in ultimate appellate courts,[43] the importance of isolating the ratio decidendi in any case,[44] and the importance of expedition in commercial cases, both in respect of their hearing and disposition. He links the excessive use of extrinsic evidence to the clogging of the arteries of litigation. He writes:[45]

> "This is bad not only for litigation generally. It is bad for commercial litigation in particular. A commercial court is supposed to be a piepowder court. The merchants come in. They stamp the dust off their boots. They want a speedy answer. Commercial health – the health of individual traders and the health of the economy as a whole – depends not only on the direction of the circulation of money, but also on its velocity. Those who owe money should pay it speedily. Those who do not owe it are entitled to a judgment removing doubt about that point. Slowness in adjudication can result in the bankruptcy of traders despite the justness of their claims or defences. Many transactions and businesses are interconnected. Much legal process is instituted or defended unmeritoriously, in the knowledge that the court's delays can be exploited to deny justice. These abuses of legal process are massive in scale.
>
> The trouble is that the English position is so liberal that even though it forbids recourse to negotiations, it tends to invite parties to prepare and tender negotiation material in the hope that all or part of it will be admitted as background material.

> The cost pressures affecting large firms of solicitors operating under their expensive business models are notorious. In those circumstances a cynic might say that greater love hath no managing partner than this – the eruption of large-scale commercial litigation against a loyal and valued client. Even if most managing partners do not experience that emotion, commercial litigation involving analysis of contractual background does generate excessive discovery, huge tenders of ill-digested documents, the preparation of diffuse witness statements and prolix cross-examination."

I would take this opportunity to place on the record my strong endorsement of these sentiments and the explicit and implicit criticisms they contain.

As with especially the earlier editions of *Meagher, Gummow and Lehane*, there are also deployed throughout *Heydon on Contract* bon mots, literary allusions, and acerbic reflections which bring a smile to the reader who is otherwise occupied in a search for crystalline principle. Take, for example, the discussion of privity and the author's citation of the 30th edition of *Anson's Law of Contract*, edited by the former Lord Justice Beatson, the soon to be Lord Burrows, and Professor Cartwright. The author quotes from Anson the 'assertion' that:

> "In principle the promisee should also be able to recover substantial damages if, by reason of a breach of contract, the promisee (a) comes under a moral obligation to compensate the third party, though under no legal obligation to do so, or (b) voluntarily incurs expense in making good the default."

He then writes: "Apart from a noticeable odour of restitutionary sanctity, this passage has several problems."[46] These are then delineated with some vigour and zeal. You will recall my earlier observation as to the absence of shrinking violets on Eight Selborne.

Priceless, too, is the description of Sir Owen Dixon's concurrence with Sir Victor Windeyer's discussion of voluntary equitable assignments in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 16. Of this, Heydon says:

> "[Windeyer's] judgment received a significant encomium from Dixon CJ, in the dying months of his much-admired career. The encomium was cool, perhaps. But it was real. And it was notable. For it was enunciated by a stern critic. From his lips or pen what seemed to be praise was rarely sincere. And what seemed to be sincere was rarely praise. He said: "I have had the advantage of reading the discussion contained in the decision of Windeyer J of the whole subject of voluntary equitable assignments and I do not know that there is anything contained in it with which I am disposed to disagree."[47]

It will not be said of this book, as Mr Heydon's great friend, the late R P Meagher AO QC, also of Eight Selborne, once memorably wrote of an English text on the law of trusts, that "[n]obody should yield to the temptation to buy this book, and the author, the publisher and the editors ought all be ashamed of themselves and each other".[48] Happily, entirely the opposite is true of *Heydon on Contract* (with the possible exception of the pessimist who signed off on the original print run). What was said, however, of the late Professor Treitel, who died only a matter of weeks prior to the publication of this work, by the current Dean of the Oxford Law Faculty could well also be said of Dyson Heydon and this work:[49]

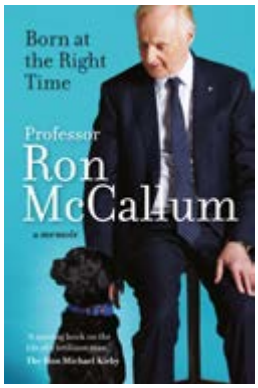
> "it was clear that Treitel and contract were well-suited. The law of contract provided ideal material for his rigorous doctrinal analysis and precise attention to detail, and his desire to impose some order on the case-law in particular."

This is a most significant publication, brilliantly written and splendidly produced, including an enormously useful table of contents and index. It is a great honour to have been asked to participate in its launch.

ENDNOTES

1 See JD Heydon, *Heydon on Contract* (Lawbook Co, 2019), ch 18 and [13.280]ff respectively.
2 JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis, 4th ed, 2018).
3 From (1979-80) 29 ALR to (1999-2000) 169 ALR.
4 From [1980] 1 NSWLR to (1999-2000) 48 NSWLR.
5 The Hon JJ Spigelman, *Transitions in the Court: Ceremonial Speeches by Chief Justice Spigelman 1998-2011* (NSW Bar Association, 2012) 26-27.
6 Glanville L Williams, *Criminal Law: The General Part* (Stevens & Sons, 1953). An expanded second edition followed eight years later: *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961).
7 Williams, *Criminal Law* (1953), v.
8 Ibid.
9 Heydon, above n 1, vi (emphasis in original).
10 *Searle v Commonwealth of Australia* [2019] NSWCA 127; *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135; *Coplin v Al Maha Pty Ltd* [2019] NSWCA 159; *Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [2019] NSWCA 185; *Strike Australia Pty Ltd v Data Base Corporate Pty Ltd* [2019] NSWCA 205; *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWCA 210.
11 *ACME Properties Pty Ltd v Perpetual Corporate Trust Ltd as trustee for Braeside Trust* [2019] FCA 1189.
12 A L Armitage, 'Book Reviews: Criminal Law: The General Part' (1954) 12(2) *Cambridge Law Journal* 243, 247.
13 Heydon, above n 1, vii. On this theme, see JD Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1.
14 See, eg, Heydon, above n 1, [9.790], [9.920], [9.980], [9.1050], [9.1070], [13.170].
15 Ibid, [9.980]-[9.990].
16 Ibid, [30.140].
17 Ibid.
18 Spencer Bowen and Handley, *The Doctrine of Res Judicata* (LexisNexis, 4th ed, 2009).
19 Spencer Bowen and Handley, *Actionable Misrepresentation* (LexisNexis, 5th ed, 2014).
20 KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2016).
21 See, eg, Heydon, above n 1, viii, [14.270], [14.760], [14.780], [14.800], [25.70], [31.20].
22 See the then Justice Heydon's remarks on the launch of the Hon KR Handley AO's 2006 work *Estoppel by Conduct and Election:* 'Estoppel by Conduct and Election' (2006/2007 Summer) *Bar News* 110.
23 Chapter 23, for example, includes a section headed "Forensic aspects of frustration": Heydon, above n 1, [23.150]ff.
24 Ibid, [12.250]. In other areas, the reader is directed to specialist texts dealing with topics that may arise in contractual disputes but are only flagged in passing in the text. See, for example: in relation to statutory unconscionability, [18.80] and [18.90]; in relation to merger, ch 25.
25 (2002) 54 NSWLR 690; [2002] NSWCA 124 at [98].
26 Notwithstanding this sentiment, in his capacity as author of *Heydon on Contract*, the author generously acknowledges academic work he admires. Three examples are: DW Greig and JLR Davis, *The Law of Contract* (Law Book Co Ltd, 1987), referred to in the Preface at v; G Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2nd ed, 2016), referred to at [13.10]; and JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2018), referred to at [24.20].
27 Heydon, above n 1, [31.640]-[31.930].
28 The author includes in this respect modern High Court authority on contractual illegality: ibid, [20.900].
29 See, for example, the author's discussion of *Jackson v Horizon Holidays Ltd* [175] 1 WLR 1468 and *Albazero (Owners) v Albacruz (Cargo Owners) (The "Albazero")* [1977] AC 774: Heydon, above n 1, [12.160] and [12.170] respectively.
30 L W J Aitken, 'Book Review: Selected Speeches and Papers' (2018) 37 *University of Queensland Law Journal* 329, 333.
31 Heydon, above n 1, [8.250] (emphasis added).
32 Many other differences are highlighted in the text. These include, for example: differences as to the operation of the doctrine of frustration on executed leases (ibid, [23.90]); differences as to the availability of damages for the disgorgement of benefits obtained by a wrongdoer (at [26.190]); and differences as to Lord Hoffmann's approach to remoteness of damage (at [26.590]).
33 Franks Commission, *Commission of Inquiry: Report* (Clarendon Press, 1966) 101-2, quoted in David Palfreyman, 'Higher Education, Liberal Education, Critical-thinking, Academic Discourse, and the Oxford Tutorial as Sacred Cow or Pedagogical Gem' in Palfreyman (ed), *The Oxford Tutorial: 'Thanks, you taught me how to think'* (Oxford Centre for Higher Education Policy Studies, 2nd ed, 2008) 16.
34 JD Heydon, 'Speech in Honour of Lord Hoffman', in John Sackar and Thomas Prince (eds), Heydon: Selected Speeches and Papers (Federation Press, 2018) 59, 61.
35 *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")* [2004] 1 AC 715.
36 Heydon, above n 1, [8.250]. In his footnote to this passage, the author is at pains to point out that "the application of Yeats's remark to Lord Hoffman is intended to be complementary." Whether or not the spelling of "complementary" is a rare typographical oversight or intentional is intriguing.
37 Ibid, [30.180].
38 Ibid.
39 Lord Sumption, 'A question of taste: the Supreme Court and the interpretation of contracts' (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, 303.
40 Ibid, 301.
41 Heydon, above n 1, [30.220].
42 Ibid, [26.970].
43 See, for example, ibid, [26.970].
44 See, for example, the extensive discussion of Sir Anthony Mason's judgment in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; [1982] HCA 24 in Heydon, above n 1, chapter 9, especially the remarks at [9.1200].
45 Heydon, above n 1, [9.1520].
46 Ibid, [12.140].
47 Ibid, [13.10].
48 R P Meagher, 'Book Review: An Introduction to the Law of Trusts' (1991) 8 *Australian Bar Review* 183, 184.
49 Anne Davies, 'Guenter Treitel 1928-2019' (19 June 2019) University of Oxford, Faculty of Law <https://www.law.ox.ac.uk/news/2019-06-14-guenter-treitel-1928-2019>.

BOOK



Born at the Right Time

Professor Ron McCallum
(Allen & Unwin, 2019)

Ron McCallum is not someone for whom you have to search far to find a distinguished descriptor. As a leading voice in the field of labour law, the former Dean of the University of Sydney Law School, Chair of the United Nations Committee on the Rights of Persons with Disabilities, and 2011 Senior Australian of the Year, a comprehensive list of his achievements alone could fill the pages of a lengthy tome. However, McCallum's memoir is remarkable not only for the extraordinary life it describes, but the compelling insights it offers into the man himself.

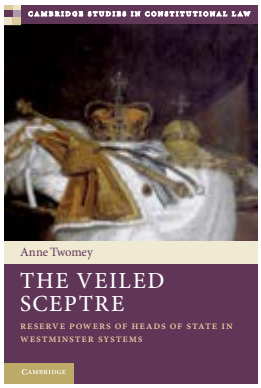
The fortunate timing of McCallum's birth is a theme that permeates the book. Blinded shortly after his premature birth in 1948, McCallum details the sweeping technological advancements in his lifetime that opened doors to opportunities previously unfathomable for blind people. From an early education that relied on the use of braillette boards, the advent of cassette players, speech synthesisers and other assistive technologies were all indispensable in allowing McCallum to overcome seemingly insurmountable barriers to education and ultimately to the legal profession. As McCallum discusses his often-challenging path through school, university and professional academia, the overwhelming sentiment is one of love for the many who assisted him along the way. He speaks with great affection for his mother, who was determined that her son should not be stymied by his disability and encouraged him to envisage a life for himself beyond the workshop labour jobs that awaited most blind people of his era. He has similarly high praise for the countless friends, students and volunteers who devoted hours to recording cases and textbooks onto cassettes for him to listen to. The book is most moving when McCallum speaks of his gratitude for his wife, Professor Mary Crock, and three children, who fulfilled the promise of a close-knit and loving family life he had long thought to be out of reach.

The title 'Born at the Right Time' is characteristically self-effacing, for it was not merely fortunate timing that contributed to McCallum's success, but also his own strength of character. He writes with nuance about his complex and evolving attitudes towards his disability. He is open in recognising that his tireless efforts early in his career to not only operate on the same level as his peers but to thrive in their midst were symptoms of a desire to 'put my blindness behind a curtain and to seek success despite it'. Later in his career, having established himself in the legal profession, he describes a shift whereby he became more involved with disability advocacy, taking on various positions within blindness organisations and notably working at a high level within the United Nations. This later period in his career also saw McCallum return to university lecturing, which he describes as his 'first academic love'. At one point, while reflecting on his own teachers, McCallum remarks that 'I don't think that you can be a truly good teacher unless you love your students'. I have had the great privilege of witnessing this sentiment first-hand, having been lectured by Ron in Administrative Law earlier this year. The joy that he so clearly derives from teaching is impossible not to emulate. His good humour and genuine fondness for his students elicit a universal respect and engagement, no mean feat in a time where university lectures are typically treated as extended social media scrolling opportunities.

Born at the Right Time is not an arduous book to read, nor does it delve too comprehensively into McCallum's extensive legal, academic and governmental experience. What it does do is leave a strong impression of a man with a profound belief in fairness, whose empathy for workers, minorities, refugees and the incarcerated may be traced directly back to his own feelings of isolation at various points in his life. It is a sensitive and endearing story of a man of great intelligence, kindness, introspection and gentle good humour, whose contribution to the Australian legal community and society more broadly cannot be overstated.

Olivia Fehon

BOOK



The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems

Professor Anne Twomey
(Federation Press, 2019)

Professor Anne Twomey is an internationally-recognised expert on constitutional law. Such is the learning contained in her recent book *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* that it featured in the written submissions of the Prime Minister and the Advocate General for Scotland in the UK Supreme Court's recent consideration of the prerogative power to prorogue the UK Parliament,[1] and was described by Gleeson CJ as a 'major contribution to the study of constitutional arrangements'[2].

Reserve powers are the powers exercisable by a head of state according to his or her discretion without, or contrary to, the advice of responsible ministers. Rather than focussing on labels of what are the reserve powers, Professor Twomey argues the preferable approach is to understand the constitutional principles from which constitutional conventions that govern the exercise of the reserve powers are derived.

These principles include: the rule of law;[3] responsible government;[4] representative government;[5] separation of powers;[6] and necessity.[7] As the events of 1932 (involving NSW Premier, Jack Lang) and 1975 (involving Australian Prime Minister, Gough Whitlam) will attest, the most controversial reserve power is the dismissal of a chief minister and thereby, their government. This power was described by MacKinnon as one that "hovers like a ghost": the very prospect of its exercise has led to resignations of governments without the necessity of formal dismissal (such as in Manitoba in 1915 and in Pakistan in 1957).

Bagehot famously described the British monarch's rights as '… the right to be

consulted, the right to encourage, the right to warn …', and Professor Twomey observes that '[i]nfluence exercised by a monarch before final decisions are made and final advice is given, is an essential aspect of the reserve powers, as it tends to avert any need to exercise them. That influence is rendered more effective by the existence of the reserve powers and by the ambiguity about their scope. The existence of the reserve powers … is enough to cause a Prime Minister to pause and think twice.'

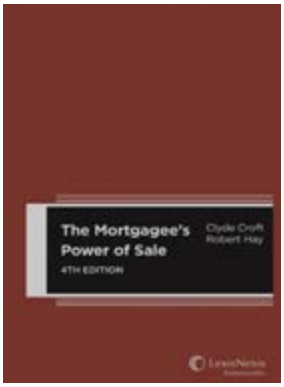
Professor Twomey's text is an invaluable resource. It draws on a vast range of previously unpublished material, including from the Royal Archives at Windsor Castle, to provide numerous real world examples of constitutional crises, including those resulting in the dismissal of governments, which reveal how conflicting constitutional principles have been resolved in countries with a Westminster-style system of responsible government.

Bharan Narula

ENDNOTES

1 At [83] (p 26). The submissions are available at https://www.supremeCourt.uk/docs/written-case-for-the-prime-minister-and-advocate-general-for-scotland.pdf.
2 Chief Justice Gleeson, *Book Review: The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (2018) 45 ABR 319 at 323.
3 The head of state must act in a legally and constitutionally valid manner.
4 The head of state is obliged to act upon the advice of ministers responsible to Parliament.
5 The lower House is formed of representatives directly elected by the people.
6 Determining what is legal is an exercise of judicial power and is for the Courts.
7 On rare occasions, when government has fallen outside the bounds of constitutionality, the head of state may exercise an otherwise unconstitutional power to lead government back to constitutional validity.

BOOK NEW EDITION

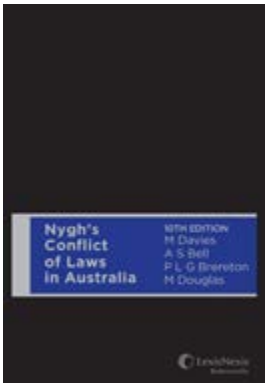


The Mortgagee's Power of Sale (4th edition)

Clyde Croft and Robert Hay (LexisNexis, 2019)

This text is an exposition of the law relating to the exercise of the power of sale by mortgagees of land, both under the general law and also under the Torrens system. It is structured transactionally, following the chronological steps taken by a mortgagee seeling mortgaged property under a power of sale. Although written by Victorians, the text includes reference to the relevant statutory provisions in NSW as well as Victoria. This edition is a minor update to the previous work (2013) to include reference to more recent cases, and remains a useful addition to the library of practitioners in the area.

BOOK NEW EDITION



Nygh's Conflicts of Laws in Australia (10th edition)

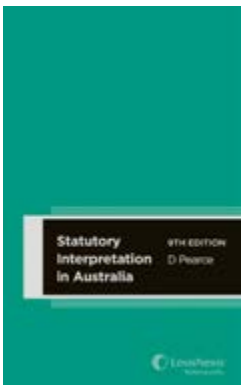
M Davies, A S Bell, P L G Brereton and M Douglas (LexisNexis, 2020)

This is the third edition of this seminal work published since the untimely death of Peter Nygh in 2002. The co-authors of the previous editions (Martin Davies from the Tulane University Law School, Andrew Bell - now President of the NSW Court of Appeal, and Paul Brereton - now of the NSW Court of Appeal) are joined by Michael Douglas from the University of Western Australia who has taken over responsibility for chapters previously authored by Martin Davies (dealing with Negotiable Instruments and International Monetary Obligations, the difference between Movables and Immovables, and Transactions Between Living Persons) and by Andrew Bell (dealing with State Immunity, the Exclusion of Foreign Laws and Institutions, Contracts, Corporations and Insolvency, and the Administration of Deceased Estates).

There have been significant developments since the previous edition, including High Court decisions considering the definition of marriage,[1] arbitration and jurisdiction agreements,[2] and the commercial exceptions to state immunity.[3] Discussion of the UK Supreme Court's decision considering state immunity and the act of state doctrine[4] has also been included, along with many decisions of intermediate Courts of appeal, including consideration of the choice of law in unjust enrichment and the presumption as to the content of foreign law,[5] pleading foreign law,[6] the public policy defence to enforcement of foreign judgments relating to gambling activities,[7] and the interaction between choice-of-law clauses and forum statutes, including in relation to the Australian Consumer Law.

As with previous editions of this work, this remains an essential part of any practitioner's law library.

BOOK NEW EDITION



Statutory Interpretation in Australia (9th edition)

D Pearce (LexisNexis, 2019)

This is the first edition of this work to be published since the retirement of Professor Geddes who co-authored the 3rd to 8th editions. There are two significant changes from previous editions. The first is that as a result of the author's publication of *Interpretation Acts in Australia* in 2018, the treatment of the content and operation of Interpretation Acts has been greatly reduced (the reader instead being referred to that other work for more detailed analysis and discussion). The second is that the increasingly burdensome listing of cases in the body of the text (the author eschews the use of footnotes) has been alleviated to aid readability by the inclusion of what is described as an "Annexure" at the end of the book. Here, the author has set out the citations of cases and relevant secondary materials where there are (generally) more than three citations relating to a particular topic. The reader is helpfully directed to the Annexure where this is relevant.

Dominic Villa

MOVIE

Diego Maradona (2019)

Released in July this year, *Diego Maradona* is the third film from acclaimed British director Asif Kapadia. As anyone who has seen either of Kapadia's two previous films knows, Kapadia is no ordinary documentary-maker – his first film, *Senna* (2010) won a BAFTA and his second, *Amy* (2015) won an Academy award for Best Documentary Feature. He relies almost exclusively on archival footage and home video clips rather than retrospective video interviews, and none of his documentaries have formal commentaries or a narrator. This gives Kapadia's films an immersive quality; rather than constantly being told by a third party what happened in the past, you are witnessing the past through uninterrupted original footage which has the immediacy and intimacy of the present. As a result, you cannot help but be absorbed by his films - whether you have an interest in Formula One, Amy Winehouse or football or not.

Constructed from over 500 hours of never-before-seen footage – some of which is from Maradona's personal archive – this film centres on the seven year period beginning in 1984 during which Maradona was contracted to SSC. Napoli for what was at the time a world-record fee. Maradona's well-known genius on the pitch catapulted the much-maligned team and its marginalised city of supporters into the 1988–89 European championships (which they won), resulting in a level of hysteria and idolisation never seen before in any sport. For a period Maradona's star burned so brightly that he was literally worshipped by some fans alongside the Virgin Mary.

I have no particular interest in football. Before seeing this film I couldn't have told you Maradona's nationality or which teams he played for. And I certainly hadn't heard the phrase 'the hand of God'. Yet I was every bit as engrossed by this film as my football-fanatic friends. It is like watching an opera – a rags to riches tale, a charismatic central character who is his own worst enemy – a victim of his own success. It has greed – so much greed (not least of all from those who refused to release Maradona from his contract no matter how much he begged), power (particularly within the string-pulling Camorra), addiction, adultery and, ultimately, destruction. It is the story of someone who was simultaneously magnificent and deeply flawed and who was hounded to his demise. It displays the full spectrum of human frailties writ large against a backdrop of super-human talent. Whether you are a football fan or not, whether you were a fan of Maradona or not, you should see this film. I will be surprised if it doesn't receive a nomination for Best Documentary at the 92nd Academy Awards. It certainly has my vote.

Sarah Woodland

The film is available on DVD and via Apple iTunes.

ENDNOTES

1. Commonwealth v Australian Capital Territory (2013)
2. Rinehart v Hancock Prospecting Pty Ltd (2019) 366 ALR 635
3. Firebird Global Master Fund II Ltd v Republic of Nauru (2015) 258 CLR 31
4. Belhaj v Straw [2017] AC 964
5. Benson v Rational Entertainment Enterprises Ltd (2018) 97 NSWLR 798
6. Palmer v Turnbull [2018] QCA 112
7. Kok v Resorts World at Sentosa Pte Ltd (2017) 323 FLR 95
8. Valve Corporation v Australian Competition and Consumer Commission (2017) 351 ALR 584

PODCAST

Secret History of the Future

'Journey into the past and you'll discover the secret history of the future.' Spanning two seasons, this energetic and intriguing podcast presented by Tom Standage (*The Economist*, London) and Seth Stevenson (*Slate*, New York) examines historical tech to discover and apply learning to our understanding of evolved modern technology. 'Patterns from history, to help us face the changes to come', where it is 'unreasonable to expect anyone to have seen the whole picture'.

The subjects are diverse. Can a data breach of the 19th century French telegraph system teach us about modern cyber security? Could investigating the death of the first pedestrian ever killed by an automobile in 1899 help us avoid a pileup of mistakes as driverless cars take over our roads? An 18th century robot that played winning chess executed a trick pulled by tech companies today. Composers' worries upon invention of the 19th century phonograph inform how to handle 21st century proliferation of digital music sampling.

The episode 'Unreliable Evidence' on 17 July 2019 may be of particular interest to barristers, especially those practising in crime. This episode visits fingerprinting in the early 20th century – then a new forensic technique, hailed as infallible – to draw lessons about the risks inherent in the modern reception of DNA profiling evidence, and how those risks should be managed. Standage and Stevenson tap into cultural and institutional tendencies to assume infallibility in such new forensic techniques, and identify dangers when the law is slow to arrest these assumptions in the criminal trial process.

As the presenters describe, fingerprinting originally wasn't for crime scenes; it was used to curb repeat offenders of pension fraud. But a fingerprint in a cash box in connection with a 1905 murder inside a shop was seized upon by an investigating officer who was also on a metro police fingerprinting committee, and who realised its forensic potential. At trial, the novel evidence was explained using a juror's fingerprint to demonstrate. The presentation was plainly persuasive; the suspects were found guilty and hanged.

At the time, fingerprinting was in the throes of replacing the 'Bertillon system' of identification. The Bertillon system was named after its inventor, Alphonse Bertillon, a French policeman who considered that each person's body proportions are different. His anthropometric system of identification gained wide acceptance as reliable and scientific in criminal investigation in the 19th century, utilising measurements of eleven human body parts – head width, finger length and so on. The system had a measure of success in France, but less so in parts of the British Empire governing racial populations tending to more homogenous measurements.

The episode fast forwards to a 2012 break and enter resulting in a death. Investigators found DNA at the crime scene including under the victim's fingernails. The DNA matched that of a person known to police, Lucas Anderson. The difficulty was that Anderson was in hospital at the time of the murder.

Anderson was mystified but, suffering drug, alcohol and mental health issues, mused 'maybe I did it and don't remember it'. Defence lawyers dug – his alibi was impenetrable. They did find, however, that Anderson had been conveyed to the hospital by the same ambulance used hours later to convey the deceased. With this physical link, the possibility of DNA transfer, albeit via unknown equipment, could explain the DNA evidence.

DNA evidence has at times been viewed as infallible. Standage and Stevenson discuss the human impulse to cut down the old while building up the new. Fingerprinting was not really questioned for a century, but studies found false positives in 1/1000 and false negatives in 1/20. Culturally, institutions may favour a tendency to rush technology into forensic use before it is thoroughly tested. It took nearly a century to test fingerprint evidence rigorously. The episode advances towards the question 'have we made the same mistake with DNA?' and answers 'Yes, I think we have'.

The episode also asks how DNA will be analysed in future. The presenters acknowledge that DNA is different from fingerprints; it has more solid and better scientific foundations. However, in some respects the technology is too precise, 'complicated science that we're expecting people to be able to interpret on a level with really dire consequences'. It falls primarily to the Courts – 'the gatekeepers' – and prosecutors to be aware of problems and protect the integrity of the evidence and process. Lucas Anderson 'is happening all the time' because DNA moves, all the time. It is not an infallible fingerprint.

The colourful agony of finalising written submissions

'I slept, and dreamed that life was Beauty;

I woke, and found that life was Duty.

Was thy dream then a shadowy lie?

Toil on, sad heart, courageously,

And thou shalt find thy dream to be

A noonday light and truth to thee.'

It is unlikely that the American Ellen Sturgis Hooper had the circumstances of 21st century antipodean junior barristers in mind when she wrote these words in 1840, but they are entirely apposite to the daily realities of at least this junior, leaving aside the blissful month of January, which offers such riches of beauty and freedom from duty that it more than makes up for the preceding year's eleven months of grind. Duty is an important feature of the practice of a barrister, but the closest experience of beauty most barristers have in the course of daily practice is found in a walk through Hyde Park on the way to the District Court. Those barristers who crave beauty in their work may seek to find it in elegant, yet succinctly drafted, written submissions. Yet nowhere in barristerial practice is the gulf between beauty and duty so apparent as in the process of finalising opening written submissions.

The drafting process itself is a hard slog, of course, and with good reason. The primary purpose of written submissions may be thought to be to assist the Court with a view to persuading it of the merits of one's own case. Where one is led by senior counsel, it may be said that a lesser-stated but no-less significant purpose of written submissions is to remind, or in some cases, inform for the first time, the senior counsel settling them of the evidence in the case at hand. The submissions must be factually accurate, legally accurate and also (and herein lies the rub) persuasive. It's not easy combining all three of these facets within a 10 or 15 or 20 page limit on a deadline using the common headings the parties agreed to and submitted to the Court some weeks or months earlier while simultaneously responding to, or deftly warding off, emails and phone calls from solicitors on both the matter at hand and unrelated matters. Nevertheless, since drafting written submissions is such a central part of a junior's role, one feels a sense of accomplishment when the draft is complete. So far, so (relatively) beautiful.

Once the submissions are drafted by the junior, they must then be settled by the silk, and despite my occasional melodramatic imaginings that the silk will telephone me to say, 'I'm sorry, but these are so hopeless that I can't use them at all, and I'm recommending to the solicitors that a new junior be briefed in your place', experience has demonstrated that the process is generally fairly speedy, straightforward and painless. It is when the silk has settled the draft submissions and they are sent to the solicitors and the client for approval that all aspirations of beauty are abandoned and duty rises to the fore.

There are occasions where solicitors helpfully detect typographical errors and update citations for the inclusion of authorised reports and respectfully raise points of substance as to arguments or factual matters, and clients raise any necessary factual corrections or commercial sensitivities for consideration, and all that is completed in plenty of time before the submissions are due to be served. Those occasions are, however, increasingly rare.

Regrettably, while technological changes have brought many benefits to practice and life, they have also brought the undesirable ability for multiple people to make changes to a document whenever they like. It is not unusual, in the experience of this junior, for submissions which have been settled by senior counsel some days before their due date to boomerang back upon counsel by email only a matter of hours before they are due to be served, in an unrecognisable rainbow form, containing the tracked changes of five different authors from the solicitors and the client organisation. Defined terms, which had previously been inserted sparingly by counsel, have bred overnight, now requiring a dictionary in order to read the submissions. Among the generally reworded sentences, formerly grammatically correct sentences have been edited by junior employees of the client organisation so as to introduce split infinitives. References to longstanding High Court authorities have been struck through, and in their place, a command from the client instructor to counsel has been included: 'Find more recent first-instance authorities and cite those instead.' A reference to the leading text on the subject authored by a retired High Court judge is deleted, accompanied by the comment, 'Do not cite this text' with no further elaboration.

Any feelings of satisfaction at a job well-done, or at least completed, now completely evaporated, I find myself having to resist the twin temptation to hit the 'Reject All Changes and Stop Tracking' button and send a passive-aggressive email in the manner of George Frederic Handel, who upon being the recipient of a complaint from a friend as to how dreary the music at the Vauxhall Gardens was, responded, 'You are right, sir, it is pretty poor stuff. I thought so myself when I wrote it.' In the few hours remaining I turn to working out which changes are helpful, which are neutral, which are positively harmful, which the busy silk (now in conference on another matter) needs to be bothered with, and how to broach the topic with the client who seemingly thinks that the submissions are theirs despite the document bearing counsel's name.

In the meantime, I exhort my sad heart to toil on courageously – even if the highest expression of beauty that can be hoped for is that the submissions are filed on time with no accidental mark-up remaining in the document. BN

THE FURIOUS![1]

The market is a cruel but fair mistress and those barristers who have what it takes, thrive whereas those that don't, are weeded out. We are, after all, a meritocracy. The system works so why do some on Bar Council insist on trying to 'fix' it with equitable briefing and so on?

Great point![2] Bar Council should stop trying to fix a problem that – read my lips – DOES NOT EXIST!!!

Meritocracy! Great word. And that is what the bar is. A MERITOCRACY! Period! And anyone who says it isn't just doesn't have what it takes. Perhaps they need to go back to law school, I don't know. What I know is that barristers play on a level playing field. Absolutely level!!!

Here's proof. Take any two barristers from Grammar with the name of Ian or David. If Ian is better than David, he'll get ahead. No questions asked. Everyone knows that. Perhaps if David played in the first 11 at Shore, he might get a look in as a junior on a brief given he has the right stuff. He might get a repeat gig if he is a good bloke and did an OK job. Personally, I have no problem getting in juniors from across the divide. I have had my share of ex-Riverview or Joeys boys. They put up bloody good eights in the Head of the River. Bloody good eights. That shouldn't be overlooked when you are wanting a solid team with solid commitment. That and something to talk about in the minutes before your matter is called. Frankly, if my junior doesn't know the score at Lord's three days into a five-dayer, I worry about his focus.

Need more proof? Just look about you. Most barristers look and sound a lot like me. What are the CHANCES?? It's NOT a 'coincidence'. That's MERIT being REWARDED!! And in my book, that's worth protecting!!

It would be great if we could give equality of opportunity to everyone but that's never going to happen. Bar Council should stop its clumsy attempts to fix social problems and concentrate, instead, on improving the competitiveness of the NSW bar internationally.

Great point! Bar Council should stop trying to fix a problem that is – read my lips – TOO BIG TO FIX!!!

If the bar isn't a level playing field it is because society isn't. Anyone who thinks we can fix that isn't living in the real world. Just like the polar bears and the boggy lawn at my waterfront holiday house, once I saw the problem, I was smart enough to know it was too big to fix. Only A MORON would try!!! It's not like barristers have any moral duty to try to make things 'fair' or 'representative'. But if the bank I act for has mainly Davids and Ians on its board then how can you say the bar isn't "representative"? And if that bank's defendant clients aren't Ians and Davids, well, that is just how life works and if you hear someone saying something else, STOP listening. It's FAKE NEWS!

Now some of the ELITES out there might say I'm not 'consistent'. WHO ARE THEY?? They don't know what they're talking about! I have always been 'consistent' in saying that nothing should be done. Nothing should change. Period! Unless it's reintroducing Queen's Counsel. That's what WE NEED to make us competitive. If Bar Councillors were SERIOUS about making the bar great again, they would put it at number one on their agenda!!!! Again. It's so sad to see the lack of LEADERSHIP on this issue. They're not even trying. But in the end, they'll get it. And when they do, they should hire a branding consultant – I can give them some names. He'll probably tell them to get a jump on the competition by going straight to 'KC' and ditching 'QC' which, let's face it, has a pretty short shelf life. And while he is at it, he might jazz it up a bit to make sure that when people deal with silks of the NSW bar, they know they are dealing with the best of the best. Something like, 'King's Finest Counsel'. How good is that post nominal!!!

1 Note from the editor: This edition of The Furies has been replaced by 'The Furious'. The views expressed are those of the author and not necessarily shared by *Bar News*.

2 Note from the author: I am Furious!! It is about time that the inherent bias of *Bar News*, captive to the PC lefty bleeding heart elites, be balanced by one person not afraid to shout out loud the views of the Quiet Majority.

BN

NEW SOUTH WALES
BAR ASSOCIATION