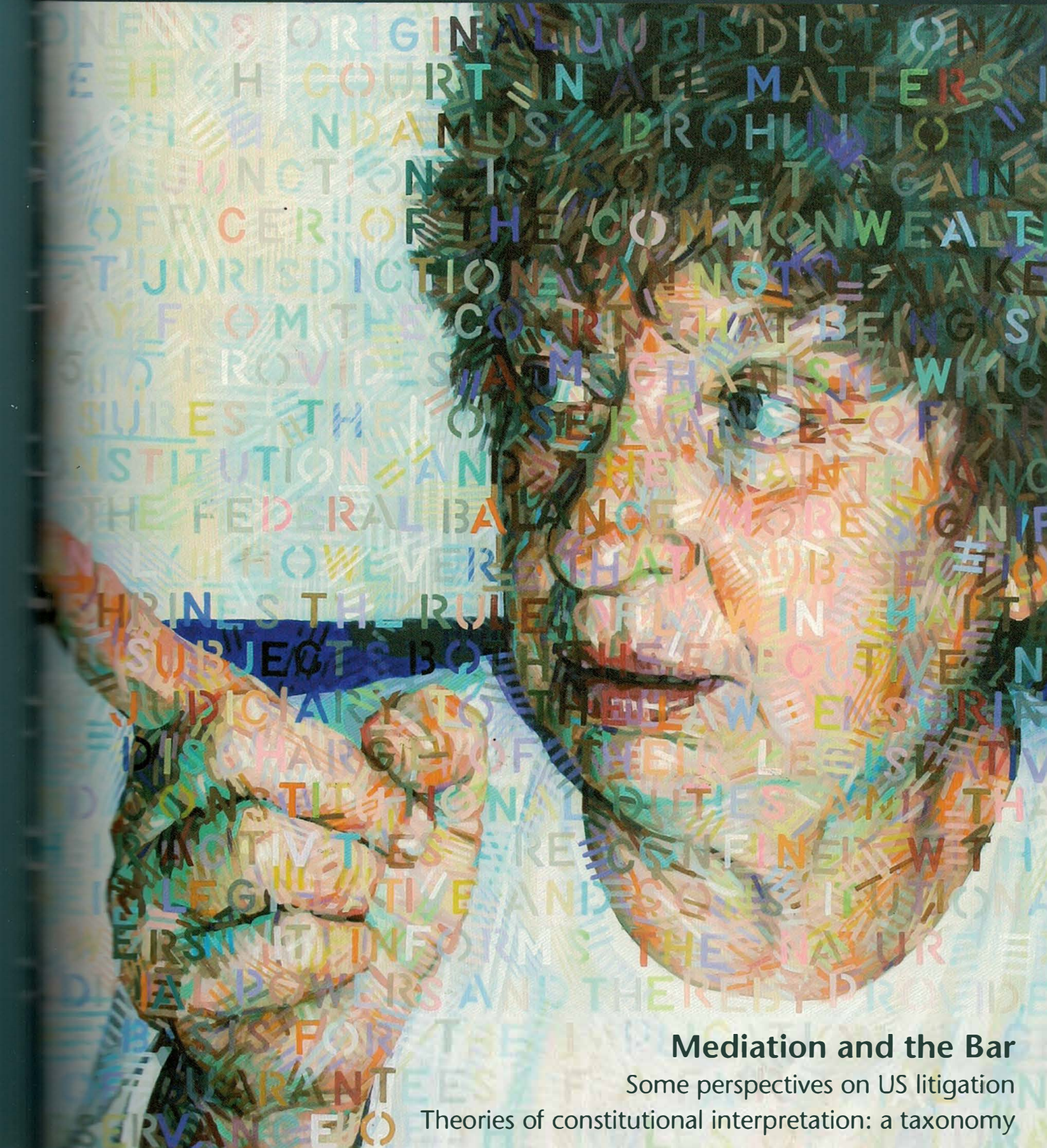


THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2007

BARnews



Mediation and the Bar

Some perspectives on US litigation

Theories of constitutional interpretation: a taxonomy

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THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2007

barnews

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Cover

Portrait of the Hon Mary Gaudron QC

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ISSN 0817-0002

Views expressed by contributors to
Bar News are not necessarily those of the
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Mary Gaudron and David Hicks

The cover for this issue is adorned by the unmistakable image of the Hon Mary Gaudron QC, whose portrait was unveiled in the Bar Association Common Room on 21 February 2007. The portrait, by renowned portraitist Sally Robinson is a significant addition to the Bar Association's already impressive collection.

The launch provided all present with a reminder of her Honour's withering wit, nice line(s) in self-deprecation and, through it all and, as ever, her fierce and formidable intellect and burning sense of justice. In this context, her portrait fittingly incorporates the text of section 75(v) of the Constitution by way of a superimposed stencil. Her Honour spoke, with an enthusiasm bordering on passion, of her belief that it is section 75(v) – providing for mandamus, prohibition or injunction against officer(s) of the Commonwealth – that enshrines the rule of law in this country, and as such constitutes the single most important provision of the Constitution. In that context, and unsurprisingly, she made reference to the scandal of the detention of David Hicks for over five years without the laying of charges.

What was striking about the circumstances surrounding Hicks's ultimate plea to charges of vastly diminished gravity than those originally raised was the widely held *perception* that he had only pleaded guilty in order to escape the living hell of Guantanamo Bay and the prospect of a bespoke 'trial' without the fundamental features and protections associated with

justice in a developed and civilised society. Whether or not this perception is accurate may never be known. It highlighted, however, in a material way the manner in which the rule of law, and respect for it, has been gravely undermined by the whole saga. The perception I have referred to would surely not have arisen or been so widespread had it not been for the circumstances of his detention without charge and the prospect that any 'trial' Mr Hicks was given was to be bereft of those basic features long regarded as essential and fundamental hallmarks of justice.

David Jackson AM QC

Jackson QC was bestowed a rare honour for a practising barrister in the Australia Day honours list with the award of Membership of the Order of Australia. The award was principally in relation to his outstanding skill and role as an advocate. As such, it was an important institutional recognition of the significant role played by advocates in our adversary system. Jackson QC has dominated the Australian appellate Bar and, in particular, the High Court for well over 20 years. Any barrister privileged enough to have appeared with him (or indeed, against him) will be well aware of his consummate professionalism, his dedicated and careful preparation, his brilliance at refining an argument and the apparent ease and style of his presentation.

This issue

Bar News is pleased to publish an Opinion piece by Attorney General Hatzistergos on the topic of jury trials, and congratulates him on his appointment. It is hoped that he, and his shadow, Greg Smith, both members of the Bar Association, will be regular contributors over the next four years.

As is now customary, *Bar News* is also pleased to be able to publish this year's Sir Maurice Byers Address by Justice Heydon on the topic of 'Theories of Constitutional Interpretation: a Taxonomy.' The address bears all the characteristics of his Honour's approach to scholarship: meticulous research, an abiding sense of the importance of history, and a commitment to the rigorous classification of ideas with a view to ultimate intellectual elucidation.

The featured theme of this issue is mediation and the Bar. Long-time mediation specialist, Angyal SC, provides a systematic guide to preparation for, and the conduct of, mediations. Gleeson SC, in a typically challenging way, discusses the approach the Bar should be taking institutionally to mediation, whilst Street SC and Kunc volunteer their thoughts on the subject.

Readers will also find considerable interest in two thought provoking pieces by new members of the Bar, Christopher Withers and David Sulan, who respectively write of their recent experiences in litigation and advocacy in New York and London where they practised for six and four years respectively. Withers provides an illuminating account of the distinctive features of commercial litigation in New York, with surprising views as to the value of pre-trial depositions and a degree of apprehension, based on his experience, at the growth of class actions for securities related claims. Sulan writes of the concerted attempt by Herbert Smith to establish an in-house advocacy unit in London with the recruitment of two queen's counsel.

Those interested in legal history will enjoy the Hon John Slattery QC's reminiscences of the Supreme Court judges of the 1940s and will savour the republication of Max Beerbohm's *Dulcedo Judiciorum* and his observations on the Chancery and common law courts in London almost 100 years ago. (Spigelman CJ appropriately drew on in this piece in his farewell speech on the occasion of Bryson JA's retirement which is noted in this issue along with that of Handley JA).

Admirers of Bullfry QC will also be delighted by his return to these pages after a short absence, care of the good Professor Aitken, with as ever the dab hand of Poulos QC to illustrate Bullfry's increasingly disconcerting encounters with the members of the solicitor's branch.

Readers of *Bar News* for at least the last 15 years will be saddened to learn that this issue contains the final instalment of 'Coombs on Cuisine', formerly 'Circuit

Food', by Coombs QC. This decision is causally quite unrelated to the High Court's recent decision in *John Fairfax Publications Pty Ltd v Gacic* [2007] HCA 28. Coombs never described a 'square of pig's paunch' as 'texturally, bringing to mind the porcine equal of a parched weetbix' nor a 'dismal pyramid of sorbet' as 'jangling the mouth like a gamelan concert': *ibid* at [161]. His restaurant reviews have been characterised by the irrepressible *joie de vivre* of a true raconteur, conversationalist and bon vivant. Thanks to the former president (affectionately 'Coombsy') for the pleasure, fun, tips and recipes that he has shared over the years.

On a final note, *Bar News* records its appreciation to outgoing Bar Association President Michael Slattery QC for his keen support of this publication over many years as well as for the energy and dedication he has brought to the discharge of his office.

Andrew Bell

Letter to the editor

Dear sir,

In Elizabeth Cheeseman's 'Hot tubbing: concurrent expert evidence',

the author says that the practice of taking the evidence of experts concurrently appears to be an Australian innovation (*Bar News*, Summer 2006/2007, p55).

An interesting answer appears in the autobiography of former Federal Court judge Sir Edward Woodward, where it is said 'the original idea [for the practice] had come from John Kerr, in an article he wrote in response to the refusal of economists to give evidence at a national wage case because of Bob Hawke's aggressive cross-examination': *One Brief Interval: A Memoir*, The Miegunyah Press, Melbourne, 2005, p129.

David Ash,
Frederick Jordan Chambers.



THE HEART OF THE CITY ST JAMES CHURCH

CHRISTIAN MEDITATION GROUPS

Four ecumenical Christian meditation groups meet each week in the crypt of St James' Church at the top of King Street in the city. The groups are part of a worldwide network of over 1500 groups meeting in about 110 countries.

The ancient Christian tradition of meditating on a simple sacred phrase was revived by the English Benedictine monk, John Main (1926-1982). Meditation involves coming to a stillness of spirit and a stillness of body. It is the aim given by the Psalmist ("Be still and know that I am God"). Despite all the distractions of our busy lives, this silence is possible. It requires commitment and practice. Joining a meditation group is a very good start.

Anyone who already meditates or who is interested in starting to meditate is welcome. You may quietly join the group and slip away afterwards or stay around to talk or ask questions.

When Tuesday: 12.10pm – 12.50pm
Wednesday: 7.45am – 8.30am
Friday: 12.15pm – 1.00pm
Sunday: 3.00pm – 3.30pm

Where Crypt of St James' Church
176 King Street, Sydney
(enter under the spire)

Websites www.christianmeditationaustralia.org
www.wccm.org

Enquiries richardcogswell@hotmail.com

Future directions

By Michael Slattery QC



Periodically we should consider where current trends are taking the New South Wales Bar. This is my last president's column for *Bar News*. I thought, therefore, it might be useful to give a personal view of trends that I believe are already marking out the future shape and direction of the Bar. Some of these trends in public affairs, in local and overseas practice and in membership are quite surprising. By examining them it is possible to foresee what the Bar will look like five or even ten years from now.

Public affairs and resources for the criminal justice system

The Bar's profile as a commentator on public issues relating to the administration of justice will continue to increase. Defending the administration of justice has been one of the objects of the New South Wales Bar Association since it was first formed in 1903.

Two factors have recently brought this role into greater focus. The traditional role of attorneys-general (both state and federal) in defending the judiciary as the first law officer of the Crown has substantially withered. Public debate and legislative action since 11 September 2001 have tended to reward authority and security at the expense of individual freedoms. Neither of these factors is likely to change much in the short run. Politicians now do not readily defend either the judiciary or those freedoms. The Bar Association is one of the few public voices doing so. What may surprise many members though is that currently the association's voice in this area is welcomed by the media and the public. I believe this

reflects a widespread community desire for an authoritative but independent voice that will contest political ideas shaped by opinion polls.

The Bar Association is repeating what it has long said: that the law is there to protect us all and very often to protect from the consequences of popular prejudice. Our message closely reflects the crisp sixteenth century warning attributed to Sir Thomas More, 'What do we do if those chasing after devils decide to chase after us?' I expect that this role will grow for a long time to come.

One example of the major public issues on which the Bar is now speaking arises out of the recent state budget. Constant attention by the profession is needed to the adequate resourcing of this state's criminal justice system. The New South Wales Government plans to increase police numbers by 750 and the corrective services recurrent expenditure budget by close to nine per cent. Both the DPP and the Legal Aid Commission budgets should have commensurate increases, so they will have sufficient resources to meet the consequently higher demand for their services.

Local practice

New barristers can give us refreshing insights into why many young lawyers are choosing to practise at the Bar rather than pursue other career options. In the last eighteen months I have met and listened to their stories, which have common themes. Most were senior associates who left medium to large city firms. Many wished to practise without the distractions of compulsory marketing and other features of semi-corporate hierarchies. Many do not wish to supervise work and billing by junior solicitors for the benefit of more senior lawyers. Many new barristers are content to charge a significantly lower fee for the same written advice they would have drafted as a senior associate. All of them want a less corporatised existence and to get closer to the law. I have found that all of them are quite passionate about moving to the Bar. This anecdotal evidence was confirmed by our new barrister surveys, which found that satisfaction levels among new barristers persist at extremely high levels.

The reasons these lawyers are abandoning other forms of practice reaffirm the Bar's longer term advantages and point to areas where its work is likely to grow in the future – for the good of clients. Barristers are highly competitive on price for the same service provided by solicitors and as sole practitioners provide the assurance of quick, conflict-free advice. I expect this will lead to many changes for the Bar in the next five years. Here are three examples of what is emerging.

First, corporate clients are now discovering how price competitive the Bar's services really are and that barristers can be accessed directly by in-house counsel. There is a rising phenomenon of in-house corporate counsel directly briefing the Bar. They are doing so without retaining external solicitors, especially where quick, informal advice is needed about:

- ◆ potentially litigious issues:
- ◆ small to medium size transactional work; and
- ◆ specialised areas of practice such as tax, environmental law and intellectual property.

One senior corporate in-house counsel recently said to me that the senior junior Bar 'provides the best value for money for legal advice anywhere in Sydney'. The low overheads and uncomplicated structure of the Bar account for its highly competitive fees for the same advisory service from a lawyer of the same or greater experience than will be found in a firm. Direct briefing for this kind of general advisory work is likely to expand substantially in the next five to ten years.

Second, significant sub-components of the major transactional work undertaken by firms require independent advice to avoid conflicts of interest or to satisfy due diligence requests arising in the course of these transactions. Barristers who are experienced in commercial and corporate practice are equipped to give such advice as an adjunct to large transactional work. In the future, much of this advice could just as readily be given by barristers as by firms of solicitors.

Third, briefing barristers may not often be the first thought of firms tendering

to provide legal services to government. Providing legal services to public authorities wholly from within a firm tends to be more profitable to the firm than for the firm to brief the Bar to provide some of those services. An unexamined assumption by a firm that it will not be briefing barristers for any of its legal services to government may actually disadvantage the client. The time is coming when government authorities, grasping the price competitiveness of the Bar's legal advice and related legal work, will let tenders for legal services on the basis that tendering firms should specify in their tenders the way that they will save the government client money by indicating what kinds of legal services can be briefed out to barristers. As the Bar is not a direct competitor of the tendering firm there can be little objection to this from tenderers. Calls for tenders for legal services may well contain such a requirement in the near future.

International practice

International practice can seem far away for a sole practitioner but it is becoming rapidly more accessible to all of us. More barristers are recognising this as a viable practice option and not one to be left to the large law firm. Several of our members are already leading what I am sure will be one of the more noticeable changes to our mode of practice in the next five years.

Already New South Wales and New Zealand barristers are taking advantage of the *Trans Tasman Mutual Recognition Act 1997* and are practising across the Tasman. In September 2006 Jonathon Sumption QC described to us his international practice based in London. In March this year Chief Justice Myron T Steele of Delaware spoke in the common room about the resolution by the United States Conference of Chief Justices in February 2007 to recognise qualifications from Australian universities as giving a direct entitlement to sit for Bar exams in most US states. The chief justices, the Department of Foreign Affairs and Trade and the Law Council of Australia are all helping to implement the legal services provisions of the US-Australia Free Trade Agreement, which will open US legal services markets to Australian barristers. Already a number of local barristers are admitted to practice in London, New York

and Hong Kong and are taking referral work in and from all of those cities.

Those barristers who regularly practise overseas maintain a steady focus, at the most, on one or two jurisdictions. In the final few months of my presidency I will, among other things, attempt to highlight the real opportunities that we have for foreign practice.

Over the rest of this year many of our members practising overseas will highlight the path they have taken and some of the pitfalls they have encountered. Their central messages should inspire confidence tempered by realism. Their personal experience is that local barristers have at least as broad a range of highly effective advocacy skills as the advocates we encounter in major foreign jurisdictions. However patience, flexibility and long term planning are needed to establish overseas practice.

Mary Gaudron and Bar demographics

When contrasted with the previous fifteen years the growth in the numbers of women practising at the Bar in this decade is at last showing an increased upward trend. Between 1985 and 2000 the number of women in practice increased from about nine per cent to a little over 13 per cent of practising barristers. The rate of increase and retention of women at the Bar accelerated between 2001 and 2007 and I expect will continue to do so. In these six years the percentage of women barristers rose from about 13 per cent to about 17 per cent. Thus it is now taking six, not 15, years to achieve a similar four per cent increase.

Some of this positive change can be traced back to the Bar Association's programmes commencing around 2000, which were aimed at supporting women and parents at the Bar. The female university students' visits programme, the childcare scheme, the mentoring scheme and the Equitable Briefing Policy have all had an effect on this trend. The last of these was modelled on a briefing practice pioneered by the Hon Mary Gaudron when she was solicitor general of New South Wales.

The inspiring portrait of Mary Gaudron by Sally Robinson, appearing on the front

cover of this edition of *Bar News*, was unveiled in the common room in February. The New South Wales Bar is proud to have commissioned this portrait of Mary, who is one of its leaders and a great Australian jurist. Her experience at the Bar is one of heroism and great endurance. Against many obstacles she won a leading practice and in turn created opportunities for all women barristers. As solicitor general she fostered the careers of other women, who have now themselves become leaders of the profession. In her speech of thanks at the unveiling Mary emphasised the profound value to our society of having an independent Bar, which speaks publicly for the rights of individuals.

The Fair Go for Injured People Campaign

Finally, I wish to thank all members who were involved in the Fair Go for Injured People campaign over the last six months. The campaign was ground breaking from the time it started on 19 September 2006.

Since the introduction of both the Motor Accidents Act in 1999 and the workers compensation legislation of November 2001, this was the first sustained public campaign in which all people in this state injured by the negligence of others have had an organised and united voice.

The four legal bodies involved, the Australian Lawyers Alliance, the Law Council of Australia, the New South Wales Law Society and the Bar Association of New South Wales, formed an alliance with a common set of principles and remained unified all the way through the campaign.

The campaign resulted in commitments to the principles of the campaign from the Greens, the Australian Democrats, the Christian Democrats and almost all other independents standing for election. Just before the polling day the Liberal Party made a commitment to review this state's compensation legislation to attempt to achieve the objectives of the campaign. These commitments provide an important platform from which the campaign will now continue. I expect that the success of this campaign will be revealed over the medium term.



The central role of the jury as a means of community participation in the justice system

By Attorney General Hatzistergos

The principle of jury trial in common law countries can be traced back to 1215 and the right to be tried by one's peers in the Magna Carta. Despite their ancient character, juries remain particularly relevant to contemporary law, politics and society in New South Wales.

In the past decade there have been growing calls for real and meaningful community participation in the way that criminal justice is delivered. Courts have had to change to meet new demands by keeping the public informed of the cases before them and the judgments being delivered. The principles of open justice have taken on a renewed importance in this environment.

Nevertheless juries are an essential structural component of community participation. They give legitimacy to verdicts and sentences in the eyes of the public which a system restricted to judge-alone decisions could never do. The relationship between courts, the media and community expectations about the sentencing of offenders is often controversial. The central role of juries weighs against the arguments that the courts are ivory towers, disconnected from contemporary social and political values, and helps ease the tension between these competing claims.

It is surprising, then, that the institution of the jury in criminal trials should come under attack in the media itself. Writing in the *Sydney Morning Herald* on 25 May Richard Ackland suggested that the time had come to abolish juries. He pointed out the risks that go with jury trials, including the disqualification of a juror mid-trial (because of undisclosed driving convictions in the *Petroulias* case) or the overturning of a conviction because the juror has made their own investigations on the Internet.

The New South Wales Government places a high value on participation in juries. That's why it recognises the 10,000 citizens who serve as jurors each year by paying them a higher allowance than most other states. The government is also actively engaged in reviewing and reforming the jury system to ensure that it continues to be effective and relevant, and provides a direct means for ordinary members of the community to have a role in the decisions of our courts.

There is no doubt that there are challenges associated with the use of juries in criminal trials. Juries have always placed their own particular demands on the administration of justice and special arrangements are needed for the participation of lay people in judicial decision-making. The advent of the Internet poses particular challenges to the way that juries are managed. But so have other technological developments, such as the reporting of cases in the broadcast media, which have all been successfully accommodated.

The government has taken a number of steps to reduce the potential for prejudice in jury trials. The *Criminal Trial Courts Bench Book* has been updated to include the additional directions for juries that were recommended by the Court of Criminal Appeal in *R v Skaf and Skaf*.

Judges direct jurors not to use, during the course of the trial, any material or research tool, such as the Internet, to access legal databases, earlier decisions, or other material of any kind relating to any matter arising in the trial.

The government has also amended the *Jury Act 1977* to make it an offence for jurors to conduct their own investigations about a case. In addition the sheriff has been given powers to investigate alleged breaches of this prohibition.

Rather than wind back or abolish the institution of the jury in the face of technological and social change, the government is committed to modernising and adapting juries to meet these challenges and to keeping them as an important and influential part of the criminal justice system.

One way that we are doing this is by ensuring that juror participation is expanded to include more and more sections of the community.

Recently I tabled the report of the NSW Law Reform Commission on the participation of deaf or blind people on juries.

The report recommends a number of changes to the Jury Act and Sheriff's Office procedures that would enable people who are deaf or blind to serve on a jury, and notes positively the use of blind or deaf

jurors in jurisdictions in the USA and New Zealand. The report also notes the concerns of some in the legal profession about the need to weigh the rights of deaf or blind people against an accused person's right to a fair trial.

Technologies such as real time transcripts and assisted hearing devices, as well as interpreter services, give blind or deaf people the capacity to participate at a greater level than ever before. The commission recommends making the blind or deaf eligible for jury service and ensuring that they are provided with all necessary 'reasonable adjustments' to allow them to do so. Where these will still not ensure adequate participation of the deaf or blind jury member, the courts should retain the ability to exclude them from the case.

An important suggestion recently raised by the chief justice is for jury involvement in sentencing. The NSW Law Reform Commission is now investigating whether the trial judge might consult with the jury on aspects of sentencing.

Several other references concerning juries have been made to the commission which, considered together, will equip the government with a range of reform options to continue modernising juries in this state.

They include a reference for the commission to review the number and complexity of the directions, warnings and comments required to be given by a judge to a jury at a criminal trial, the summing up and the ability of jurors to comprehend and apply these instructions.

Further, the commission is undertaking a review of the provisions governing eligibility for jury service. This has been stimulated by concern that the numbers of people who are either disqualified, ineligible or have a right not to serve on a jury may mean that the make-up of jurors is unrepresentative of the community.

These are important and valuable investigations that will help to ensure that juries retain their relevance to contemporary society. By reforming and adapting the institution of the jury to changing conditions the government is maintaining them as an effective means of community involvement in the justice system.

Sons of Gwalia Ltd (Subject to Deed of Company Arrangement) v Margaretic (2007) 81 ALJR 525, 232 ALR 232

In this case the High Court considered the extent to which shareholders, who claim to have purchased shares in a company as a result of misrepresentations made by the company, rank after general creditors in a winding-up or company administration.

Sons of Gwalia Ltd ('Gwalia') was a publicly listed gold mining company registered in 1981. In August 2004, Mr Margaretic purchased 20,000 fully paid ordinary shares in Gwalia for approximately \$26,200. Eleven days later, the board of Gwalia appointed administrators on the basis that Gwalia was insolvent or likely to be so. There was no dispute that the shares purchased by Margaretic became worthless from the date of appointment of administrators. A deed of company arrangement subsequently entered into by Gwalia contained a provision that incorporated s563A of the *Corporations Act 2001* (Cth) ('the Act'). Section 563A provided:

Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied.

Margaretic made a claim against Gwalia on the basis that it had failed to disclose that its gold reserves were insufficient to meet its gold delivery contracts and that it could not continue as a going concern, in contravention of the continuous disclosure obligations imposed by s674 of the Act. Margaretic sought compensation pursuant to s1325 of the Act and damages for misleading and deceptive conduct in contravention of s52 of the *Trade Practices Act 1974* (Cth) and s12DA of the *Australian Securities and Investments Commission Act 2001* (Cth). The compensation claimed was calculated by reference to the difference between the cost of Margaretic's shares and their market value (which was accepted to be nil).

The Gwalia administrators commenced proceedings in the Federal Court seeking, *inter alia*, a declaration that Margaretic's claim was not provable in the company administration. ING Investment Management LLC, a general creditor of Gwalia, was named as second respondent to the application. Margaretic cross-claimed for a declaration that he was a creditor of Gwalia and entitled to all the rights of a creditor under Pt 5.3A of the *Corporations Act*. Emmett J made a declaration that Margaretic's claim was not to be subordinated pursuant to s563A. His Honour's decision was upheld on appeal to the full court (Finkelstein, Gyles and Jacobson JJ).

The critical issue was whether Margaretic's claim against Gwalia could be characterised as a debt owed to him in his capacity as a member of the company. By majority (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, Callinan J dissenting), the court held that Margaretic's claim was not owed to him in his capacity as a member and therefore did not fall within s563A. The majority concluded that the claim was not founded upon any rights Margaretic obtained, or any obligations he incurred, by virtue of his membership of Gwalia. As Gleeson CJ noted, 'membership of the company was not definitive of the capacity in which he made his claim'. In a similar vein, Hayne J distinguished



Luka Margaretic, shareholder of collapsed gold miner Sons of Gwalia, 31 January 2007. Photo: Colin Murty / Newspix.

between a claim with respect to money paid to a company under the statutory contract between member and company and a claim with respect to money paid to bring the contract into existence. In the latter case, the company's liability for loss occasioned by its misleading or deceptive conduct was not derived from an obligation confined to the company's relationship with members (none of the causes of action relied upon by Margaretic being dependent for their operation upon his status as a shareholder in Gwalia). Accordingly, the respondent's claim was not to be postponed by s563A to claims made by general creditors. In the words of Chief Justice Gleeson:

One thing is clear. Section 563A does not embody a general policy that, in an insolvency, 'members come last'. On the contrary, by distinguishing between debts owed to a member in the capacity as a member and debts owed to a member otherwise than in such a capacity, it rejects such a general policy. If there ought to be such a rule, it is not to be found in s563A.

Two subsidiary questions were also considered by the court. The first concerned the proper scope of the so-called 'principle' in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317. ING submitted that *Houldsworth* prohibited a shareholder from making a claim for loss or damage incurred through the purchase of shares in the company as a result of the company's own fraud or misrepresentation unless the shareholder first rescinded the 'membership contract'. Because rescission is unavailable to a shareholder after a company has gone into liquidation or voluntary administration, it was said to follow that Margaretic's claim failed at the threshold and that there was, as a result, no need to consider the scope of s563A. The majority held that *Houldsworth* was not authority for a principle as wide as that asserted by ING. Moreover, for the reasons summarised above, the rights or liabilities sought to be enforced by Margaretic arose independently of any statutory contract between himself and the company. It followed that even a generous interpretation of the 'principle' in *Houldsworth* did not prevent the claim from being brought on the facts before the court.

Secondly, the court considered the continuing relevance of its earlier decision in *Webb Distributors (Aus) Pty Ltd v Victoria* (1993) 179 CLR 15. In that case, the court held that claims brought by shareholders against a company for misrepresentations regarding shares subscribed for by them concerned sums due to the claimants in their capacity as members of the company under s360(1)(k) of the *Companies (Victoria) Code*. Gleeson CJ, Kirby and Hayne JJ distinguished *Webb* on the basis that: (a) the sub-section considered in the earlier case differed from the terms of s563A; and (b) the shares at issue in *Webb* had been obtained by subscription, not by purchase from third parties, with the result that considerations regarding the need to maintain a company's capital underlay the court's decision. Gummow J was more forthright and questioned both the accuracy of the principles relied upon by the majority in *Webb* and the result reached.

The decision in *Gwalia* has been much criticised by elements of the finance industry. One effect of the decision is that the pool of assets to be shared by ordinary creditors will, in certain circumstances, be significantly smaller than otherwise expected. Lenders will have no real way of forecasting the likelihood of future claims by shareholders and up-front lending costs may increase to take the possibility of such claims into account. Moreover, an administrator faced with a number of claims from allegedly misled shareholders will be required to consider the merits of each claim individually, with the result that the complexity (and cost) of an administration will increase. At the time of writing, there is no firm indication as to whether the Australian Government will seek to amend s563A to reverse the High Court's decision. Several issues arising from the decision have been referred to the Corporations and Markets Advisory Committee (CAMAC) for further consideration. If the government does decide that an amendment is appropriate, one possible source of inspiration will be §510(b) of the United States Bankruptcy Code, which subordinates all claims for damages arising from the purchase or sale of a company's securities.

By David Thomas

Commonwealth of Australia v Cornwell (2007) 234 ALR 148; [2007] HCA 16

The High Court's decision in *Commonwealth of Australia v Cornwell* highlights the importance of characterising damage when dealing with the legal consequences of an asserted loss.

From May 1967, Mr Cornwell was employed by the Commonwealth to work as a spray painter in a bus depot. He worked full time, but was classified as a 'temporary employee'.

In July 1965, Mr Cornwell asked his superior officer whether he could join a superannuation fund (1922 Fund) established under the *Superannuation Act 1922*. Although the fund was for permanent rather than temporary employees, Mr Cornwell had a right to apply to the treasurer to be deemed an employee to whom the Act applied. The trial judge found that if Mr Cornwell had applied, his application would almost certainly have been approved. However, on the basis of advice from his superior officer, found to be negligent, Mr Cornwell took no action.

The 1922 Fund was closed to new entrants in 1976. The *Superannuation Act 1976* created a new fund (1976 Fund), to which members of the 1922 Fund were transferred. Like the 1922 Act, the 1976 Act excluded temporary employees, subject to a special power for temporary employees to be deemed eligible.

On 24 March 1987, Mr Cornwell was reclassified as a permanent public service position. At the same time, he became a member of the 1976 Fund. Mr Cornwell retired on 31 December 1994 and was paid in accordance with his entitlements under the 1976 Fund.

Mr Cornwell commenced proceedings on 16 November 1999 for the difference between what he received when he retired and what he would have received if he had joined the 1922 Fund in 1965.

The Commonwealth sought to rely on s11 of the *Limitation Act 1985*, which fixed the relevant limitation period at six years from the date on which the cause of action first accrued. The Commonwealth's primary argument was that the cause of action accrued in 1976, when the opportunity to join the 1922 Fund was lost.

That argument failed. The majority (Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ, Callinan J dissenting) held that the cause of action did not accrue until Mr Cornwell retired.

Generally, a cause of action for negligence accrues when damage is sustained. The time when economic loss is first sustained depends on the nature of the interest infringed: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527. The economic loss in this case depended on Mr Cornwell's rights under federal statutes. The interest infringed here was the entitlement conferred by those statutes. Attention to the statutory regime creating Mr Cornwell's interest is crucial.

Under the 1922 Act, a member made contributions for 'units of pension'. The entitlement on retirement depended on the number of units being contributed at retirement. If Mr Cornwell had joined the 1922 Fund any time before 1976, Mr Cornwell may have been able to place himself in the same position he would have been in if he had joined the scheme in 1965, by paying more for each unit.

This changed in 1976. Under the 1976 Act, a member received a certain portion of his or her final salary, calculated by reference to the number of years as an eligible employee. The calculation included time spent as a member of the 1922 Fund.

This was the point on which the Commonwealth relied. When the 1976 Act commenced, Mr Cornwell lost forever the opportunity to count the 11 years from 1965 to 1976 towards his entitlement. Even if he had joined the 1976 Fund at once, Mr Cornwell could not have made up the quantum of his benefits to allow for those 11 years of service. The Commonwealth argued that Mr Cornwell's loss was irretrievably sustained at this time.

The argument failed because it is an incomplete characterisation of Mr Cornwell's entitlement and of his loss. The accrual of benefits under the 1976 Act depended on satisfying one or more statutory contingencies. To be entitled to the 'standard age retirement pension', a member needed to reach certain ages (depending on other criteria) before retiring. Entitlement to an 'early retirement benefit' depended on a

number of criteria for voluntary or involuntary retirement. Separate criteria had to be met for an 'invalidity benefit'. Where there was no entitlement to any of these benefits, an employee who ceased to be such otherwise than by reason of death was entitled to accumulated contributions he or she had made to the fund.

In light of this regime, Mr Cornwell's loss was an unusual one. Even if Mr Cornwell had joined the 1922 Fund in 1965, his entitlements would have been contingent on meeting the statutory criteria in the 1976 Act. In 1976, when the opportunity to join the 1922 Fund was lost, it was sheer speculation whether Mr Cornwell would be better or worse off if he had taken the opportunity which was lost to him.

Many lost opportunities, especially in a commercial context, are recoverable as losses, but a contingent loss or liability is not itself a category of loss. In the majority's view, Mr Cornwell could not be said, in the relevant sense, to have sustained a loss of a commercial opportunity that had some value in 1976. It was only ascertainable that Mr Cornwell would have been better off after Mr Cornwell had retired.

The case provides no neat test for when or whether a lost opportunity becomes relevant loss or damage (there probably isn't one). Nevertheless, it shows the importance of a question of law – what was the legal interest infringed – and of a related question of fact – what would have happened in the absence of the wrongful conduct. They can both be relatively detailed inquiries. Mr Cornwell lost an opportunity in 1976, but the court could not assess that opportunity, or conclude he would have been better off, until the court knew the circumstances of his retirement.

By James Emmett

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22

This case concerned four adjoining plots of land, referred to as no.11, no.13, no.15, and no.20, each of which had erected upon it a two storey block of home units. In 1998 the respondent (Say-Dee) and the first appellant (Farah) entered into a joint venture to purchase and develop no.11. The purchase proceeded, but the development foundered after an application for development approval to build an eight storey (later amended to seven storey) unit block was rejected by the council. The development application was made on behalf of the joint venture by the second appellant, Mr Elias, who was regarded in all courts as the alter ego of Farah and of the third appellant (Lesmint). The fourth appellant (Mrs Elias) was Mr Elias' wife, and the fifth and sixth appellants were their daughters.

In the course of refusing the development application, the council suggested, in effect, that no.11 should be amalgamated with adjoining properties to maximise the development potential of the land. After the application was refused, Mr and Mrs Elias and their daughters purchased one unit in each of no.15 and no.20, and Lesmint purchased no.13.

Say-Dee sought various forms of equitable relief against all of the appellants, including declarations that they held their interests in nos 11, 13, 15 and 20 on constructive trust for a partnership between

Say-Dee and Farah. The claim in relation to no.20 was abandoned at the start of the trial.

Two important factual issues at trial were, first, how much of the information conveyed to him by the council in relation to the development application was disclosed by Mr Elias to Say-Dee and, secondly, whether Mr Elias offered Say-Dee the opportunity to purchase no.13 and units in nos 15 and 20 before the appellants proceeded with those purchases. Palmer J found for the appellants on both of these issues, and dismissed Say-Dee's claim on that basis.

The Court of Appeal overturned both of these findings, and proceeded to uphold Say-Dee's claim on the basis that the appellants held the properties as constructive trustees under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244 by reason of their having received those properties with the requisite degree of knowledge of a breach of fiduciary obligation. As an independent ground of the decision, the Court of Appeal also decided that the appellants held the properties as constructive trustees on the basis that they had been unjustly enriched at Say-Dee's expense. In addition, the Court of Appeal rejected the appellants' contention that the indefeasibility provisions in s42(1) of the *Real Property Act 1900* (NSW) precluded Say-Dee from obtaining relief by way of the imposition of constructive trusts.

The High Court, in a joint judgment, restored the factual findings made by Palmer J. That disposed of the appeal. However, the court proceeded to deal with the balance of the reasoning of the Court of Appeal. In relation to liability under the first limb of *Barnes v Addy*, the court held:

1. The court assumed, without deciding, that this limb was capable of applying to persons dealing with fiduciaries, as distinct from trustees.
2. Mrs Elias and her daughters could not be liable under this limb because they never received property to which a fiduciary obligation attached. Information regarding the council's view that the lots should be amalgamated to maximise their development potential was not confidential and so not property in any sense. In addition, the court expressed the view that even if the information were confidential it would not amount to property which could be held under a constructive trust imposed by application of the first limb.
3. Mrs Elias and her daughters could not in any event be said to have received the information because they did not actually receive it and Mr Elias, who did receive it, was not their agent in any relevant sense.
4. The court declined the respondent's invitation to alter the law so as to extend liability under the first limb to persons who received no property, but merely a benefit of some kind as a result of a breach of trust or fiduciary obligation.

In relation to liability on a restitutionary analysis, the court held:

1. In the absence of argument on this issue in the courts below, or any relevant pleadings, the Court of Appeal ought not to have decided the case on this basis.

2. The Court of Appeal's reasoning was in any event wrong, for the following reasons:
 - a. No recognised basis for imposing restitutionary liability was identified. Asserting the existence of 'unjust enrichment' was not sufficient, and nor was identifying (albeit incorrectly) a breach of fiduciary duty.
 - b. Restitution is not in any event the basis on which liability under the first limb of *Barnes v Addy* is imposed.
3. Even if the Court of Appeal's reasoning was right, it would not avail Say-Dee on the facts because Mrs Elias and her daughters were bona fide purchasers for value without notice of any relevant wrongdoing.

In relation to the indefeasibility provisions in the Real Property Act, the High Court upheld the appellants' contention and accepted that a claim under the first limb of *Barnes v Addy* is not a 'personal equity' which would defeat the operation of s42(1) of the *Real Property Act 1900* (NSW).

The court indicated that, until it decided otherwise, Australian courts should continue to apply the formulation in the second limb of Barnes v Addy, which requires in addition that the trustee or fiduciary act with an improper purpose.

In the High Court Say-Dee sought to hold the appellants liable on two bases not advanced in the courts below: first, as having knowingly assisted in a breach of fiduciary duty and so liable under the second limb of *Barnes v Addy*; and secondly by asserting that the unit in no.15 represented profits from a breach of fiduciary duty into which it was entitled to trace. As to liability under the second limb of *Barnes v Addy*, the High Court held:

1. Liability under this limb attaches to those who knowingly assist in breaches of fiduciary obligations, in addition to breaches of trust.
2. The requisite degree of knowledge required for liability under the second limb is knowledge of the first four categories referred to in *Baden Delvaux & Lecuit v Societe Generale pour Favoriser le Development du Commerce* [1993] 1 WLR 509. That is, (i) actual knowledge; (ii) willfully shutting ones eyes to the obvious; (iii) willfully and recklessly failing to make such inquiries as an honest and reasonable man would make and (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man. Mere knowledge of circumstances which would put an honest and reasonable man on inquiry is insufficient.
3. Mrs Elias and her daughters did not have the requisite knowledge to fix them with liability on the above basis.

4. The court declined to decide the correctness of the proposition, advanced by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, to the effect that there is a general principle of accessory liability attaching to persons who dishonestly procure or assist in a breach of trust or fiduciary obligation. The court indicated that, until it decided otherwise, Australian courts should continue to apply the formulation in the second limb of *Barnes v Addy*, which requires in addition that the trustee or fiduciary act with an improper purpose.

As to tracing, the court rejected any such entitlement on the basis that Mrs Elias and her daughters were not volunteers. Both provided money that went towards the purchase, and Mrs Elias mortgaged property she owned and provided a personal covenant to repay the debt.

By Richard Scruby

Hicks v Ruddock (2007) 156 FCR 574

David Hicks, an Australian citizen, was captured by the Northern Alliance in Afghanistan in November 2001 and transferred to United States custody in December 2001. At the time of the application leading to this decision he had been in the power and custody of the United States at Guantanamo Bay for over five years without being validly charged or tried. After this decision, on 26 March 2007, Hicks pleaded guilty to providing material support for terrorism. He was sentenced to seven years imprisonment, of which all but nine months were suspended. He has since returned to Australia where he is serving the balance of his sentence.



Major Michael Mori, David Hicks's counsel in the US Military Commission hearing, on the steps of the Law Courts Building, Queens Square.

Photo: Alan Pryke / Newspix

At the time of this application the impasse over Hicks's continuing detention without valid charge or trial had not been resolved and Hicks sought declarations and relief in the nature of habeas corpus, in effect requiring the Commonwealth and two of its ministers to seek and request his release and repatriation by the United States. The respondents – the Commonwealth attorney-general, the minister for foreign affairs and the Commonwealth of Australia – sought summary

dismissal of Hicks's claim on the ground that it disclosed no reasonable prospects of success. This application hinged on the submissions that allowing the matter to proceed to hearing would:

- ◆ contravene the 'act of state' doctrine by requiring the Federal Court to pass judgment on the legality of acts of the United States, a foreign government; and
- ◆ result in the court hearing a proceeding impacting on foreign relations giving rise to non-justiciable questions over which it has no jurisdiction.

The practical argument behind these submissions was that Hicks's continuing internment was a political question concerning the foreign relations between Australia and the United States involving the application of non-justiciable standards.

In analysing the principles of 'act of state' and justiciability, Tamberlin J referred to the key decisions of the House of Lords in *Buttes Gas & Oil Co v Hammer* [1982] AC 888 and *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883. *Buttes Gas* concerned questions of the boundary of the continental shelf between two former sovereign states and whether Buttes had fraudulently conspired with one of those states to defraud the other. Lord Wilberforce held (at 938) that these issues only had to be stated for their non-justiciable nature to be evident and that there were 'no judicial or manageable standards' to judge them by. The principles stated in *Buttes Gas* were qualified in *Kuwait Airways*, involving the seizure of a Kuwait Airlines aircraft by Iraq. After referring to the statement of Lord Wilberforce, Lord Nicholls stated (at 1080-1081):

In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law... Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the Buttes litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome is not in doubt. That is the present case.' (Emphasis added)

Tamberlin J referred to *Re Diftort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 in which Gummow J (at 369-370), although observing that a breach of Australia's international obligations would not of itself 'be a matter justiciable at the suit of a private citizen' was careful not to foreclose argument on the question of justiciability in 'exceptional circumstances'. The argument that Hicks had no reasonable prospects of establishing the existence of such exceptional circumstances was rejected by Tamberlin J in the following passage (para. 91):

In *Kuwait Airways*, a clear acknowledged breach of international law standards was considered sufficient for the court to lawfully exercise jurisdiction over the sovereign act of the Iraq state. In that case, the clear breach of international law was the wrongful seizure of property. It is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more

fundamental contravention of a fundamental principle, and is such an exceptional case as to justify proceeding to hearing by this court.

By Chris O'Donnell

Tully v The Queen (2006) 81 ALJR 391, 231 ALR 712

The question of whether or not a *Longman* warning should be given by a trial judge has been considered once again by the High Court in *Tully v The Queen*.

In *Tully* the accused faced a series of charges relating to alleged serious sexual misconduct with the daughter of his then partner. The complainant was no older than 10 years of age when the alleged offences ended.

No independent evidence confirmed the allegations made by the complainant except for some photographs that showed some intimate physical features, which could only reasonably have been seen if the offences had occurred.

The alleged offences occurred in 1999 and 2000. The complainant first made a complaint to her mother in April 2002. She said she did not tell her mother earlier because she was afraid of the appellant, threats he had made to her and the fact that he possessed guns and ammunition. There was evidence at the trial that the accused possessed many handguns and rifles and at the relevant time slept with a handgun under his pillow.

By a majority (Hayne, Callinan and Crennan JJ) the High Court decided that a warning as discussed in *Longman v The Queen* (1989) 168 CLR 79 was not required.

Crennan J made reference to a *Longman* warning in these terms:

In *Longman* the majority, Brennan, Dawson and Toohey JJ, said it was imperative for a trial judge to warn a jury of the danger of convicting on uncorroborated evidence when an accused lost the means of adequately testing a complainant's allegations by reason of a long delay 'of more than 20 years' in prosecution.

Her Honour was of the view that there was nothing in the circumstances of this case which made it imperative for the trial judge to give such a warning. Her Honour considered the question of forensic disadvantage and said:

The critical issue in relation to the need for a warning in accordance with *Longman* is whether any delay in complaint (and/or prosecution), be it 20 years, or two or three years, creates a forensic disadvantage to an accused in respect of adequately testing allegations or adequately marshalling a defence, compared with the position if the complaint were of 'reasonable contemporaneity'.

By Keith Chapple SC

2007 Sir Maurice Byers Lecture



Theories of constitutional interpretation: a taxonomy¹

Delivered by the Hon Justice J D Heydon AC on 3 May 2007

Introduction and disclaimers

There is no express provision in the Constitution mandating the principles on which it is to be interpreted. It was enacted in 1900 as a statute of the Imperial Parliament, but the *Interpretation Act 1889* (Imp), which was in force in 1900, enacts no principle of constitutional interpretation. However, the Constitution does have characteristics which some have taken as pointing to particular approaches. Thus Higgins J said: *'[I]t is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.'*² O'Connor J said that its terms are 'broad and general ...', intended to apply to the varying conditions which the development of our community must involve'.³ Because it creates 'one indissoluble federal Commonwealth'⁴, it will last indefinitely – perhaps until Australia loses independence after total defeat at the hands of a foreign power, or until human existence itself ends. And the Constitution provides for only one means of amendment – the difficult route marked out by s128. But although these indications in the Constitution have been used to support various theories of interpretation, the reasoning underlying them is not commanded by the Constitution itself. As McHugh J has said, '[a]ny theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself.'⁵

This lecture seeks to examine some of these theories as expounded in the High Court. This lecture is not to be taken as a criticism of any of them, or as an expression of preference for any of them, or as a defence of, or a departure from, conclusions reached in any particular cases. It seeks only to attempt the sometimes difficult task of understanding them, and classifying them. Nor does the lecture purport to be an exhaustive account of constitutional interpretation. There are many theories of constitutional interpretation advanced outside Australia, and advanced within Australia by writers, which have never had any support in the High Court. Further, lectures have to be short, mercifully, and hence it is not now possible to expound even the High Court's theories themselves exhaustively. The lecture does not deal directly, for example, with theories stemming from assumptions of federal balance⁶ or the theory that 'guarantees of personal rights should not be read narrowly',⁷ or theories relating to the vexed question of when and how terms can be implied into the Constitution,⁸ or theories requiring the Constitution to conform to the 'principles of universal and fundamental rights'.⁹ Instead, the lecture concentrates on those theories which seek to explore the relationship between the meanings of constitutional words and the times at which the search for those meanings is conducted.

The stature of Maurice Byers

But before going to the lecture proper, it is necessary to say what a great honour it is to have been asked to deliver it. For anyone who has ever been at the New South Wales Bar, that invitation is one of the greatest honours the Bar Council has at its disposal. It is so because of the stature of Maurice Byers, not only at the New South Wales Bar, but in the wider scene of twentieth century Australian life generally. Before him there never was a solicitor-general – or any counsel – with his mesmeric powers over the High Court. It must be doubted whether there ever will be again. His rate of victory was extraordinarily high.

His influence on constitutional development was correspondingly great. But his triumphs did not generate vanity. He was a perfect gentleman. Both as an advocate and as a man he was modest, serene, dignified, calm, gracious and elegant. He was an admirable writer¹⁰ and speaker.¹¹ He was civilised, unflappable, genial and unfailingly polite. He was the quintessence of charm. He only admitted once to being disconcerted – when appearing in the High Court after the pugnacious and argumentative Sir Garfield Barwick was succeeded by the polite and quiet Sir Harry Gibbs: 'It took me some time to spot the difference. I was the only one talking. All the judges appeared to be listening.'¹² Only three things upset him. One was 1975, or at least some events during that tumultuous year. A second was constitutional doctrine he disagreed with, as when he said: 'Notions such as 'federal balance' or 'traditional state powers' are faint cries doomed to a death as inglorious as their birth.'¹³ The third was any form of ill manners, particularly in court. He tended to treat the more pompous or driven of his contemporaries with mild and genial mockery, but he was profoundly kind and generous to younger people.



Sir Maurice Byers QC: 'his triumphs did not generate vanity. He was a perfect gentleman.'

Sometimes, late at night or early in the morning, when no-one else is about, to walk down Phillip Street is to sense the mist procession – to feel that the graves have given up their dead, and to experience as ghostly presences the great figures of the New South Wales Bar, for they have all walked here from the very first moment there was a New South Wales Bar. It stimulates an intense remembrance of Maurice, with a half smile, a courteous wave and a rolling gait, rhythmically and gracefully moving along, like some great and stylish vessel from the golden age of sail.

His generosity is reminiscent of events more than a century ago in the Senate. Among the members who assembled in the first federal parliament were two contrasting senators. The first was aged 31; the second 50 – a considerable age in 1901. The first represented Western Australia, the second New South Wales. The first was ill-educated, a carpenter who had often been unemployed, had prospected for

gold, and was a trade union official. The second was well-educated, a barrister who had been an acting Supreme Court judge, had spent some years in the New South Wales Parliament, and had been a minister. The first was a free trader, the second was a protectionist. In a politically abrasive age, the first was pro Labor, the second was, as they say now, of the centre right. In a sectarian age, the first was a non-conformist Protestant, the second a Catholic. The first had a straggling moustache and was undistinguished looking, but was aggressive and acerbic. The second had a full beard, was strikingly handsome, and tended to be calm and emollient. The first was one of the least well-known politicians in the country; the second was government leader in the Senate. One evening the second called the first into his

know anything about the greatest of the Labor rats in 1916, George Pearce. The second, too, is completely unknown to the general public. But Justice O'Connor retains respect among the legal profession, or at least among some of that small fraction of it which conducts and decides litigation in superior courts. Let us hope that the near oblivion which has overtaken Senator Pearce and Justice O'Connor does not engulf the name of Maurice Byers.

Below are discussed seven originalist theories of constitutional interpretation, four non-originalist ones, and two of a hybrid character. It is desirable to begin with Justice O'Connor's approach to constitutional interpretation, for all the approaches to be discussed later either derive from it or react against it.

It is desirable to begin with Justice O'Connor's approach to constitutional interpretation, for all the approaches to be discussed later either derive from it or react against it.

room, and gave some friendly advice about how sometimes in politics patience made headway where rancorous aggression did not.¹⁴

That was an act of Byers-like kindness. After it, their careers diverged. The first senator, whether because of the advice which he received from the second or not, never looked back. He spent 36 years in the Senate and 24 years in federal ministries – periods which if they are not records must be close to records. When he led the Australian delegation to the Washington Naval Conference in 1921–2, his conduct so impressed the head of the British Empire delegation, Balfour, that the latter told Bruce that he regarded the leader of the Australian delegation as 'the greatest natural statesman he had ever met.'¹⁵ Bruce agreed, and said he was 'the wisest and most courageous counsellor' he had met in his long experience. If sincere, Balfour's was a great tribute, for that very conference was attended by Charles Evans Hughes and Aristide Briand, and Balfour's experience of statesmen extended back 44 years to observing Bismarck, Disraeli and Salisbury at the Congress of Berlin in 1878. And Menzies said in 1965, just before he retired: 'I have sat in many cabinets over a total period of well over 20 years; but I have never sat with an abler man.'¹⁶

The fate of the second senator was different. He left the Senate after two years. He became a High Court judge, soon became chronically ill and died prematurely nine years later. Sir Owen Dixon said of him in 1964 in his address on retiring from the High Court that 'his work has lived better than that of anybody else of the earlier times'¹⁷ – a direct tribute which was somewhat rare in that brilliant but sombre and rather tart oration.

The first of the two senators is now completely forgotten. Not one percent of the delegates to last week's ALP National Conference would

First theory: the 1900 meaning

O'Connor J's theory of statutory construction

On 8 June 1904 the High Court had been in existence for less than a year. Three days of argument had concluded in *Tasmania v The Commonwealth* only five days earlier. *Autre temps, autre mœurs*, but on that day the three justices each delivered substantial judgments. O'Connor J said:¹⁸



Senator George F Pearce

I do not think it can be too strongly stated that our duty in interpreting a statute is to declare and administer the law according to the intention expressed in the statute itself ... The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances – to the history of the law ... In considering the history of the law ... you must have regard to the historical facts surrounding the bringing the law into existence ... You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it.

This account, both in its restrictive aspects and in its liberal aspects, accorded with the general understanding of the age.

Its restrictive aspects centred on an exclusion of evidence of the subjective intention of the legislators as such: the search is for 'the intention expressed in the statute itself', not for the intention expressed elsewhere. Lord Russell of Killowen CJ had said the same thing five years earlier.¹⁹ And Justice Holmes said four years earlier: 'we

do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means.²⁰

The liberal aspects of O'Connor J's pronouncement turned on examining 'the historical facts surrounding bringing the law into existence'. Among the relevant historical facts are the technical meaning of the language as used in a legal context, the subject matter of the legislation, what the law was at the time the statute was enacted, and what particular deficiencies existed in the law before the statute was enacted. These were ideas which had been embedded in the common law for centuries. Coke had recorded them 320 years earlier.²¹ Holt CJ had repeated them 207 years earlier.²² Taney CJ explained them 59 years earlier.²³ Lord Blackburn supported them 27 years earlier.²⁴ So did Lord Halsbury two years after O'Connor J spoke.²⁵

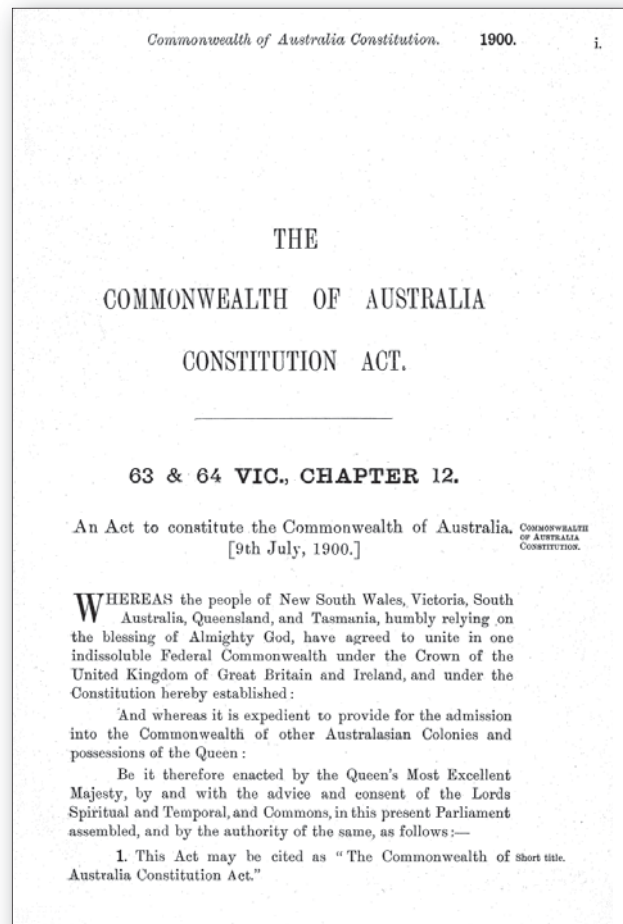
Identical private law theory of construction

Not only did O'Connor J's account of statutory construction stand in a long tradition; it also corresponded with theories extant both in 1900 and now about the construction of documents in private law – wills, contracts, conveyances, deeds, articles of association, declarations of trust, assignments and correspondence. Leaving aside the operation of remedies like rectification, what counts is not what the makers of a given document intended to do, but what the document they made actually did.²⁶

Implicit in O'Connor J's stress on the need to search for the meaning of the statute as found in, and found only in, language used in a particular context is that once that meaning has been established, it remains constant. That is, a statute enacted in 1900 bears the same meaning in 1904 as in 2004. Hence, as Lord Esher MR said, 'the words of a statute must be construed as they would have been the day after the statute was passed'.²⁷ Similarly, if a court is construing a contract or grant of title to land made many years ago, it does so in the light of the meanings of the words used by the parties as understood at that time. It can use dictionaries illuminating meaning at that time, to see, for example, whether reservations in respect of 'sand, clay, stone and gravel' extended to rutile, zircon and ilmenite²⁸ and it can examine histories of the processes by which those minerals were extracted from black sands.²⁹

Statutory principles of construction and the Constitution

The present significance of O'Connor J's statement of these principles of statutory construction is that he said they should be applied 'at least ... as stringently' to the Australian Constitution.³⁰ That view flows from the fact that, as Sir Owen Dixon said writing extra-judicially, the Australian Constitution 'is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British parliament enacted in the exercise of its legal sovereignty over the law everywhere in the king's dominions'.³¹ Since the Constitution is a statute, said Sir John Latham, it is 'to be construed according to the general rules of statutory interpretation'.³² The competing view – that the Constitution derives its force from the people – was first advanced in 1976 by Murphy J.³³ It has had some later currency,³⁴ and it is said to compel a different approach to construing the Constitution, discussed below.³⁵



Since the Constitution is to be construed as a statute, there is a need to read it as a whole³⁶ with a view to giving effect to the object and purpose its language expresses,³⁷ to read it in the light of the historical circumstances surrounding its enactment,³⁸ and to give it the meaning it then bore.³⁹

It is true that the early High Court judges were generally not faced with an acid choice between giving the words of the Constitution what they took to be the meaning of those words in 1900, and what they took to be some different later meaning. But in view of what has recently been said by proponents of non-originalist theories, it is necessary to stress this: the view that the 1900 meaning was the true meaning was hardly ever doubted for the next three quarters of a century, and has been asserted even later.

In 1912 Griffith CJ said that the construction of the Constitution does not change 'from time to time to meet the supposed changing breezes of popular opinion'.⁴⁰ In 1972 Barwick CJ said that the words of the Constitution are to be read in 'that natural sense they bore in the circumstances of their enactment by the Imperial Parliament in 1900'.⁴¹ In 1986 that was repeated by Wilson J,⁴² and by Dawson J, who noted in *Brown v The Queen* that '[T]he perception of changed

Since the Constitution is a statute, said Sir John Latham, it is 'to be construed according to the general rules of statutory interpretation'. The competing view – that the Constitution derives its force from the people – was first advanced in 1976 by Murphy J. It has had some later currency, and it is said to compel a different approach to construing the Constitution.

circumstances cannot of itself ever justify an interpretation which conflicts with the original intention, for a constitution must be a charter upon which more than temporary reliance can be placed.⁴³ It has also been repeated by justices including Mason J in 1980⁴⁴ and Deane J in 1988,⁴⁵ despite the fact that these justices at different times have propounded other theories of construction.

The relationship between history and meaning

Griffith CJ, Barton and O'Connor JJ repeated O'Connor J's emphasis on historical analysis in 1907 when they said that 'an 'astral intelligence', unprejudiced by any historical knowledge, ... interpreting [the] Constitution merely by the aid of a dictionary might arrive at a very different conclusion as to its meaning from that which a person familiar with history would reach.⁴⁶ Preferring the latter course, they said that 'the relevant historical facts' had to be considered so as to reveal three things – what 'the framers of a Constitution at the end of the nineteenth century may be supposed to have known', the 'object of the advocates of Australian federation' and 'the mischief and defect' which the constitutional provision under examination was remedying.⁴⁷ They said it was 'the historical facts which supply the answers to the inquiry as to the 'mischief and defect for which the law did not provide'.⁴⁸

These are not merely antique phrases, for they look forward almost word for word to the techniques blessed in *Cole v Whitfield*.⁴⁹ The expression 'may be supposed to have known' is noteworthy. It is similar to a statement of O'Connor J's permitting examination of 'the state of facts which must be taken to have been within the knowledge' of the Westminster legislature in 1900.⁵⁰ McHugh J in *Theophanous v Herald & Weekly Times Ltd*,⁵¹ with respect helpfully, said:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

So far as that involves an inquiry into what particular framers in fact took for granted or understood, it is a subjective inquiry, and a subjective inquiry which verges on an inquiry into actual intention. McHugh J denied the legitimacy of the latter inquiry.⁵² On the

approach of Griffith CJ, Barton and O'Connor JJ too, the inquiry is not specifically into what a particular framer in fact took for granted or understood or what particular meaning the framer was aware of. Rather the inquiry is into what the framers *may be supposed* to have taken for granted or understood, or what *must be taken to have been within* their knowledge. The inquiry is an inquiry into the common currency of the time.

The Official Record of the Debates of the Australasian Federal Convention and other extrinsic materials

During argument in *Municipal Council of Sydney v The Commonwealth*⁵³ Griffith CJ said of the Convention Debates:

They are no higher than parliamentary debates, and are not to be referred to except for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth.

Although the court soon thereafter adopted the practice of not referring to the Convention Debates, that statement appeared to assume that among the rules of statutory interpretation extant in 1901 was a rule that materials extrinsic to the actual words of the legislation, for example parliamentary debates about a Bill before it was enacted and reports leading to the introduction of the Bill, could be considered, not as evidence of the intention of the legislature, but for the purposes referred to by Griffith CJ. It was not without opponents, but it can be seen as emerging from at least 1852,⁵⁴ and can be seen in operation in 1898, when Lord Halsbury LC referred to the report of

a commission recommending the enactment then being considered by the House of Lords in order to identify the mischief that the enactment has intended to remedy.⁵⁵ Examples of that common law principle of statutory construction can be found readily, not only just before the enactment of s15AB of the *Acts Interpretation Act 1900* (Cth) and its equivalents,⁵⁶ but also much earlier:⁵⁷ arguably that legislation has tended to obscure the antecedent existence of the common law principle.⁵⁸ Thus, at a symposium in 1983 Justice Murphy said he habitually had recourse to Hansard and to committee reports. He went on: 'Indeed, for legislation in the period 1972-75, if I wanted to know what it was all about, I'd go to the Senate Hansard and sometimes find a very clear statement of the legislative intent.' Later in the symposium Justice Mason said: 'Like Mr Justice Murphy,



Justice O'Connor

I often look at second reading speeches. Unlike him I do not confine my attention to those made by Senator Murphy.⁵⁹

In 1988 in *Cole v Whitfield* seven justices brought constitutional interpretation into line with the particular approach to statutory interpretation just discussed. They said:⁶⁰

Reference to the history [including the Convention Debates] ... may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.⁶¹

These principles correspond with those stated by O'Connor J in excluding recourse to the subjective intentions of the framers. They also correspond with them in the purposes for which historical materials may be examined as stated by him and his colleagues in early High Court cases.⁶²

Later in the symposium Justice Mason said: 'Like Mr Justice Murphy, I often look at second reading speeches. Unlike him I do not confine my attention to those made by Senator Murphy.'

Even now, approaches to statutory construction do not differ radically from that stated by O'Connor J. It is 'originalist' in the sense that it depends on construing a statute by reference to the concepts current at the time when it is enacted rather than those current at the time when it is construed.⁶³ Whether any difference between modern 'purposive' principles of interpretation and those of O'Connor J has been exaggerated is a question too large for analysis tonight.

The fact that before 1988 the court's examination of Convention Debates was limited seems to have led to suggestions that the High Court's recourse to history in the manner described by O'Connor J 'appears to have occurred on a largely random basis',⁶⁴ and that the High Court 'has in general rejected the use of extrinsic historical material in the interpretation of the Constitution'.⁶⁵ These statements can be challenged in two ways.

The first is by pointing to theoretical statements justifying recourse to historical materials. Apart from those of the first three justices in *Tasmania v The Commonwealth*⁶⁶ and *Baxter v Commissioners of Taxation (New South Wales)*,⁶⁷ there are many others made by justices at times as diverse as Isaacs J in 1910,⁶⁸ Isaacs and Rich JJ in 1913,⁶⁹ Knox CJ, Isaacs, Rich and Starke JJ in 1920,⁷⁰ Barwick CJ in 1975,⁷¹ Gibbs J in 1975,⁷² Aickin J in 1978⁷³ and Stephen J in 1979.⁷⁴

The second way in which allegations that the High Court rejected extrinsic historical material can be refuted is by identifying the cases –

to be numbered in tens, if not hundreds – in which historical materials other than the Convention Debates have been looked at, both before and after 1988, and, on the whole, not perfunctorily. That is not a task for this evening.

It is not true, then, that the High Court has rejected the use of extrinsic historical material. It may be truer, but it is not wholly true, to say that its use 'appears to have occurred on a largely random basis'. A further charge that this was done 'without detailed consideration of broader principles'⁷⁵ perhaps has some force.

Need for ambiguity?

While O'Connor J appeared to favour the view⁷⁶ that the court should search for a 1900 meaning only when the words are ambiguous, Murphy J's view was that the court may, at least in 'very exceptional circumstances', examine legislative history even if there is no ambiguity, thereby perhaps creating an ambiguity.⁷⁷ This point, at least so far as it concerns constitutional interpretation, awaits resolution.

For decades O'Connor J's approach held sway in the interpretation of the Australian Constitution. Gummow J said in 2002, however, that 'questions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago'.⁷⁸

What other considerations have now arisen?

Second theory: connotation and denotation

One qualification to the view that the meaning of the constitutional words should be limited to a 1900 perspective was put thus by Barwick CJ: 'The connotation of words employed in the Constitution does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words.'⁷⁹

One familiar example of the positive operation of the connotation/denotation distinction relates to airline services. In 1900 there were no airlines; the Wright brothers were not to fly until 1903; but in 1945 the power conferred by s51(i) to legislate for trade and commerce was held to apply to the provision and regulation of airline services.⁸⁰ The connotation of 'trade and commerce' had not changed; the denotation had. The utility of this distinction has been criticised.⁸¹ Indeed some have found it difficult to understand and apply, and get it the wrong way round, rather like the doctrines of Sir Henry Maine. When the young Frank Longford found himself sharing a weekend at a country house with the prime minister, Stanley Baldwin, he asked him what the most profound thing he had learned in life was. Baldwin thought and said: 'The most profound thing I have discovered – one that has explained the whole of society to me – is what Sir Henry Maine taught in *Ancient Law* – that the movement of progressive societies has been from status to contract.' Then he paused, and asked in a puzzled way: 'Or was it the other way around?'

Third theory: ambulatory words

A third approach depends on treating some words – it could not work with all – in the Constitution as being explicitly not limited to their 1900 meanings. This is originalist in the sense that the words of the Constitution in their 1900 meaning incorporate later meanings. Thus s51(v) gives power to legislate in relation to 'postal, telegraphic, telephone and other like services'. Of the last four words, it has been said that '[l]ater developments in scientific methods for the provision

One familiar example of the positive operation of the connotation/denotation distinction relates to airline services. In 1900 there were no airlines; the Wright brothers were not to fly until 1903; but in 1945 the power conferred by s51(i) to legislate for trade and commerce was held to apply to the provision and regulation of airline services. The connotation of 'trade and commerce' had not changed; the denotation had.

of telegraphic and telephonic services were contemplated.¹⁸² In the same case it was said of s51(xviii), giving legislative power with respect to '[c]opyrights, patents of inventions and designs, and trade marks' that 'it could be expected that what might answer the description of an invention for the purpose of s51(xviii) would change to reflect developments in technology.'¹⁸³ One reading of these passages is that the language employed in s51(v) and s51(xviii) explicitly directs the reader not to employ only the 1900 meaning, but future meanings as well.

Fourth theory: the evolutionary nature of legal expressions

The fourth approach applies where an expression relates to doctrines 'still evolving in 1900'⁸⁴ or 'in a condition of continuing evolution'⁸⁵ or 'in a state of development'⁸⁶ or subject to 'cross-currents and uncertainties'⁸⁷ or subject to 'dynamism'.⁸⁸ In these circumstances, where it is possible to establish the meaning which skilled lawyers and other informed observers of the federation period considered a constitutional expression bore, or would reasonably have considered it might bear in future, or might reasonably have considered that it might bear in future, that meaning should be applied.⁸⁹ On this approach, although a post-1900 meaning must in one of those senses have been perceived or foreseeable, it is not necessary that a particular application of the constitutional expression was not or would not have been foreseen in 1900.⁹⁰ Although on this approach an examination of history, so far as it casts light on original meaning, may not be decisive, it is important – it is part of 'legal scholarship in preference to intuition or divination'.⁹¹

Fifth theory: essential and non-essential elements of 1900 meaning

The fifth theory is that some words in use in 1900 could be given meanings a century later which differed from their precise meaning in 1900 providing that that meaning was evolving into the later meanings. The fifth theory accepts that approach, but treats the constitutional words as requiring the evolving meaning to share the 'essential' characteristics of the words as used in 1900 and to be within the purposes underlying those constitutional words, as distinct from being inferred from later events or points of view. Thus the question whether modern statutes regulating the composition and functions of modern juries accord with s80 of the Constitution has been answered by examining the history of juries in England and the Australian colonies before and just after 1900 and identifying the purposes reflected in s80. Sometimes the distinction between what is essential and non-essential has been expressed as equivalent to the

distinction between what is 'fundamental' and what is not,⁹² or the distinction has been seen as a distinction between preserving matters of 'substance of right', as distinct from 'mere matters of form and procedure'.⁹³ On that approach it has been held that the following are essential characteristics of jury trial:

- ◆ unanimity;⁹⁴
- ◆ 'representativeness',⁹⁵ which requires that even though a jury need not comprise 12 persons, the number must be sufficient to achieve representativeness;⁹⁶ and a number below 10 may not be enough;⁹⁷ and
- ◆ random and impartial selection.⁹⁸

However, the following are not essential characteristics:

- ◆ the jury being kept separate throughout the trial;⁹⁹
- ◆ gender or property tests for membership;¹⁰⁰ and
- ◆ absence of reserve jurors.¹⁰¹

How are essential characteristics to be distinguished from non-essential ones? The qualifications for jury membership in 1900 were seen as non-essential, not, it was said, because they appeared not to be 'enlightened' in the climate of 1993, but because such requirements detracted from the essential characteristics of representativeness. In *America*, Brandeis J said that changes to jury trials designed 'to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice' were compatible with the Seventh Amendment,¹⁰² and that language has been approved in the High Court.¹⁰³ Nor is a characteristic like unanimity to be treated as inessential merely because many people in 1993 thought that it did not correspond with demands of 'contemporary convenience or practical utility'. A characteristic can be inconvenient or impracticable, but also be essential, and such a characteristic may not be removed except by referendum.¹⁰⁴ The essentiality of the characteristic depends on its relationship to the 'function' of jury trial¹⁰⁵ and its objectives.¹⁰⁶

The expression 'the essential features of a trial by jury' goes back to the time of O'Connor J¹⁰⁷ and was used in the Supreme Court of the United States in the nineteenth century.¹⁰⁸ However, many have struggled for a much longer time with the distinction between essence and attributes, and no doubt similar difficulties arise here, particularly if this distinction is employed in analysis of parts of the Constitution other than s80, as it sometimes has been.¹⁰⁹ Indeed there is a sense in which the search for the meaning of all the constitutional words in 1900 is a search for the essential qualities of the institution or concept

referred to, as distinct from the insignificant aspects of that institution or concept.

It may be noted that the result of the essentiality doctrine is that 'though a law enacted in 1903 providing for an all male jury would satisfy s80, such a law if enacted today would not do so.'¹¹⁰ On one view this outcome can be explained consistently with originalism by treating the 1903 understanding of the meaning of s80 as now being seen as erroneous. On another, the doctrine can be seen to have a non-originalist operation in that by producing a different constitutional meaning it has produced a different outcome in terms of validity.

Sixth theory: the centre and the circle; the core and the penumbra

A sixth theory is that put by Higgins J in the *Union Label case*:¹¹¹

The usage in 1900 gives us the central type; it does not give us the circumference of the power. To find the circumference of the power, we take as a centre the thing named ... with the meaning as in 1900; but it is a mistake to treat the centre as the radius.

Sometimes, instead of analysis of what is the centre or the radius, there is analysis of the 'core' and the 'penumbra'.¹¹²

These are not the only instances of resort to imagery and metaphor in constitutional interpretation,¹¹³ but, here as elsewhere, the images and the metaphors are more vivid than precise. Windeyer J several times employed Higgins J's reference to the centre and the radius, but seemed to treat it as a reference to the denotation/connotation distinction.¹¹⁴ Difficulties arise if Higgins J meant something else. In geometry a centre refers to something which has position but no magnitude. One cannot infer from the centre alone how long the radius is or what area the circle covers. How does one infer from the constitutional language identifying the centre what the radius is, or what the whole circle is?

A prominent American advocate of originalism, Raoul Berger, said that the key question of construction was 'what did the framers mean to accomplish; what did the words they used mean to them?' Yet in fact these are distinct questions.

In astronomy the core/penumbra distinction refers to two different types of shadow. The dark shadow cast by a small point of light when that light is interrupted by an object between the source and the viewer is called an umbra. The shadow cast by a large source of light, like the sun when the moon is between it and the earth, is part umbra and part penumbra. The umbra is a dark shadow, the penumbra a lighter shadow. But the only difference is the degree of darkness; the edge between umbra and penumbra is tolerably distinct, and the edge between penumbra and areas outside it are also distinct.

An astronomer who knows the relative positions and distances of sun, moon and earth at a given time can predict where those edges will be. There is no analogy between an astronomer's treatment of these heavenly bodies and a lawyer's construction of the Constitution.

Hart used the core/penumbra distinction in a way seemingly similar to the way it is used in the cases. For rules to be workable, he said, '[t]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some feature in common with the standard case; they will lack others or be accompanied by features not present in the standard case.' Thus, he suggested, 'a penumbra of uncertainty must surround all legal rules'.¹¹⁵ But how does one infer from the core or 'umbra' of a constitutional expression, or otherwise find out, what the penumbra is? The cases do not say, and the utility of the distinction has recently been doubted.¹¹⁶

A particular outcome can sometimes be justified by reference to more than one of the six theories just discussed. This may reflect on the validity of the taxonomy; it may reflect on the underlying difficulty of constitutional interpretation.

In relation to s51(xviii), which gives the Commonwealth legislative power over '[c]opyrights, patents of inventions and designs, and trade marks', it is possible to analyse some applications as instances falling within the central type, while others fall within a wider circumference. It is possible to analyse some as within the power because they share the essential qualities referred to by the power. It is possible to analyse some as falling within a meaning which, though it did not exist in 1900, was foreseeable then. It is possible to analyse some as instances of the words having a 1900 connotation with, later, new denotations, while others are instances of the words bearing a new connotation, though one which was foreseeable in 1900 because the types of intellectual property referred to had a capacity to change, not merely to encompass new examples, but new kinds of right. To illustrate the last point, after *Grain Pool of Western Australia v The Commonwealth* upheld the validity of legislation recognising certain 'plant variety rights', Callinan J, a party to that decision, said that it concerned 'change, not so much in meaning as in scope':¹¹⁷ that is, the connotation/denotation distinction. His view is perhaps supported by the following words in the *Grain Pool case*:¹¹⁸

The boundaries of the power conferred by s51(xviii) are [not] to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark.

Another example concerns radio. In 1901, although the work of Rutherford and Marconi was well advanced, there were no radio or television broadcasts; yet in 1935 the power conferred by s51(v) to legislate with respect to 'postal, telegraphic, telephonic and other like services' was applied to radio broadcasting¹¹⁹ and in 1965 to television broadcasting.¹²⁰ The operation of the denotation doctrine appears at its purest so far as the reasoning depended on a conclusion that radio and television broadcasting services are telephonic (which was Latham CJ's preferred position).¹²¹ So far as the reasoning depended on the words 'other like services' (which was Latham CJ's alternative

This view seems to be related to the idea that the enactment of the Australia Acts in 1986 ended the sovereignty of the Westminster parliament 'and recognised that ultimate sovereignty resided in the Australian people'. But no-one seems to have gone so far as to say that the Constitution meant one thing in 1985 and another in 1987.

position), it is a less pure illustration, because the word 'like' may be seen as expressly importing future developments pursuant to the third theory discussed above.¹²²

Seventh theory: the actual intentions of the founders

All the above six approaches are, wholly or in part, 'originalist'. Under them the meanings in 1900 of the words in the Constitution are potentially either the whole, or a significant part, of the key to constitutional construction, at least where those meanings can be established as different from modern meanings. But they forbid any search for the actual intentions of the founders, save to the extent to which statements by individuals of their intentions, or their views as to the intentions of others, cast light on the 1900 meanings of words in 1900. A prominent American advocate of originalism, Raoul Berger,¹²³ said that the key question of construction was 'what did the framers mean to accomplish; what did the words they used mean to them?' Yet in fact these are distinct questions. The framers may have intended to accomplish things which the words they used, in the meaning they had to the framers' generation, did not accomplish. Those who do favour a search for the subjective intentions of the framers form a seventh category – they are originalists, but originalists of a different kind. The principal judicial exponent of this view is Callinan J,¹²⁴ though the school does have academic adherents in Australia.¹²⁵ Its best known foe is Scalia J. An Australian critic is Gleeson CJ.¹²⁶

It can be important to be strict in distinguishing this seventh category from the first six in relation to the Convention Debates. The first six look to the debates as evidence of original usages, but accept that what a framer said was intended may not have been achieved and that the Constitution can 'have a meaning that escaped the *actual understandings or intentions* of the founders or other persons in 1900'.¹²⁷ The seventh looks to the debates as evidence of intention, and presumes or infers that a stated intention was achieved.

It is possible to exaggerate the extent to which there are adherents to this seventh category. In *D'Emden v Pedder*,¹²⁸ Griffith CJ, Barton and O'Connor JJ said that where a provision of the Australian Constitution was indistinguishable in substance from a provision of the United States Constitution which had been judicially interpreted by the United States Supreme Court, 'it is not an unreasonable inference that its *framers intended* that like provisions should receive like interpretation.' Is that to be read as suggesting an inquiry into subjective intent? Or is to be read another way as conveying only that an expression in the Australian Constitution bears the same meaning as the same expression in the United States Constitution because that meaning was the received meaning in 1900? On that reading, while the framers may have intended that outcome, their subjective intentions are irrelevant to construction.

Similar questions arise out of much later judgments. It is common for judges to speak of the intentions of the framers, or the intention of particular provisions,¹²⁹ or a provision not 'intended to confer power' to legislate for the creation of corporations,¹³⁰ or 'the purpose which the framers ... had, or must be supposed to have had', in including ... s80,¹³¹ or the 'constitutional purposes'¹³² or 'purpose'¹³³ of s90, or the 'prime purpose' of s92.¹³⁴ Are these expressions references to the actual mental states of the framers of these provisions? Or are they only references to the intention which is revealed by the construction of the language? On the latter approach, in McHugh J's words in *Eastman v The Queen*: 'the relevant intention of constitutional provisions is that expressed in the Constitution itself, not the subjective intentions of its framers or makers.'¹³⁵ Thus when in the same case he spoke of what 'the framers ... intended in 1900' in relation to the appellate jurisdiction of the High Court,¹³⁶ and the 'purpose of the last paragraph of s73'¹³⁷ he is to be understood as meaning the intention or purpose expressed in s73, not any intention or purpose which the individuals who approved it had.¹³⁸ In many other judgments the context does not make meaning so clear, and days of innocent pleasure can be had by making lists of judgments delivered by avowedly non-intentionalist judges who keep speaking in language which debates the existence of intention, purpose and other mental states on the part of the framers.

Non-originalist theories of construction

Let us turn to non-originalist theories of construction.

The longer a constitution lasts, the greater the desire observers feel to identify ways in which friction between its origins at a particular time and the need for it to operate in what are thought to be very different times can be reduced. To some extent that desire is satisfied by the second to sixth originalist theories. To the extent that it has not been, non-originalist theories have been devised.

In part the issue relates to the broadening effects of changing human experience. A sculpture or a building can be understood better when viewed from different angles. The appearance of a hill alters as the light changes during the course of a day or during the changing of the seasons. A book read when young is sometimes enjoyed more when reread at a greater age, sometimes less. As people age they understand some human problems better than they did when they were young. Similarly, with more than a century of national life over, and new problems emerging, the Constitution is examined in a new light. Some may conclude that a particular construction arrived at a long time ago was right, and must be adhered to, whether or not it is now convenient or inconvenient in its operation. Others may conclude that the construction of a provision applied at an earlier time was

wrong, and a new construction must be worked out, once and for all. A third group may conclude that an old construction was right at the time it was devised but is not right for later periods, and that a new construction must be worked out for the present age, perhaps itself to be abandoned at some future time when circumstances change again. The approach of the second and third groups generally depends on some non-originalist theory of construction, and the application of that theory in a particular instance will often no doubt be triggered by a desire to avoid some grave inconvenience which experience over time has brought to light. In this sense non-originalist theories are 'consequentialist'.

Just as some originalist theories have relied on imagery and metaphor – the centre and the circle, the core and the penumbra – so have non-originalist theories. The four to be examined – not in the chronological order of their devising – are associated with Deane J, Kirby J, McHugh J and Mason CJ. Deane J sees the Constitution as a 'living force', not to be tied by the 'dead hands' of the framers. The Constitution is not to be like some piece of land perpetually under the control of a succession of medieval abbots against whom mortmain legislation had to be directed in order to compensate the monarch for non-receipt of the many feudal dues exigible on the death of a tenant. Kirby J sees the Constitution as a 'living tree'. What is more beautiful in nature than a living tree, its leaves gently moving as the breezes change? And what is more attractive than its shelter from the blazing Australian summer sun as the weary pedestrian trudges along? McHugh J favours a general construction in order to avoid leaving us slaves to the mental world of 1900 – and ever since Governor Phillip's declaration against slavery there has been a strong anti-slavery tradition in Australia. Mason CJ invokes the importance of preventing the Constitution from being frozen in 1900 – a powerful phrase, even as the world laments the loss of the polar icecaps in the age of global warming.

Although both Deane J and Kirby J rely on some obscure and inconsistent words of Inglis Clark,¹³⁹ and although Kirby J strongly approves what Mason CJ has said,¹⁴⁰ no one member of the quartet bases his view specifically on what any other member of it said. It is possible that over time the four views will coalesce into one. But there are fissiparous tendencies. Thus Sir Anthony Mason has pointed out that the 'living tree' theory is repeatedly referred to in Canada and that it 'can be guaranteed to bring a Cheshire cat-like grin to the face of any Canadian lawyer or law student whenever it is mentioned'.¹⁴¹ Hence it is also possible that, as has happened with other rebels against once dominant traditions of thought, advocates of the non-originalist theories will cause a thousand flowers to bloom and a hundred schools to contend.

First non-originalist theory: the Constitution as a living force, free of the 'dead hands' of the framers

Deane J's non-originalist approach can be summarised thus. The legitimacy of the Constitution when adopted depended on the consent of the people living in the last decade of the nineteenth century. Its legitimacy now depends on the consent to it (by acquiescence) of the people living now. Accordingly it must be construed as 'a living force' to reflect the will of the people living now, not as a lifeless declaration of the will of the long dead framers or anyone else of their generation.

There is a dispute about whether this rejection of the 'dead hands' of the framers applies only to prevent the natural implications of the express terms being constricted, or whether the rejection affects the construction of the express terms themselves. There are passages supporting both views.

The reasoning can be seen more fully in the following passages. Deane J said of the Constitution that its 'present legitimacy ... lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'.¹⁴² Or, as Murphy J had earlier put it, while the original authority for the Constitution was the United Kingdom Parliament, the existing authority is 'its continuing acceptance by the Australian people'.¹⁴³ Deane J continued:

[T]he Constitution must be construed as 'a living force' representing the will and intentions of all contemporary Australians, both women and men, and not as a lifeless 'declaration of the will and intentions of men long since dead'.¹⁴⁴

This view seems to be related to the idea that the enactment of the *Australia Acts* in 1986 ended the sovereignty of the Westminster parliament 'and recognised that ultimate sovereignty resided in the Australian people'.¹⁴⁵ But no-one seems to have gone so far as to say that the Constitution meant one thing in 1985 and another in 1987. Nor is it clear why the *Australia Acts* – merely the last in a series of steps by which external control of Australian affairs declined and fell – should alter approaches to statutory construction. Two years earlier, in 1992, Deane J (and Toohey J) had found a doctrine of legal equality in the Constitution on the ground that the conceptual basis of the Constitution was the 'free agreement of 'the people'' in 1900 to unite in the Commonwealth under the Constitution.¹⁴⁶ Reliance on the agreement of the people in 1900 is a distinct thing from reliance on the acquiescence of the people in 1994. What then is the significance of the role that the people, through the election of governments who agreed to the Convention process, through the election of Convention delegates in the 1890s and through referenda at the end of the decade played in the adoption of the Constitution, and of their asserted subsequent acquiescence in it? Deane J did not make this plain, but Dawson J has suggested a possible significance. He argued that because the 'legal foundation of the ... Constitution is an exercise of sovereign power by the Imperial Parliament', it followed that 'the Constitution is to be construed as a law passed pursuant to the legislative power to do so. If implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances'.¹⁴⁷ Hence it was wrong to import 'into the Constitution, by way of implication, preconceptions having their origin outside the Constitution ...'.¹⁴⁸ If, like Deane J, one perceives the vital element in the adoption of the Constitution as the role of the people rather than that of the Westminster Parliament, the wider role for implications which Dawson J feared may exist. Deane J's approach seems to require the courts to exclude from consideration anything said during the House of Commons or House of Lords debates leading to the enactment of the *Commonwealth of Australia Constitution Act 1900*, anything which either imperial or colonial statesmen said about the key expressions and conceptions before 1900, and in particular anything said during the Convention Debates of the 1890s. Indeed Deane J explicitly said: ¹⁴⁹



If the words of s51(xx), construed in context in accordance with settled principle, extend to authorise the making of such laws, it is simply not to the point that some one or more of the changing participants in convention committees or debates or some parliamentarian, civil servant or draftsman on another side of the world intended or understood that the words of the national compact would bear some different or narrower meaning.

He said that it is wrong 'to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines'.¹⁵⁰

On the strength of Deane J's reference to 'natural implications', it has been argued that Deane J was denying the relevance of historical material only in relation to the question of what implications can be drawn from the express provisions or fundamental doctrines of the Constitution, rather than to the question of what those express provisions mean or what those fundamental doctrines are, and that this is supported by the fact that in other cases Deane J advocated recourse to the intentions of the Convention Debates. However, an implication in a Constitution is as much a part of it as an express provision. And Deane J seems to have extended his approach to the construction of express terms, for he said: 'if the parliament disagrees

with any decision of the court about the meaning or effect of provisions of the Constitution, it can submit it to the people to be overruled by amendment of the Constitution.¹⁵¹

Second non-originalist theory: the Constitution as a 'living tree'

Kirby J's non-originalist view in its most extreme form – for there are variations in what he says – can be summarised thus. The law, language and life generally have changed, and in some respects greatly, since 1900. It is vital that the Constitution not be read from the point of view of the circumstances of 1900, for to do so prevents the Constitution from being an adequate means of meeting the very different 'governmental needs' of today's Australians. The Constitution must be treated as a living tree, so that it will continue to grow and provide shelter in new circumstances to the Australian people.

On one occasion Kirby J put his position this way:

If constitutional interpretation in Australia were nothing more than a search for the 'intentions' of the framers of the document in 1900, doubtless a single answer would, theoretically, be available as to the meaning of every word of the Constitution. Such meaning would be found in history books; not by legal analysis. But if, as I would hold, the text of the Constitution must be given meaning as its words are perceived by succeeding generations of Australians, reflected in this court, it is imperative to keep the mind open to the possibility that a new context, presenting different needs and circumstances and fresh insights, may convince the court, in later times and of later composition, that its predecessors had adopted an erroneous view of the Constitution.¹⁵²

If, like Deane J, one perceives the vital element in the adoption of the Constitution as the role of the people rather than that of the Westminster Parliament, the wider role for implications which Dawson J feared may exist.

In terms that does not suggest that the correct interpretation of the Constitution changes from time to time. It suggests rather that there is only one correct view of the Constitution, but that it may not be ascertained for some time – for naturally new contexts may cast light on the problem of constitutional construction.

But on other occasions Kirby J suggests rather that the Constitution can have different meanings at different times, each being correct for its time. He has said that '[i]t is a serious mistake ... to attempt to construe any provision in the Constitution ... from a perspective controlled by the intentions, expectations or purposes of the writers of the Constitution in 1900'.¹⁵³ He has denied that ascertainment of the meaning borne by the constitutional language 'in 1900 is crucial or even important'.¹⁵⁴ The constitutional words 'are set free from

the framers' intentions. They are set free from the understandings of their meaning in 1900'¹⁵⁵ To treat the meaning in 1900 as crucial, he says, would 'limit subsequent developments, whether in the understanding of legal terms, a change in the meaning of language or radically different social circumstances to which the language would apply.'¹⁵⁶ The Constitution should be read 'according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people'.¹⁵⁷ He said: 'a constitution is a living tree which continues to grow and to provide shelter in new circumstances to the people living under its protection.'¹⁵⁸ That suggests that those words might be given a particular meaning correctly at one point in time, and a different meaning, also correctly, at a later time.¹⁵⁹

Third non-originalist theory: generality of language as a means of avoiding slavery

In summary, McHugh J's theory is in part an amalgam of some originalist theories and in part non-originalist. McHugh J thinks that the framers intended that the general words of the Constitution should apply to whatever circumstances later generations thought they covered, and that the framers almost certainly did not intend to leave later generations as slaves to the understandings of the framers themselves. To that extent the seventh theory applies, but to that extent only. McHugh J also pointed to many general expressions in the Constitution capable of an ambulatory meaning, and this has some echoes of the third and fourth originalist theories. He relies on a distinction between 'concepts' and 'conceptions' which has some affinity with, while being more sophisticated than, the second originalist theory. But he breaks with all originalist theories which give primacy to a search for specific meaning in 1900.

In *Eastman v The Queen*, McHugh J said: 'Even when we see meaning in a constitutional provision which our predecessors did not see, the search is always for the objective intention of the makers'¹⁶⁰ If the search is for the objective intention, that suggests that there is only one true intention, and one true construction. But that suggestion does not accord with McHugh J's general approach, for he went on:¹⁶¹

A commitment to discerning the intention of the makers of the Constitution, in the same way as a court searches for the intention of the legislature in enacting an ordinary statute, does not equate with a Constitution suspended in time. Our Constitution is constructed in such a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the *current* understanding of those concepts and purposes.

Earlier McHugh J had claimed that a distinction drawn by Dworkin between concepts and conceptions exists in the Constitution: 'once we have identified the concepts ... that the makers of the Constitution intended to apply, we can give effect to the present day conceptions of those concepts.'¹⁶² He then said:¹⁶³

[M]any words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts

and circumstances succeeding generations thought they covered. Examples can be found in the powers conferred on the parliament ... to make laws with respect to 'trade and commerce with other countries, and among the states', 'trading or financial corporations formed within the limits of the Commonwealth', 'external affairs' and 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one state'. In these and other cases, the test is simply: what do these words mean to us as late twentieth century Australians?¹⁶⁴

This is reminiscent of Dworkin's view that the framers of the Bill of Rights clauses in the United States Constitution framed them so as to reflect abstract principles, capable of different meaning in different ages.¹⁶⁵ This approach is in fact distinct from the fourth theory discussed above, because the fourth theory does not permit adoption of the current meaning from time to time unless it is within the range of meanings reasonably foreseeable in 1900. It also rejects the first theory. That this is so is made plain by his observation:¹⁶⁶

This court has not accepted that the makers' *actual* intentions are decisive, and I see no reason why we should regard the understandings of the immediate audience as decisive.

This does, however, pose the question that if the makers' actual intentions are not decisive, why does it matter (if it is true) that 'the makers of the Constitution intended that [the general words] should apply to whatever facts and circumstances succeeding generations thought they covered'? A similar question is thrown up by the next passage:¹⁶⁷

The fact that the meaning attributed to a particular provision now may not be the same as the meaning understood by the makers of the Constitution or their 1901 audience does not make constitutional adjudication a web of judicial legislation. They may not have envisaged that freedom of political communication was part of the system of representative government. They may not have understood that the Commonwealth power with respect to industrial disputes could be invoked by the serving of a log of claims. The participants at the Constitutional Conventions may not have understood that juries would include women or those without property or that 'the people of the Commonwealth' might include Aboriginal people. But to deny that the events following federation and the experiences of the nation can be used to see more than the Constitutional Convention participants or the 1901 audience saw in particular words and combinations of words is to leave us slaves to the mental images and understandings of the founding fathers and their 1901 audience, a prospect which they almost certainly did not intend.'

Again, if the makers' actual intentions are not decisive, why does it matter that the founding fathers almost certainly did not intend to leave later generations slaves to their mental images and understandings? The answer appears to be that the actual intentions of the framers are relevant in identifying a rule of construction giving dominance to meanings as they change in the ages after 1900, but are immaterial to the working out of that rule over those ages. The intentions of the framers were self-immolating: they intended that their intentions should not bind, save in this one respect.

Dixon J has been enlisted¹⁶⁸ in this camp on the strength of the following remark:¹⁶⁹

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

Griffith CJ, Barton and O'Connor JJ have also been enlisted in this camp on the strength of their quotation of Story J's words: 'The [Constitution] was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of providence.'¹⁷⁰

It is, however, highly questionable whether Dixon J did intend to suggest that the meaning of the Constitution could change. Dixon J did not say it changed. He said only that its application to changing circumstances could be flexible. That could be a reference to the connotation/denotation theory or to other originalist theories. Further, Dixon J's statement is reminiscent of and no doubt indebted to Marshall CJ's statements in *McCulloch v Maryland* that '[w]e must never forget, that it is a constitution we are expounding' and that constitutions are 'intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'¹⁷¹

Some argue that the conclusion to be drawn from the words of Marshall CJ and Dixon J is not that the constitution changes from age to age. Rather it is that constitutions must be interpreted broadly, because their framers would have understood that they would last into future ages the particular problems of which they could not readily foresee. As Scalia J has said:

The real implication was quite the opposite – Marshall was saying that the Constitution had to be interpreted generously because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future. If constitutional interpretation could be adjusted as changing circumstances required, a broad initial interpretation would have been unnecessary.¹⁷²

Fourth non-originalist theory: a workable Constitution in modern conditions

Mason CJ's approach, put briefly, rests on the idea that the passing of time has revealed deficiencies in the capacity of Australian governments to cope under the present Constitution with modern problems arising from the increased complexity of life, the integration of commerce, the rise of the welfare state, and what would now be called globalisation. Since it has proved difficult to effect amendments to the Constitution by popular vote under s128, it is incumbent on the courts to revise the Constitution so as to improve the capacity of the Constitution, and that of Australian governments, to cope with modern life. He calls for the Constitution to be interpreted, not as if it were frozen in the restricted attitudes of the framers, but dynamically, with an orientation towards policies which will meet those problems, bearing in mind the need to consider whether it is advantageous for a particular problem to be solved by federal control. The Constitution

is a broad framework, not a detailed blueprint. The approach may be described as a cautious but consequentialist version of Kirby J's, openly favouring Commonwealth power.

Mason CJ's approach reflects a desire to keep, as it were, the national show on the road. That desire is neither ignoble nor uncommon.

Thus he said extra-judicially:

The problem is that the words of the Constitution have to be applied to conditions and circumstances that could not have been foreseen by its authors. It follows that exploration of the meaning of the language of the Constitution at the time of its adoption and of the intentions of the authors have a limited view in resolving current issues. Accordingly, there is a natural tendency to read the Constitution in the light of the conditions, circumstances and values of our own time, instead of freezing its provisions within the restricted horizons of a bygone era. Viewed in this way, the Constitution is not so much a detailed blueprint as a set of principles designed as a broad framework for national government.¹⁷³

He said that constitutional interpretation rests on a 'dynamic principle'.¹⁷⁴ He appeared to approve the view that in doubtful cases, the deciding factor when interpreting provisions concerning Commonwealth powers ought to be whether or not it is advantageous for the matter to be under federal control.¹⁷⁵ He said:

the complexity of modern life, the integration of commerce, technological advance, the rise of the welfare society, even the intrusive and expanding reach of international affairs into domestic affairs, require increasing action on the part of the national government, so that it seldom appears that a narrow interpretation would best give effect to the objects of the Constitution.¹⁷⁶

He favours 'policy oriented interpretation'.¹⁷⁷

Mason CJ's approach reflects a desire to keep, as it were, the national show on the road. That desire is neither ignoble nor uncommon. It has been argued that the House of Lords has in recent decades adopted a similar approach to the development of the law generally.¹⁷⁸ The reasoning can be seen as leading to the conclusion that the power conferred on the federal parliament to legislate on 'external affairs' extends to matters geographically external to Australia. One argument for this course was that it was necessary, since if it were not taken there could be areas in which other nations could legislate, but Australia could not because neither the Commonwealth nor the states would be able to do so. This, as the argument was put, would leave an unacceptable 'lacuna', as Deane J put it,¹⁷⁹ or, as Jacobs J put it, would leave the 'crown in the Australian Executive Council and in the Australian Parliament' without 'that pre-eminence and excellence as a sovereign crown which is possessed by the British crown and parliament',¹⁸⁰ or, to use the less elevated phrase of Murphy J, would

render Australia an 'international cripple unable to participate fully in the emerging world order'.¹⁸¹

These extra-judicial suggestions of Justice Mason's in 1986 had been prefigured in a judgment as early as 1975. In *North Eastern Dairy Co Pty Ltd v Dairy Industry Authority (New South Wales)* he said that the concept of 'freedom' in s92 was not to be ascertained by reference to doctrines of political economy prevalent in 1900, but is 'a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time [T]he operation [of s92] may fluctuate as the community develops and as the need for new and different modes of regulation of trade and commerce become apparent'.¹⁸²

Perhaps this passage can be explained by recourse to the connotation/denotation distinction and perhaps by recourse to the idea that 'free' is an expression of ambulatory meaning, necessarily calling for attention to evolving conditions in order to give it content from time to time. However, underlying the passage also appears to be the idea that the meaning of s92 'should' be changed as social 'needs ... evolve'. The fact that Mason J, of course, was party to *Cole v Whitfield*, which reverted to the ideas of 1900 to explain s92, may be seen as one of those little local difficulties that arise when a new reading of the Constitution is suddenly introduced.

Thoughts on the four non-originalist theories

These non-originalist theories of Deane J, Kirby J, McHugh J and Mason CJ, obviously enough, are inconsistent with originalist theories.¹⁸³

Although they were stated in the last 25 years or so, they can be seen as having precursors in earlier judgments. That is particularly so of their consequentialist features. Thus Isaacs J defended a particular construction of s101 on the ground that it 'avoids serious consequences, hardly supposable as intended' and 'a most astounding result'.¹⁸⁴ And one reason Windeyer J gave for accepting the conclusion that s51(v) applied to legislation regulating radio and television was that 'the very nature of the subject-matter makes it appropriate for Commonwealth control regardless of state boundaries'.¹⁸⁵ On another occasion he justified a conclusion in relation to the appellate jurisdiction of the High Court over territory courts by reason of 'national needs'.¹⁸⁶ In a further judgment he gave the following as a reason for concluding that the rights of the Imperial Government over the territorial sea and its seabed extended to the Commonwealth: 'The words of the Constitution must be read ... to meet, as they arise, ... national needs'¹⁸⁷

The high watermark of this approach was a long and famous passage in *Victoria v The Commonwealth (The Payroll Tax Case)*, decided in 1971.¹⁸⁸ In that passage, there are four sentences of present importance. Windeyer J said:

I have never thought it right to regard the discarding of the doctrine of the implied immunity of the states and other results of the *Engineers' Case* as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing

realisation that Australians were now one people and Australia one country and that national laws might meet national needs. ... But reading the instrument in this light does not to my mind mean that the original judges of the High Court were wrong in their understanding of what at the time of federation was believed to be the effect of the Constitution and in reading it accordingly.

Independently of that passage, there are reasons for thinking that Windeyer J did not always support the view that the construction of the Constitution can legitimately change from time to time. In *Ex parte Professional Engineers' Association*, decided in 1959,¹⁸⁹ in the course of explaining the connotation/denotation distinction, he said: 'In the interpretation of the Constitution the connotation or connotations of its words should remain constant'.

... despite Windeyer J's unquestioned greatness, there is an inconsistency in his judgments on the present question, and sometimes ambiguity within a single judgment. In part this is because he was a pioneer, often an unconscious one, of modern theories of progressive interpretation in an age when originalist theories dominated.

Further, in the *Payroll Tax Case*, Windeyer J was drawing attention to two types of development. One type concerned legal and factual developments which, while leaving Australia within the British Empire or Commonwealth of Nations, were causing the Commonwealth of Australia to become wholly independent even if the Australian states were not – developments that can be shortly captured by referring to the Balfour Declaration of 1926 and the Statute of Westminster 1931. The other type comprised internal legal and factual developments which were unifying the country – economic integration and the increasing paramountcy of federal law by reason of s109 of the Constitution. These changes are similar to those he referred to when he said that the words of the Constitution: 'are not to be tied to the very things they denoted in 1901. The words of s92 remain unaltered and so does their meaning; but economic methods and the forms of economic organisation and the instruments of trade and commerce have expanded and altered, and threats to the freedom of which s92 speaks arise in new ways.'¹⁹⁰

Windeyer J may have been teaching that the interpretation of the Constitution can change as its interpreters take into account new national experiences and become aware of new problems to which the Constitution must be applied. But was Windeyer J saying that only one view is right? Or are both right for their particular times, even though they differ? The latter seems to be his position in the *Payroll Tax Case*, for if to return to 'the discarded theories would ... be an error', and it was not an error by the early justices to have adopted them in the first place, then the true meaning of the Constitution is seen as capable of changing from time to time.¹⁹¹ Kirk has advanced a slightly different reading, namely that 'whilst the previous interpretation had not been clearly and unreasonably wrong, the 'new light' of events had shown the new approach to be more appropriate and correct.'¹⁹²

The fact is that despite Windeyer J's unquestioned greatness, there is an inconsistency in his judgments on the present question, and sometimes ambiguity within a single judgment. In part this is because he was a pioneer, often an unconscious one, of modern theories of progressive interpretation in an age when originalist theories dominated. In part it was because in elucidating the problem he relied on Holmes J. That judge, over his very long life, in the characteristically misty grandeur of his aphorisms, was far more prone to ambiguity. For example, in *Damjanovic & Sons Pty Ltd v The Commonwealth* Windeyer J's position appears originalist, but he cites¹⁹³ Holmes J in *Missouri v Holland*:¹⁹⁴

When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realise that they

have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said one hundred years ago.

Care must be taken in handling similar ambiguities in later cases. Thus in *Re Tracey; ex parte Ryan*¹⁹⁵ Brennan and Toohey JJ said:

History and necessity combine to show that courts-martial and other service tribunals, though judicial in nature and though erected in modern times by statute, stand outside the requirements of Ch III of the Constitution.

So far as this refers to 'necessity' in the light of present conditions, the reasoning is non-originalist. So far as it rests on how the mental climate of 1900 would have seen necessity, it is originalist.

It is common to test the construction of statutes by comparing the consequences of competing constructions, and choosing the one which will produce the less absurd or unreasonable results. That approach is sometimes but not always applied to the Constitution. Thus the scheme for cross-vesting the jurisdiction of state courts in the Federal Court of Australia was struck down despite the opinion of many that it was a highly 'convenient' and 'efficient' solution to what was seen as a troubling problem of 'arid jurisdictional disputes'.¹⁹⁶ But on other occasions regard is paid to 'practical considerations' in assessing the soundness of a particular construction.¹⁹⁷ On these occasions a non-originalist approach is being employed – a construction is adopted which leads to the most workable outcome in modern conditions, unless a form of originalism is resorted to by saying that an offending

construction 'would create immense practical problems ... which the makers of the Constitution can hardly have intended'.¹⁹⁸

Penultimate theory: expansive construction of powers, not prohibitions

Two other theories which fall outside the originalist and organic categories remain to be mentioned.

The first is the development by Mason J of a somewhat obscurely expressed idea of Dixon CJ's.¹⁹⁹ Mason J said that while constitutional prohibitions should be applied in accordance with their meanings in 1900, grants of power should be construed 'so as to apply it to things and events coming into existence and unforeseen at the time of the making of the Constitution, so that the operation of the relevant grant of power in the Constitution enlarges or expands' The justification offered was: 'As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the Constitution was enacted.'²⁰⁰ This approach has attracted little agreement.²⁰¹

Last theory: 'common law' approach

There is an approach to the Constitution which has not been overtly applied in Australia. To some extent its silent operation can be noticed here, although it can be seen more clearly in the United States. It has been called evolutionary, and the type of evolution involved has been called 'the method of the common law'. That is, as decision succeeds decision, each cautiously proceeding by analogy with or limited extension of the one before, a body of doctrine builds up which is highly unlikely to conform either with the actual intention of the framers or with their language as it was originally understood. The doctrine of *stare decisis*, coupled with the extent to which governments and citizens have relied on the evolved position, makes it highly unlikely that that position will be overruled.²⁰² To call this process 'the method of the common law' does not justify it. The true method of the common law does involve gradual advances and retreats as old problems are solved and new difficulties emerge. But if the results are unsatisfactory they can speedily be dealt with by statute and less speedily by overruling. And the common law method cannot operate in relation to statutes: it is not open to the courts to evolve away from what the statute commands. This must be so a *fortiori* with that most important statute, namely the Constitution.

Has there ever been a theory of 'literalism' or 'strict textualism'?

It is sometimes suggested that a key dichotomy in constitutional interpretation is a dichotomy between approaches which are 'literalist' or are 'strictly textual' or depend on the 'plain meaning of the words' – these are condemned – and others. Those who suggest this rarely point to convincing examples of the condemned approaches. As is often the case in doctrinal controversies, much energy has been put into demolition of something which consists only of straw. What is 'literalism'? If by 'literalism' is meant examining the words in isolation, no-one advocates it. If by 'literalism' is meant examining the words in the context of the Constitution as a whole, and nothing more, no-one advocates it; indeed McHugh J has denied that it is the traditional approach.²⁰³ If by 'literalism' is meant a doctrine under which there is

'only a very limited occasion' to 'search for meaning outside the text' by 'reference to ... the wider history of the provision concerned',²⁰⁴ it does not exist. As was said earlier, the theories of interpretation deriving from O'Connor J both by precept and practice frequently involve historical inquiry.²⁰⁵ It has been contended²⁰⁶ that examples of 'literalism' can be found in the following expressions of Barwick CJ: 'The only true guide ... is to read the language of the Constitution',²⁰⁷ 'the text of our own Constitution is always controlling',²⁰⁸ 'what falls for construction are the words of the Constitution'²⁰⁹ But to concentrate only on little verbal fragments is misleading. Barwick CJ favoured reading the Constitution in the light of its history in order to ascertain the 1900 meaning. Thus he said: 'The meaning which 'establishing' [in s116] in relation to a religion bore in 1900 may need examination ... to ensure that the then current meaning is adopted.'²¹⁰ He also said that the meaning of the Constitution was to be decided 'having regard to the historical setting in which [it] was created In the case of ambiguity or lack of certainty, resort can be had to the history of the colonies, particularly in the period of and immediately preceding the development of the terms of the Constitution.'²¹¹ It was not a question of taking any 'literal' or 'textual' meaning, but that of conducting historical inquiry into the 1900 range of meanings.

Other possible candidates for a 'literalist' approach in the High Court of analysing the words in a vacuum are some statements of Dixon CJ denigrating the value of historical analysis. An example is *Victoria v The Commonwealth*.²¹² But even there Dixon J did concede that the 'inconspicuous' role of the drafting history of s96 in Australian history 'may explain why the terms in which it was drafted have been found to contain possibilities not discoverable in the text as it emerged from the conventions'. Further, to treat Dixon J as a literalist in the narrowest sense is difficult in view of his preparedness to detect implications in the Constitution: for implications can only be found from context. It is also difficult in view of some of his judgments which reveal a deep historical understanding, for example the usages of the word 'excise',²¹³ or his statement that his view of s75(iii) was 'completely informed by the history of the provision, which explains ... the whole matter'.²¹⁴

The *Engineers' Case* is sometimes criticised as embodying a rigid literal approach. But it did accept that the Constitution had to be interpreted against the historical background and 'in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it'²¹⁵

Hence all extant approaches to interpretation in some degree depend on resort to a context which is wider than the words of the Constitution, even taken as a whole. It is likely that that has always been so.

Conclusion

Gummow J has said that questions of constitutional construction 'are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation'.²¹⁶ That is true. It is also true that taxonomy by itself does not solve problems, and it is important to avoid the fate which, according to Lord Millett, befell the late Professor Birks when in 'his later years he became obsessed with taxonomy' and recanted many of the propositions

which he had previously pronounced.²¹⁷ But it is desirable to seek to understand theory so far as it really does underpin constitutional construction. To try to classify competing theories is an aid, however limited, to understanding both them and the Constitution itself.

- ¹ What follows owes much to questions raised by Henry Burmester, 'The Convention Debates and the Interpretation of the Constitution' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 25; Jeffrey Goldsworthy, 'Originalism in Constitution Interpretation' (1997) 25 Fed LR 1; Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 Fed LR 323; Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2004) 24 MULR 672; Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 PLR 234. I am also indebted to Lorraine Finlay, Adam Sharpe and Rebecca Spigelman for their assistance.
- ² *Attorney-General (New South Wales) v Brewery Employés Union of New South Wales* (1908) 6 CLR 469 at 611-612 (emphasis in original).
- ³ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 – unless the particular context or the rest of the Constitution suggests otherwise.
- ⁴ *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105 per Griffith CJ, Barton and O'Connor JJ.
- ⁵ *McGinty v Western Australia* (1996) 186 CLR 140 at 230.
- ⁶ *New South Wales v The Commonwealth* (2006) 231 ALR 1 at 224-234 [774]-[797] per Callinan J.
- ⁷ *Re Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 268 per Murphy J (s 41).
- ⁸ See the criticisms by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 231-232 of what Deane and Toohey JJ said in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70.
- ⁹ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417 [166] per Kirby J.
- ¹⁰ For example, 'A Personal View of Mr Justice Murphy', *Bar News* (Autumn 1987) p 5.
- ¹¹ For example, his speech at a Bar dinner on the retirement of Sir Harry Gibbs, *Bar News* (Autumn 1987) p 9; and his speech at a Bar dinner in his honour on 17 July 1994, *Bar News* (Spring/Summer 1994) p22.
- ¹² 'Sir Harry Gibbs', *Bar News* (Autumn 1987) p 9.
- ¹³ 'Comment' (1984) 14 Fed LR 276.
- ¹⁴ G F Pearce, *Carpenter to Cabinet*, p 47.
- ¹⁵ Foreword to G F Pearce, *Carpenter to Cabinet*, p 12.
- ¹⁶ Introduction to Peter Heydon, *Quiet Decision*, p 2.
- ¹⁷ 110 CLR xi.
- ¹⁸ (1904) 1 CLR 329 at 358-359.
- ¹⁹ *Attorney-General v Carlton Bank* [1899] 2 QB 158 at 164: the goal of statutory construction is 'to give effect to the intention of the Legislature', but subject to key qualifications – 'as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed'.
- ²⁰ 'The Theory of Legal Interpretation', 12 Harv LR 417 at 419 (1899).
- ²¹ *Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638, where the Barons of the Exchequer said that statutory interpretation depends on four questions:

'What was the common law before the making of the Act.

... What was the mischief and defect for which the common law did not provide.

... What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth.

... The true reason of the remedy'

- ²² *Harcourt v Fox* (1693) 1 Show KB 506 at 535; 89 ER 720 at 734: 'A contemporary exposition of a law, if there be any question about it, as our books tell us, is always the best, because the temper of the law makers is then best known.'
- ²³ *Aldridge v Williams* 44 US (3 How) 9 at 24 (1845): 'The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself, and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.'
- ²⁴ *Direct United States Cable Co Ltd v Anglo-American Telegraph Co Ltd* (1877) 2 App Cas 394 at 412: it was necessary to consider 'the subject matter with respect to which [the statutory words] are used, and the object in view'.
- ²⁵ *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92 at 98: 'The time when, and the circumstances under which', the statute was enacted 'supply the best and surest mode of expounding it'.
- ²⁶ J C Campbell, 'Commentary' (1985) 1 Aust Bar Rev 139 at 142: 'The question in construction is ...: what has been done by this document.' See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschoffenburg AG* [1975] AC 591 at 645 per Lord Simon of Glaisdale.
- ²⁷ *Sharpe v Wakefield* (1888) 22 QBD 239 at 242.
- ²⁸ *Minister for Mineral Resources v Brautag Pty Ltd* (1997) 8 BPR 15,815 at 15,822-15,824
- ²⁹ *ibid.* at 15,820.
- ³⁰ *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 359-360. Griffith CJ stated the same view (at 338), as did McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230.
- ³¹ 'The Law and the Constitution' (1935) 51 LQR 590 at 597.
- ³² 'Interpretation of the Constitution' in R Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 1 at p 8.
- ³³ *Bisticic v Rokov* (1976) 135 CLR 522 at 566; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 236-238. See Zines, *The High Court and the Constitution*, (1981) pp 250-251.
- ³⁴ For example, *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 442 per Deane J.
- ³⁵ See pp 22-23.
- ³⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151 per Knox CJ, Isaacs, Rich and Starke JJ.
- ³⁷ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J.
- ³⁸ See below pp16-18.
- ³⁹ From this point of view it is erroneous to assert that 'originalism in Australia was unheard of until ... *Cole v Whitfield*', as Adam A Perlin does: 'What Makes Originalism Original?: A Comparative Analysis of Originalism and Its Role in Commerce Clause Jurisprudence in the United States and Australia' (2005) 23 Pacific Basin LJ 94 at 98, n 16.
- ⁴⁰ *R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1912) 15 CLR 586 at 592 per Griffith CJ. See also

Attorney-General (New South Wales) v Brewery Employés Union of New South Wales (1904) 6 CLR 469 at 501 per Griffith CJ, 521-522 per Barton J, 534-541 per O'Connor J and 610 per Higgins J.

- ⁴¹ *King v Jones* (1972) 128 CLR 221 at 229. See also *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578 per Barwick CJ.
- ⁴² *Brown v The Queen* (1986) 160 CLR 171 at 189-190.
- ⁴³ *Brown v The Queen* (1986) 160 CLR 171 at 217. See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537.
- ⁴⁴ *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1980) 146 CLR 559 at 615 (cf *Permewan Wright Consolidated Pty Ltd v Trehwhitt* (1979) 145 CLR 1 at 35).
- ⁴⁵ *Breavington v Godleman* (1988) 169 CLR 41 at 132-133.
- ⁴⁶ *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1106.
- ⁴⁷ *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105-1106 and 1108.
- ⁴⁸ *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105.
- ⁴⁹ (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.
- ⁵⁰ *Merchant Service Guild of Australasia v Archibald Currie & Co Pty Ltd* (1908) 5 CLR 737 at 745.
- ⁵¹ (1994) 182 CLR 104 at 196.
- ⁵² (1994) 182 CLR 104 at 197.
- ⁵³ (1904) 1 CLR 208 at 213-214. An even more restrictive ban was enunciated in *Stephens v Abrahams (No 2)* (1903) 29 VLR 229 at 241 (FC).
- ⁵⁴ *Gorham's Case* (1852), quoted in *Assam Railways and Trading Co v Commissioners of Inland Revenue* [1935] AC 445 at 458-459 (Royal Commission Report rejected as evidence of legislative intention, but admissibility of the Report, and of parliamentary debates, to identify mischief assumed). See also *Hawkins v Gathercole* (1855) 6 De GM & G 1 at 22; 43 ER 1129 at 1136 per Turner LJ; *Farley v Bonham* (1861) 30 LJ Ch 239 (Sir William Page Wood VC) (reports); *Re Mew & Thorne* (1862) 31 LJBK 87 at 88-89 per Lord Westbury LC (report and speech in Parliament); *Attorney-General v Sillem* (1863) 2 H & C 431 at 531; 159 ER 178 at 223 per Bramwell B; *Holme v Guy* (1877) 5 Ch D 901 at 905 per Sir George Jessel MR ('the history of law and legislation'); *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 763-764 per Lord Blackburn; *Herron v Rathmines and Rathgar Improvement Commissioners* [1892] AC 498 at 502 per Lord Halsbury LC.
- ⁵⁵ *Eastern Photographic Materials Co v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571 at 575; cf *Salkeld v Johnson* (1854) 2 Ex 256 at 273; 154 ER 487 at 495, rejecting a Report of the Real Property Commissioners as evidence of meaning. See P Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (1961) 4 UQLJ 1 at 4-14; Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Intentionalism' (1999) 27 Fed LR 323 at 329.
- ⁵⁶ *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25-26 per Mason J; *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 373-375; *Gerhardy v Brown* (1985) 159 CLR 70 at 104 per Mason J, 113 per Wilson J, 136 and 142 per Brennan J (in construing a South Australian Act before any South Australian equivalent to s15AB existed). Thus Stephen J said that legislative debates 'may not be resorted to to determine what it is which parliament has in fact enacted in legislating ...', but only so as to cast light upon what has been variously described as the mischief to be remedied, the subject matter which the legislation intended to deal with or the legislation's general background.' *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 600. And in England Lord Simon of Glaisdale said that the courts could have recourse to any public report which had led to the legislation: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschoffenburg AG* [1975] AC 591 at 646-647. For earlier examples, see *Shenton v Tyler* [1939] Ch 620 at 626 and 639 per Sir Wilfrid Greene MR and 646-647 per Luxmoore LJ; *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 212 per Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ; *Rookes v Barnard* [1964] AC 1129 at 1170 per Lord Reid; *Letang v Cooper* [1965] 1 QB 232 at 240 per Lord Denning MR; *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 101 per Lord Wilberforce; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 509 per Gibbs J and 520-521 per Mason J. But there were contrary voices: eg *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 47 per Gibbs J, quoted below at fn 72; *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 at 478 per Mason J, suggesting that the matter was best left to parliament. For an earlier contrary voice, see *R v West Riding of Yorkshire County Council* [1906] 2 KB 676 at 716 per Farwell LJ.
- ⁵⁷ For example, *Warnecke v The Equitable Life Assurance Society of the United States* [1906] VLR 482 at 487 per A'Beckett AC; *Re Armstrong and State Rivers and Water Supply Commission (No 2)* [1954] VLR 288 at 290 per Sholl J; *Eros Finance Pty Ltd v Attorney-General* [1956] VLR 320 at 324 per Sholl J; *T M Burke Pty Ltd v City of Horsham* [1958] VLR 209 at 216 per Sholl J; and *Langhorne v Langhorne* [1958] ALR 989 at 991 per Gavan Duffy J.
- ⁵⁸ The House of Lords achieved a result very similar to s 15AB(1)(b) by developing the common law in *Pepper v Hart* [1993] AC 593 at 634.
- ⁵⁹ Attorney-General's Department: *Symposium on Statutory Interpretation* (1983) pp 39 and 83.
- ⁶⁰ (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.
- ⁶¹ It may therefore not entirely be correct to say that pre-1988 practices 'can be traced to the previously fashionable rules governing the construction of the language of statutes' (*Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 401 [132] per Kirby J), for the pre-1988 practices on the convention debates were out of line with the cases referred to in notes 54-57. Admittedly there were authorities the other way.
- ⁶² See *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 213-214 per Griffith CJ (above 17); *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105-1106 and 1108 per Griffith CJ, Barton and O'Connor JJ (above 17). See also *Re Pearson; Ex parte Sipka* (1983) 152 CLR 252 at 262 per Gibbs CJ, Mason and Wilson JJ.
- ⁶³ Examples of the other view can be found. One is where the expression 'the tenant's family' in a state enacted in 1920 was construed in 1976 as including a de facto wife: *Dyson Holdings Ltd v Fox* [1976] QB 503 at 511 per James LJ. See also *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705; *Victor Chandler International v Customs and Excise Commissioners* [2002] 2 All ER 315 at 322-323 [27]-[31] per Sir Richard Scott VC; F Bennion, *Statutory Interpretation* (4th ed, 2002) pp 762-763; Cross, *Statutory Interpretation* (3rd ed, 1995) p 51. That conclusion has been criticised: *Helby v Rafferty* [1979] 1 WLR

13 at 25. Australian law at least has not accepted any presumption that legislation is to be given an ambulatory operation. However, in *Brownlee v The Queen* (2001) 207 CLR 278 at 321-322 [126], Kirby J appeared to disagree: '... with ordinary legislation, expected to have an extended operation, it is increasingly accepted that language lives and meaning adapts to changed circumstances.'

⁶⁴ Henry Burmester, 'The convention debates and the Interpretation of the Constitution' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 26.

⁶⁵ Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 Fed LR 211.

⁶⁶ (1904) 1 CLR 329 at 350-358 per Barton J and 358-359 per O'Connor J (quoted above 15).

⁶⁷ (1907) 4 CLR 1087 at 1105-1106 and 1108 per Griffith CJ, Barton and O'Connor JJ (quoted above 17).

⁶⁸ *Evans v Williams* (1910) 11 CLR 550 at 571: in interpreting a statute, the court could consider 'the time when, and the circumstances under which' it was enacted.

⁶⁹ *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 695: the question whether a statute exceeded the limits of s51(xxxv) depended 'upon how the expression 'industrial dispute' was generally understood in 1900'.

⁷⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152: the Constitution should be 'read ... naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it'

⁷¹ *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17: 'in case of ambiguity or lack of certainty, resort may be had to the history of the colonies.'

⁷² *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 47: 'In construing the Constitution regard may be had to the state of things existing when [the Constitution] was passed and therefore to historical facts.'

⁷³ *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 187: even though the convention debates could not be referred to, resort could be had to 'historical facts as providing background against which to view the Constitution.' See also at 174-177 per Stephen J.

⁷⁴ *Watson v Lee* (1979) 144 CLR 374 at 399.

⁷⁵ Henry Burmester, 'The convention debates and the Interpretation of the Constitution' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 26.

⁷⁶ *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 359. See also *Deakin v Webb* (1904) 1 CLR 585 at 630 (if no 'reasonable meaning' can be adduced from the words, the court 'can have resort to the history of the clause or the circumstances surrounding the framing of the Constitution').

⁷⁷ *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 at 479 per Murphy J.

⁷⁸ *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [44].

⁷⁹ *King v Jones* (1972) 128 CLR 221 at 229. In *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578 he said: 'The then current meaning [ie in 1900] of the words used in the text is the meaning, the connotation, they must thereafter bear, although in application in later times they may achieve results not

within the contemplation of those who wrote the text.' See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208 at 267 per Windeyer J: 'in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they would have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.' And see *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537 per Dawson J: '[T]he words have a fixed connotation but their denotation may vary from time to time [T]he attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes.'

⁸⁰ *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29. Another common example is *Sue v Hill* (1999) 199 CLR 462. In 1900 the United Kingdom was not a 'foreign power' within the meaning of s44, because Australia was part of the British Empire: its foreign relations were conducted largely by the United Kingdom, neither the Commonwealth nor the states had complete legislative autonomy, the United Kingdom retained power to legislate for Australia, and some appeals could be heard by a court which was, if not strictly speaking a United Kingdom court, a court established by United Kingdom legislation. All those things have changed, and hence the denotation of 'foreign power' has widened to include the United Kingdom. (See *Eastman v The Queen* (2000) 203 CLR 1 at 45 [143] per McHugh J.) It has been said, however, that this is not in truth an example of a change in denotation, but that a change in connotation is involved on the ground that the essential attribute of the words 'foreign power' in 1900 was 'any sovereign state other than the United Kingdom': Dan Meagher, 'Guided by Voices? – Constitutional Interpretation on the Gleeson Court' (2002) 7 Deakin LR 261 at 268. The competing view is that the essential attribute was not being part of the sovereign state of which Australia was part, namely the British Empire, and the United Kingdom is no longer part of that sovereign state.

⁸¹ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) pp 17-20.

⁸² *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493 [18] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. On the other hand, the words before the last four words invite treatment of radio and television as new denotations: see at 20 above.

⁸³ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493 [18] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Langer v The Commonwealth* (1996) 186 CLR 302 at 342-343 per McHugh J ('the people' in s24); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-553 [44]-[45], 554 [47] per McHugh J (referring to s51(i), (xx), (xxix) and (xxxv)); *Eastman v The Queen* (2000) 203 CLR 1 at 49-50 [154] per McHugh J.

⁸⁴ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 629 [100] per Gummow J.

⁸⁵ *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

⁸⁶ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 97 [34] per Gaudron and Gummow JJ.

⁸⁷ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 501 [41] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

- ⁸⁸ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 496 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
- ⁸⁹ *XYZ v The Commonwealth* (2005) 227 ALR 495 at 537 [153] per Callinan and Heydon JJ.
- ⁹⁰ *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *XYZ v The Commonwealth* (2005) 227 ALR 495 at 537 [153] per Callinan and Heydon JJ.
- ⁹¹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24] per Gaudron and Gummow JJ.
- ⁹² *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54] per Gaudron, Gummow and Hayne JJ.
- ⁹³ *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [53] per Gaudron, Gummow and Hayne JJ. See also at 303 [71].
- ⁹⁴ *Cheatle v The Queen* (1993) 177 CLR 541 at 562 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
- ⁹⁵ *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
- ⁹⁶ *Brownlee v The Queen* (2001) 207 CLR 278 at 288-289 at [20]-[22] per Gleeson CJ and McHugh J, 298-299 [54]-[57] and 303 [68]-[71] per Gaudron, Gummow and Hayne JJ and 341 [183]-[184] per Callinan J.
- ⁹⁷ *Brownlee v The Queen* (2001) 207 CLR 278 at 304 [72] per Gaudron, Gummow and Hayne JJ.
- ⁹⁸ *Katsuno v The Queen* (1999) 199 CLR 40 at 64 [50] per Gaudron, Gummow and Callinan JJ (Gleeson CJ concurring); *Brownlee v The Queen* (2001) 207 CLR 278 at 287 [16] per Gleeson CJ and McHugh J; 299 [57] per Gaudron, Gummow and Hayne JJ.
- ⁹⁹ *Brownlee v The Queen* (2001) 207 CLR 278 at 289-290 [24]-[27] per Gleeson CJ and McHugh J, 298-302 [54]-[67] per Gaudron, Gummow and Hayne JJ and 342-343 [189]-[192] per Callinan J.
- ¹⁰⁰ *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
- ¹⁰¹ *Fittock v The Queen* (2003) 217 CLR 508; *Ng v The Queen* (2003) 217 CLR 521.
- ¹⁰² *Ex parte Peterson* 253 US 300 at 309-310 (1920).
- ¹⁰³ *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [53] and 303 [71].
- ¹⁰⁴ *Cheatle v The Queen* (1993) 177 CLR 541 at 561-562 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
- ¹⁰⁵ *Brownlee v The Queen* (2001) 207 CLR 278 at 288 [21] per Gleeson CJ and McHugh J.
- ¹⁰⁶ *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54] per Gaudron, Gummow and Hayne JJ.
- ¹⁰⁷ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375.
- ¹⁰⁸ *Brownlee v The Queen* (2001) 207 CLR 278 at 297 [53] per Gaudron, Gummow and Hayne JJ.
- ¹⁰⁹ For example, *Attorney-General (New South Wales) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 616 per Higgins J; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 519-520 [103] per Kirby J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24] per Gaudron and Gummow JJ. Legislation may be enacted under the bankruptcy power even though it does not correspond with bankruptcy legislation of the kinds existing before 1900, so long as it corresponds with some 'fundamental purpose' of bankruptcy law: *Storney v Lane* (1981) 147 CLR 549 at 557 per Gibbs CJ, approved in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 495 [22] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
- ¹¹⁰ Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 Adel LR 49 at 52.
- ¹¹¹ *Attorney-General (New South Wales) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 610. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ adopted this approach in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493-494 [18]-[19].
- ¹¹² The distinction has been referred to in non-constitutional cases, e.g., *Grant v Federal Commissioner of Taxation* (1976) 135 CLR 632 at 642 per Mason J. For constitutional usages, see *New South Wales v The Commonwealth* (No 1) (1932) 46 CLR 155 at 213 per Evatt J; *Attorney-General (Victoria) v The Commonwealth* (1962) 107 CLR 529 at 543 per Dixon J (s51(xxi)); *Re F; Ex parte F* (1986) 161 CLR 379 at 391 per Mason and Deane JJ (s51(xxi)).
- ¹¹³ See below at 21-2.
- ¹¹⁴ *Lansell v Lansell* (1964) 110 CLR 353 at 370; *Victoria v The Commonwealth* (1970) 122 CLR 353 at 399. For a neutral reference see *Attorney-General (Victoria) v The Commonwealth* (1960) 107 CLR 529 at 577.
- ¹¹⁵ H L A Hart, 'Positivism and the Separation of Law and Morals' 71 Harv LR 593 at 607 (1958). The reasoning was criticised by Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 Harv LR 630 at 662-664 (1958).
- ¹¹⁶ *Singh v The Commonwealth* (2004) 222 CLR 322 at 383 [152] per Gummow, Hayne and Heydon JJ.
- ¹¹⁷ *Singh v The Commonwealth* (2004) 222 CLR 322 at 425 [296].
- ¹¹⁸ (2000) 202 CLR 479 at 495-496 [23].
- ¹¹⁹ *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.
- ¹²⁰ *Jones v The Commonwealth* (No 2) (1965) 112 CLR 206.
- ¹²¹ *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 277.
- ¹²² See above at 18.
- ¹²³ *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) p 8; see also 'The Scope of Judicial Review: An Ongoing Debate' (1979) 6 Hast Const LQ 527 at 530.
- ¹²⁴ For example, *New South Wales v The Commonwealth* (2006) 231 ALR 1 at 223 [772].
- ¹²⁵ For example, James A Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 UNSWLJ 309 at 312.
- ¹²⁶ *Singh v The Commonwealth* (2004) 222 CLR 322 at 337 [21]. *Cf Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [41] (referring to a consequence which the makers 'can hardly have intended').
- ¹²⁷ *Eastman v The Queen* (2000) 203 CLR 1 at 46 [147] per McHugh J (emphasis added).
- ¹²⁸ (1904) 1 CLR 91 at 113 (emphasis added). See also *Deakin v Webb* (1904) 1 CLR 585 at 616 per Griffith CJ; *Brown v The Queen* (1986) 160 CLR 171 at 180-181 per Gibbs CJ.
- ¹²⁹ For example, *Mickelberg v The Queen* (1989) 167 CLR 259 at 283-284 per Deane J.

- ¹³⁰ *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482 at 503 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.
- ¹³¹ *Brown v The Queen* (1986) 160 CLR 171 at 179 per Gibbs CJ.
- ¹³² *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185 per Barwick CJ.
- ¹³³ *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 27 per Windeyer J (to prevent 'commercial disunity').
- ¹³⁴ *Deacon v Mitchell* (1965) 112 CLR 353 at 372 per Windeyer J ('to keep the highways, waterways and airways of Australia open and without impediment for traffic moving from state to state').
- ¹³⁵ *Eastman v The Queen* (2002) 203 CLR 1 at 46 [146].
- ¹³⁶ *Eastman v The Queen* (2002) 203 CLR 1 at 37 [115].
- ¹³⁷ *Eastman v The Queen* (2002) 203 CLR 1 at 40 [127].
- ¹³⁸ *Ruhani v Director of Police* (2005) 219 ALR 199 at 263 [281] per Callinan and Heydon JJ.
- ¹³⁹ *Studies in Australian Constitutional Law* (1901) pp 20-22. See *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J; *Eastman v The Queen* (2000) 203 CLR 1 at 79-80 [242] per Kirby J. Yet Inglis Clark appears to have shared O'Connor J's view when he said that the Constitution should be interpreted 'consistently with the historical association from which particular words and phrases derive the whole of their meaning in juxtaposition with their context': p 21.
- ¹⁴⁰ 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 MULR 1 at 14.
- ¹⁴¹ 'Constitutional Interpretation: Some Thoughts' (1998) 20 Adel LR 49 at 49-50.
- ¹⁴² *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171.
- ¹⁴³ *Bisticic v Rokov* (1976) 135 CLR 552 at 566.
- ¹⁴⁴ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 173.
- ¹⁴⁵ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ.
- ¹⁴⁶ *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486.
- ¹⁴⁷ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 181.
- ¹⁴⁸ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 186.
- ¹⁴⁹ *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 504. See also at 511 per Deane J ('it is not possible to restrict the effect of the words which were adopted by the people as the compact of a nation by reference to the intentions and understanding of those who participated in or observed the Convention Debates').
- ¹⁵⁰ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171.
- ¹⁵¹ Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Fed LR 1 at 17. See *Cole v Whitfield* (1988) 165 CLR 360 at 385; *Breavington v Godleman* (1988) 169 CLR 41 at 132-133; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 274 per Brennan, Deane and Toohey JJ.
- ¹⁵² *Brownlee v The Queen* (2001) 207 CLR 278 at 314 [105].
- ¹⁵³ *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 87 [77].
- ¹⁵⁴ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 525 [118].
- ¹⁵⁵ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 523 [112].
- ¹⁵⁶ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522 [109].
- ¹⁵⁷ *Eastman v The Queen* (2000) 203 CLR 1 at 79-80 [242]. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 600 [186].
- ¹⁵⁸ M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 MULR 1 at 6. The image was used in a Canadian Privy Council case, *Edwards v Attorney-General for Canada* [1930] AC 124 at 136 and adopted by Evatt J in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 115.
- ¹⁵⁹ For criticism of this approach – which has application to other non-originalist approaches – see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Fed LR 1 at 39; Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 MULR 672 at 679-687; Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 PLR 234.
- ¹⁶⁰ (2000) 203 CLR 1 at 49 [154].
- ¹⁶¹ (2000) 203 CLR 1 at 50 [154] (emphasis in original).
- ¹⁶² *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552 [43].
- ¹⁶³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-553 [44]; see also at 553 [45] and 554 [47]; *Langer v The Commonwealth* (1996) 186 CLR 302 at 342-343.
- ¹⁶⁴ Footnotes omitted.
- ¹⁶⁵ *Taking Rights Seriously* (1977), pp 131-149; *Freedom's Law: The Moral Reading of the American Constitution* (1996), pp 1-38.
- ¹⁶⁶ *Eastman v The Queen* (2000) 203 CLR 1 at 50 [154] (emphasis in original).
- ¹⁶⁷ (2000) 203 CLR 1 at 50 [155].
- ¹⁶⁸ By McHugh J in *Eastman v The Queen* (2000) 203 CLR 1 at 51 [156] and by Mason J in *Tasmania v The Commonwealth* (1983) 158 CLR 1 at 127. See also Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in (eds) Charles Sampford and Kim Preston, *Interpreting Constitutions*, 1 at 17.
- ¹⁶⁹ *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.
- ¹⁷⁰ *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105, quoting from *Martin v Hunter's Lessee* (1816) 1 Wheat 304 at 326. See also the words of O'Connor J approved in *R v Coldham; Ex parte Australian Welfare Union* (1983) 153 CLR 297 at 314 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ: 'It must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve'.
- ¹⁷¹ (1819) 4 Wheat 316 at 407 and 415.
- ¹⁷² 'Originalism: The Lesser Evil' (1989) 57 Cincinnati LR 849 at 853.
- ¹⁷³ 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 23.
- ¹⁷⁴ 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 25.
- ¹⁷⁵ 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 26.

- ¹⁷⁶ 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 23.
- ¹⁷⁷ 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 28.
- ¹⁷⁸ D Robertson, *Judicial Discretion in the House of Lords* (1998).
- ¹⁷⁹ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 602-603.
- ¹⁸⁰ *New South Wales v The Commonwealth* ('the Seas and Submerged Lands Act Case') (1975) 135 CLR 337 at 498.
- ¹⁸¹ *New South Wales v The Commonwealth* (the 'Seas and Submerged Lands Act Case') (1975) 135 CLR 337 at 503.
- ¹⁸² (1975) 134 CLR 559 at 615. See also *Permewan Wright Consolidated Pty Ltd v Trewitt* (1979) 145 CLR 1 at 35.
- ¹⁸³ Thus Callinan J said in *Singh v The Commonwealth* (2004) 222 CLR 322 at 424 [295]: 'Courts and judges may speak of the changing meaning of language but in practice substantive linguistic change occurs very slowly, particularly in legal phraseology. When change does occur, it generally tends to relate to popular culture rather than to the expression of fundamental ideas, philosophies, principles and legal concepts. Judges should in my opinion be especially vigilant to recognise and eschew what is in substance a constitutional change under a false rubric of a perceived change in the meaning of a word, or an expression used in the Constitution. That power, to effect a constitutional change, resides exclusively in the Australian people pursuant to s128 of the Constitution and is not to be usurped by either the courts or the parliament. In any event, I am not by any means persuaded that an actual change in the meaning of a word or a phrase, if and when it occurs, can justify a departure from its meaning at the time of federation.'
- ¹⁸⁴ *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 93-94.
- ¹⁸⁵ *Jones v The Commonwealth* (No 2) (1965) 112 CLR 206 at 237.
- ¹⁸⁶ *Spratt v Hermes* (1965) 114 CLR 226 at 277.
- ¹⁸⁷ *Bonser v La Macchia* (1969) 122 CLR 177 at 224.
- ¹⁸⁸ (1971) 122 CLR 353 at 395-397.
- ¹⁸⁹ (1959) 107 CLR 208 at 267. The passage is more fully quoted at fn 79 above.
- ¹⁹⁰ *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390 at 406-407.
- ¹⁹¹ This appears to have been McHugh J's view: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 197; *Eastman v The Queen* (2000) 203 CLR 1 at 47 [147].
- ¹⁹² 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 Fed LR 323 at 332-333.
- ¹⁹³ (1968) 117 CLR 390 at 407.
- ¹⁹⁴ 252 US 416 at 433 (1920).
- ¹⁹⁵ (1989) 166 CLR 518 at 573.
- ¹⁹⁶ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 540 [2] per Gleeson CJ, 569 [94] per McHugh J and 579-580 [121] per Gummow and Hayne JJ.
- ¹⁹⁷ *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 498 per Jacobs J; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9] per Gleeson CJ, McHugh and Callinan JJ.
- ¹⁹⁸ *Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [41] per Gleeson CJ and McHugh J.
- ¹⁹⁹ *Wragg v New South Wales* (1953) 88 CLR 353 at 385-388.
- ²⁰⁰ *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 615.
- ²⁰¹ Perhaps Wilson J agreed at 652-653, but Barwick CJ strongly disagreed at 577 and so did Murphy J at 623; Gibbs J (at 603) and Stephen J (at 605-606) were non-committal. Aickin J agreed with Gibbs J and Mason J. Menzies J agreed with Mason J's idea in *King v Jones* (1972) 128 CLR 221 at 246. In *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219 at 229 it was not applied to s114, the whole court saying only that it 'may have some strength in the context of a prohibition which is clearly directed against an identifiable mischief'. The issue was described as involving embarkation on 'troubled waters' in *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 67 [14] per Gleeson CJ, Gaudron, McHugh and Hayne JJ.
- ²⁰² Sir Daryl Dawson, 'Intention and the Constitution – Whose Intent?' (1990) 6 Aust Bar Rev 93 at 97.
- ²⁰³ *Eastman v The Queen* (2000) 203 CLR 1 at 47 [148].
- ²⁰⁴ Gregory Craven, 'The Crisis of Constitutional Literalism in Australia' in (eds) H P Lee and George Winterton, *Australian Constitutional Perspectives* (1992) p 2.
- ²⁰⁵ Above at 16-18.
- ²⁰⁶ James A Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 312 and n 54.
- ²⁰⁷ *Attorney-General (Commonwealth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17.
- ²⁰⁸ *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578.
- ²⁰⁹ *Uebergang v Australian Wheat Board* (1980) 54 ALJR 581 at 590.
- ²¹⁰ *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 581.
- ²¹¹ *Attorney-General (Commonwealth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17.
- ²¹² (1957) 99 CLR 573 at 603 per Dixon CJ (Kitto J concurring).
- ²¹³ *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263 at 293-299.
- ²¹⁴ *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363: see 363-367.
- ²¹⁵ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152 per Knox CJ, Isaacs, Rich and Starke JJ; see also at 150.
- ²¹⁶ *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [41].
- ²¹⁷ Peter Millett, 'Jones v Jones: Property or Unjust Enrichment?' in (eds) Andrew Burrows and Lord Rodger of Earlsferry, *Mapping the Law: Essays in Memory of Peter Birks* (2006) pp 265-266.



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Effective representation at mediation: the five key elements

By Robert Angyal SC

Advocacy in court and advocacy at mediation contrasted

Learning how to represent clients at mediation is very different from learning advocacy in court. To learn how to cross-examine, you can watch it being done or read the transcripts. This should be done with an understanding of what a cross-examiner seeks to achieve. More fundamentally, you would do this with an understanding of how the tribunal functioned.

None of this is true about learning how to represent clients at mediation, which is held in private. Participants usually agree to keep a mediation confidential, as do the mediators, who can have statutory obligations to keep them so.¹ There are no transcripts.

On a deeper level, what is a lawyer representing a client at mediation seeking to achieve? To answer that question, one must answer a more fundamental question: How and why does the mediation process work?

This paper is based on the premise that you cannot effectively represent a client at mediation without understanding what mediation is (and is not) and, most importantly, why it is a very effective process for resolving disputes. If you do not understand these things, you will not know what you should seek to achieve in representing a client, let alone how to accomplish your objectives.

For this reason, much of this paper deals with what mediation is (and is not) and with how and why mediation works.

The five key elements in effective representation at mediation

- ◆ Have an effective preliminary conference.
- ◆ Prepare your client for mediation, including a best-case/worst-case analysis.
- ◆ Be an effective advocate at mediation.
- ◆ Use the dynamic of mediation to your client's advantage.
- ◆ Document the agreement reached at mediation.

Have an effective preliminary conference

The pre-mediation conference or preliminary conference is an essential step in preparation for a mediation. This section is about how to maximise the benefit of the preliminary conference.

Make sure there is a preliminary conference

The preliminary conference is an essential step in a mediation. If the mediator does not suggest having one, organise it yourself. Otherwise, there is a risk that the mediation will go off the rails because of lack of preparation or lack of authority to settle.

Check out the mediator

The preliminary conference is your chance to make sure that the mediator's style is suitable for the dispute in question. You may want a facilitative mediator, rather than a directive mediator who offers opinions on legal issues and on whether particular settlements are reasonable. You should not feel inhibited from inquiring about the mediator's style. The preliminary conference is effectively your last chance to do this because, once it is over, the doors are closed and the plane is heading down the runway.

Check out your opponent

Use the preliminary conference to assess the negotiating style of the other party's lawyer and the role they will play at the mediation. Will they be positional bargainers, starting with an ambit claim and then making incremental concessions? Or will they engage in interest-based negotiation? Will they play a hands-off role, letting their client take the lead, or will they maintain tight control of the negotiation?

Use the preliminary conference to help your client become comfortable with mediation and the mediator

If your client is unfamiliar with mediation (and most are) and uncertain about the benefits of the process (and most are), make sure that the clients attend the preliminary conference. This should help your client to see that mediation is a structured and familiar process that has a good chance of leading to a settlement. Your client may also develop a level of trust in the mediator personally, as well as in the process itself.

Educate the mediator

Use the preliminary conference to make sure that the mediator has a grasp of the essential facts and issues of the dispute. There may be an incidental benefit from this process: The other party's summary of how it sees the dispute may give you clues about how it is likely to approach the mediation.

Make sure the parties will be prepared for the mediation

The preliminary conference is your opportunity to make sure that the parties are prepared for the mediation. For example, you may want the other party to provide copies of critical discovered documents, or to serve an expert's report that is late. While the mediator cannot direct the other party to do this, the preliminary conference is your opportunity to persuade the other party that you need these things for the mediation to be effective.

Get agreement on what the mediator should do to prepare for the mediation

It is up to the parties what the mediator reads to prepare for the mediation. Because mediators may charge for reading time, the mediator's time literally may be the parties' money.

How much preparation should the mediator do?

Some lawyers think that the more the mediator knows about the facts and the law of the dispute, the better. Others believe that, because the mediator is not an adjudicator, only a general knowledge of the dispute is necessary. Yet others take the pragmatic view that busy mediators may not read everything sent them anyway. Form a view on how much preparation the mediator should do and seek agreement on it at the preliminary conference.

Get agreement on the mediator's fees and how they are to be shared

You should clarify what the mediator's fees are; how they are to be shared among the parties; and whether the mediator requires payment in advance or into a solicitor's trust account.

Mediation agreement

Make sure everyone agrees on the form of the agreement to mediate. The mediator usually will recommend a mediation agreement. If not, you can use the agreement to mediate recommended by the Law Society. Go to its web site (www.lawsociety.com.au) and then to the site map; in the left column (headed 'Information for Solicitors – Areas of Law'), click on the link 'Mediation and Evaluation Information Kit'. When that document loads, go to page 23.

Date, time and venue for the mediation

Get agreement on these essential matters. There is no point having the mediation before the parties and their advisors are ready. On the other hand, if legal proceedings that will determine the dispute have been set down for hearing by a court in two weeks, or the court has ordered mediation by a particular date, everyone will have to be ready to mediate before then.

Make sure the mediation rooms are suitable

It is essential to have comfortable and soundproof rooms for the mediation, and as many rooms as there are parties. One of the rooms must be capable of seating everyone. The rooms should be available the whole day of the mediation and into the evening. Conference rooms in solicitors' offices can often be used and doing so will avoid having to hire rooms at a commercial venue.

Check authority to settle

The single most important function of the preliminary conference is to ensure that those attending the mediation have authority to settle the dispute between the parties. You should not be shy about inquiring whether this will be the case. There is little point in negotiating with people who do not have authority to resolve the dispute.

Authority to settle – difficult cases

In some cases (e.g., where a government department, a local government or a large corporation is a party), it may not be practical or possible to have the ultimate decision-maker at the mediation. In cases like this, the practical alternative may be to have the highest level of authority possible present at the mediation and the ultimate decision-maker available for consultation by phone.

Who will be attending the mediation?

At the preliminary conference, you should inquire who will attend the mediation on behalf of the other party, and state who will attend on behalf of your client. While there is no magic in numbers, it assists in preparation for the mediation to know whom your client will face across the table.

Costs

Many mediations are driven by concern about costs. To make informed decisions at the mediation about settlement, the parties will need to know what it has cost to come this far and what it likely will cost to pursue the proceedings. At the preliminary conference, agree that, before the mediation, the solicitors each will tell their respective client four items about costs:

- ◆ solicitor-client costs to date, including those of the mediation (What has it cost to come this far?)

- ◆ If the dispute is not resolved at mediation, the additional solicitor-client costs of a contested hearing and any likely appeals (If the matter does not settle at mediation, what will it cost to run the court case to finality?)
- ◆ Costs payable to the other party if the clients loses the contested hearing (If we run the court case and lose, how much will we have to pay the other party for its costs?)
- ◆ Costs recoverable from the other party if the client wins the contested hearing (If we run the court case and win, how much of our costs can be recovered from the other party?)

Document the agreements reached at the preliminary conference

A good mediator will confirm by letter the agreements reached at the preliminary conference. If the mediator does not do this, ask your solicitor to do it. There then can be no doubt about what the preliminary conference has achieved and this eliminates the possibility of disputes arising later.

Prepare your client for mediation, including a best-case/worst-case analysis

Many lawyers think that representing a client at mediation is simply a matter of going along and seeing what turns up. If you do not prepare your client for mediation, they will be significantly disadvantaged because they will be unprepared for the extreme pressure to settle that mediation will place on them. This section is about how to prepare your client.

There are three steps in preparing your client for mediation:

- ◆ Ensure that you and your client understand what mediation is and what it is not.
- ◆ Prepare a best-case/worst-case scenario.
- ◆ Explain the dynamic of mediation to your client.

What mediation is and what it is not

Mediation is a structured negotiation assisted by a third-party neutral called a 'mediator', who has no power to impose an outcome on the parties and thus is not an adjudicator like a judge or an arbitrator.

The mediator does have power to control the mediation process (who talks next and how long; what issues are discussed; whether the parties are together or separated; when to have lunch, etc.).

The mediator thus has power to control the *process* but does not control the *outcome* of the process.

Because the mediator has no power to impose a result on the parties, the rules of natural justice do not apply. It is standard practice for the mediator to talk to the parties in private and be told things that must be kept confidential to the party imparting them.

The mediator can and should help the parties work out what issues (factual, legal and emotional) have to be resolved in order to make settlement possible.

The mediator can and should help the parties work out what each party needs (as distinct from what it says it wants) to satisfy itself with respect to each issue.

The mediator can and should help the parties to create and explore options for resolving the dispute. The parties are not limited to results that a court or arbitrator could order. They are limited only by their imagination, by the practicality of the option being considered, and by their ability to agree on it.

A mediator should not give legal advice or advice about the likely outcome of factual disputes. It is almost impossible for mediators to be regarded as neutral and impartial if they do these things.

The mediator can and should, however, 'reality test' the position taken by a party. This is usually done in a private session, without the other party or parties being present. There is a fine but important line between vigorous reality testing and giving legal advice.

The mediator can and should help the parties (usually in private) consider how attractive is their best alternative to settling at mediation (usually a successful conclusion to litigation).

Because the mediator has no power over the substantive outcome of the process, the rules of natural justice do not apply. It is normal practice for the mediator to talk to the parties privately and to be told things by one party that must be kept confidential from the other party or parties.

Mediations almost always take longer than the parties and their lawyers anticipate, so a wise lawyer will warn clients that they need to be patient. But they almost always take much less time than the court hearing or arbitration that may be avoided.

Counsel are now often briefed to appear at mediation. Some counsel are experienced at representing clients at mediation and understand that a quite different form of advocacy is required at mediation in order to be effective.

The lawyers for the parties can play a wide range of roles at the mediation, ranging from non-participation to extremely active involvement. What role they play is a matter for their clients.

Try to understand what lies behind the dispute, no matter how often your client or solicitor tells you that; 'It's just about money' or; 'It's not about money; it's a matter of principle'.

Explore what your client needs in order to resolve the dispute (as distinct from what your client says they want).

Explore options for resolution of the dispute. Don't limit the options to remedies that a court or arbitrator could order.

Have a preliminary conference with the mediator and the other party or parties, or at least with their lawyers. This is an essential administrative step.

Prepare a position paper and copies of key documents.

Preparation of the position paper is an important part of preparation of your client's case for mediation, because it forces you and your client to crystallise the factual and legal issues in dispute; to assess your client's and the opposing client's chances of prevailing; and to consider options for settlement.

The position paper should succinctly deal with these three matters in no more than about five pages. Your aim is to be readable and persuasive, not to quote slabs of High Court authority.

Explain to your client that, as with litigation, you cannot be too prepared, but your time is your client's money. Full preparation requires an understanding by you of:

- ◆ The legal issues raised by the dispute.
- ◆ The factual issues raised by the dispute and the factual matrix in which they arise.
- ◆ Actual and potential evidence if the dispute goes to court or arbitration hearing.
- ◆ Knowledge of relevant expert opinion.
- ◆ The prospects of obtaining/defending against relief.
- ◆ Enforcement hurdles.

Get instructions on how much preparation you should do, and do it.

Make sure that your solicitor gives your client information about the costs position:

- ◆ Solicitor-client costs to date, including those of the mediation.
- ◆ Additional solicitor-client costs of getting to the end of a contested hearing.
- ◆ Costs payable to the other party (as agreed or assessed) if your client loses at a contested hearing.
- ◆ Costs recoverable from the other party (as agreed or assessed) if your client wins at a contested hearing.

Prepare a best-case/worst-case scenario

Your client will not be able to evaluate offers made to them at the mediation, or determine what offers to make, without knowing what the likely alternatives are. An offer to a plaintiff of \$1 million will be very attractive if the best alternative is likely to be judgment for \$750,000, but much less attractive if there are good prospects of obtaining judgment for \$2 million.

Once irrecoverable costs are taken into account, the 'best case' may not be particularly attractive, especially if the process of trying to achieve it (usually, continuing the proceedings to judgment) incurs a substantial risk of the 'worst case' (losing the court case). This process will help your client understand that a mediated result that is not as good as the 'best case' may be acceptable because it removes any risk of suffering the 'worst case'. Mediation is an attempt to manage this risk.

Explain the dynamic of mediation to your client

Mediation is not fun. It is not a refuge for the woolly-minded barrister who would prefer to avoid preparing cross-examination, nor for the client who would prefer not to be cross-examined. It is physically, intellectually and often emotionally exhausting.

Mediation forces the parties to confront their options and to make hard choices between them. Mediation works because this imposes almost unbearable pressure to settle.

You should warn your client about this. Pressure is easier to resist if it does not come as a surprise. Forewarned is forearmed. Other things being equal, a party better able to resist the pressure to settle will do better than one who is less able.

The dynamic of mediation is set out in section 6 of this paper. You should prepare your client by explaining the dynamic in detail to them.

Be an effective advocate at mediation

Advocacy in mediation is a skill distinct from advocacy in court. As an advocate in court, you are subject to detailed regulation.² There is almost no regulation of advocacy in mediation.³

At a mediation, you have a unique opportunity to advocate your client's cause directly to the client on the other side of the dispute. Normally, you are prohibited by the Advocacy Rules from doing this.⁴ Some mediators try to prevent lawyers from acting as advocates.⁵

There is very little material available about advocacy at mediation. Most commentators seem to think that a lawyer who advocates the client's cause at mediation is being '*adversarial*' and therefore is not behaving constructively and is jeopardising settlement prospects.⁶ At least one acknowledges that there are many possible roles for lawyers at mediation, including '*polite advocate*'.⁷

Your client, if properly prepared, will make settlement offers and evaluate settlement offers made to them based partly on the risk of the worst-case scenario. Usually, this is losing in court. If the opposing client is doing the same, then it may be productive to emphasise the strength of your client's case and to create doubt about the strength of the opposing case.

Given this, advocates should not forgo the opportunity to persuade the other client of the merit of their client's case and the weakness of the opposing case.

It is obvious that the type of advocacy used in court is unsuitable for mediation. A different style is called for.

Advocacy in mediation must be adapted to the audience and to the type of dispute. It should be simple, polite and firm.

There is no need to mince words. If credit is in issue in the proceedings and your view is that the credibility of the client on the other side of the dispute would not survive cross-examination, you should say so. You can do this as part of explaining why your client is likely to prevail if the matter goes to hearing.

Use the dynamic of mediation to your client's advantage

Explain to your client that mediations typically follow a pattern. After introductory remarks by the mediator, there will be an initial and often lengthy joint session in which the parties state their positions to the other parties. There may be lots of (often emotional) venting.

During this period, the parties may seem to be moving away from each other rather than towards each other. They may resile from tentative compromises struck earlier. Warn your client not to be alarmed by this process.

Explain to your client that the initial period usually is followed by a period in which the mediator helps the parties isolate the issues that must be resolved, in which these issues are discussed, and in which options for resolving these issues are canvassed.

Explain to your client that there probably next will be private sessions in which the mediator, perhaps robustly, will '*reality test*' the strength of your client's factual and legal position. Warn your client not to be alarmed by this process.

Explain to your client that it will probably not be until after the private sessions have run for some time that settlement offers will be made and exchanged. At this point, the parties will probably start moving towards each other.

As already noted, mediation forces the parties to confront their options and to make hard choices between them. Mediation works because this can impose almost unbearable pressure on parties to settle.

This point typically comes in the late afternoon when, after an exhausting day of negotiation, the defendant puts an offer, says that this is the final offer, and it probably is or is close to the final offer. (The roles are reversed if your client is a defendant.)

At this point, your client has a choice between:

- A. **Money that almost literally is on the table.** It is there for the taking. It is a certainty. But it is far less than your client hoped to get and perhaps not even enough to pay their legal costs, or to repay the mortgage, or to repay the loan from Aunt Maude to fund the litigation.
- B. **The eventual outcome of the proceedings.** This is some time, perhaps far, in the future. It is uncertain. It is hedged about with the inevitable lawyers' qualifications ('I've told you many times that, although your prospects are good, no case is unloseable'). It may be much better than the money on the table. But achieving it will incur the distinct, but difficult to quantify, risk of losing the case, getting nothing and bearing both sets of costs. This may lead to bankruptcy/insolvency.

Mediation works because this point usually is reached after an exhaustive consideration of the merits of the parties' positions and of the options for resolving the dispute, and after exhausting negotiation has narrowed the differences between the parties to the maximum extent apparently possible. In blunt terms: as far as settlement is concerned, this is as good as it is going to get.

At this point, your client must make a terrible choice between a certainty that is much less than was hoped for, and a mass of uncertainties that eventually may produce a much better result but also carry with them the risk of a much worse result. You, no doubt, will give the best legal advice you can, but only your client can make the choice.

If you have prepared your client for making this terrible choice, you can say at the appropriate time,

Remember I told you that a time would come during the late afternoon when you would find the pressure to settle almost unbearable? Well, here it is. Don't lose your nerve. The other party is feeling the same pressure, or worse.

Many clients will find the pressure to settle unbearable and will want to accept the offer. You should be prepared for your client to buckle under the pressure of the mediation. If you have warned your client about the choice they have to make, you can say:

Hang on a moment. The offer you're proposing to accept [put] gives you less [is much more expensive to you] than your best alternative. Remember I explained that you probably would be better off not settling than accepting less than [paying more than] your best alternative. That reality hasn't changed.

It's up to you, but I suggest we discuss the offer for a while before you tell the mediator to accept [make] it. How about a coffee/a walk in the park/a smoke/a square meal/a good night's sleep/adjourning the mediation?'

You should be prepared for pressure on your client from the mediator to accept [put] the offer that you have doubts about. You should be prepared to help your client resist that pressure. Your job is to represent your client and to make sure they obtain the best possible settlement, not to enhance the mediator's 'success' rate.

Ultimately, of course, it is up to your client whether to put [accept] the offer. Only the client can make the choice. Don't be surprised if your client ultimately goes well below [above] the 'bottom line' ['top dollar'] that you were told about in conference.

Document the agreement reached at the mediation

If agreement is reached on some or all issues, you should not let the mediation finish without the parties recording in writing what has been agreed, and signing the document.

A good mediator will insist on this. If the mediator does not, you should, in order to protect your client's interests (and also to protect you).

What is essential is to record the agreement(s) reached, to prevent backsliding, second thoughts and legitimate disagreement about what was agreed.

The document can expressly be legally binding, or expressly not legally binding – i.e., just a memorandum of understanding. The important thing is to formalise what the parties have agreed by recording it in writing.

It is very tempting at the end of an exhausting mediation (especially when there are spouses/children/dogs waiting impatiently for you and/or urgent things to do back at chambers and/or tomorrow's case to prepare) to say to your opponent, 'Just send me a fax tomorrow recording what the parties have agreed, and I'll get my client [or solicitor] to sign it.'

Resist the temptation. This is a recipe for disaster. Instead, draw up a document at the mediation, while everyone still is there and resolved to settle. Drafting the document will flush out exactly what the parties have agreed and also often makes them realise that some extra items also need to be agreed (e.g., time for payment).

The document can be and often is handwritten. If the mediation is taking place in a solicitor's office, someone may offer to get it typed up so that it looks 'more like a legal agreement' or may offer to use their firm's precedent for settlement deeds. Do not accept the offer.

Once people (especially lawyers) are given a typed document, they will think of endless changes and there is no reason not to make them, with the result that you will be there all night. The beauty of a handwritten document is that there is not much space for changes, so the alternative to keeping changes short and simple is to write the whole document out again. Usually, people are too tired to do this.

Lawyers often want to include elaborate releases in the settlement document, or insist on a separate deed of release, or want to use the firm's precedent for a release developed by the senior partner. Resist this. Drafting or analysing these documents will consume a lot of time

and can actually generate ill-will, because the lawyers will speculate about every possible cause of action that the parties may have against each other, in order to make sure that the release covers them.

A release can be very simple. Often, the phrase 'mutual releases' is sufficient in a shorthand agreement.

¹ For example, see *Civil Procedure Act 2005*, section 31.

² *The New South Wales Barristers' Rules*, Rules 16 - 72 (Advocacy Rules)

³ Rule 51 prohibits a barrister from knowingly making a false statement to the opponent in relation to the case (including its compromise). The prohibition on misleading and deceptive conduct in the *Trade Practices Act 1974* and/or the *Fair Trading Act 1987* applies during a mediation despite its confidentiality: *Quad Consulting Pty Limited v David R Bleakley & Associates Pty Limited* (1990-1991) 98 ALR 659.

⁴ Rule 54

⁵ Sir Laurence Street incorporates in his standard mediation agreement an acknowledgment by the parties that they will behave in accordance with an attached protocol. The protocol provides that "[l]egal advisers are not present as advocates ... A legal adviser who does not understand and observe this is a direct impediment to the mediation process". See *"Representation at Commercial Mediations"*, (1992) 3 ADJR 255.

⁶ See, for example, B. Sordo, *"The Lawyer's Role in Mediation"*, (1996) 7 ADJR 20 at 25.

⁷ J. H. Wade, *"Representing Clients at Mediation and Negotiation"*, Dispute Resolution Centre, School of Law, Bond University, at 153. The roles include Kindly Enemy, Point Scorer-sniper, Control Freak, Passive Observer, Uncommitted Procrastinator, Bad Cop and Strategic Intervenor: Id. at 138 - 155.

How many mediators does it take to change a lightbulb?

Well, let's unpack that shall we?

First of all, let's be clear that it isn't the mediator's function to change the lightbulb.

The mediator will explore with the lightbulb how it feels about the on and off nature of its job, its unhappiness at always having to work nights, and its relationships with the other parties, including the new lightbulbs that it feels are a threat to its position.

The mediator will talk to the new lightbulbs, reframing and normalizing their observation that the principal lightbulb is completely out of its box, and identifying that their real issue is that being picked on one at a time constantly undermines their team spirit.

The darkness seems quite hostile to all the lightbulbs and keeps telling them to go and unscrew themselves. The mediator will allow it to vent its anger and express its distress at how it always feels unwanted.

The mediator will help guide the darkness and the lightbulbs, both new and mature, to a solution reflecting their new understanding of each other. Bright sparks will realise that you'll have to be left in the dark now because the final outcome is confidential.

From <http://www.consensusmediation.co.uk/mediationjokes.html>

Why did the mediator cross the road?

I'm sorry, I can't share that information with you unless the chicken authorises me to tell you.

From <http://www.consensusmediation.co.uk/mediationjokes.html>



Should the New South Wales Bar remain agnostic to mediation?

By Justin Gleeson SC

The premise for this article is a generalisation, which may be controversial, that New South Wales barristers, both individually and through their association, have been largely agnostic towards mediation over the last 15 years. In Part 1, I seek to explore why this is so. In Part 2, I argue the case for a fundamental change in attitude by barristers towards mediation. In Part 3, I conclude with some practical suggestions.

Part 1: Agnosticism

Mediation took off in New South Wales and elsewhere in Australia in the late 1980s. Initially there were doubts as to whether it was more than a passing fad, but it must now be recognised as a permanent fixture in our legal system. Virtually every court now has a statutory power to refer parties to mediation, even without their consent. Probably more than a quarter of the fully contested cases in the various court lists are the subject of some form of mediation, usually before trial but now also sometimes before appeal.

However, there is evidence that many of the state's barristers, together with their association, have had a largely agnostic or sceptical attitude to mediation. Some aspects of this are as follows:

1. New South Wales has traditionally had the largest Bar in Australia and arguably the most disputatious. The tradition of strong and vigorous cross-examination, particularly in common law matters, but also in commercial disputes heard in equity, has been a feature of the Bar. Mediation seemed to many barristers as not really a true test of the barrister's skill, and indeed a distraction from the real work at hand.
2. By the early 1990s, as mediation assumed real prominence, the New South Wales Bar was facing threats and challenges to its existence. There was considerable pressure from various sources, including competition regulators and some large firms, to move to a fully fused system of legal practice and to discontinue the existence of an independent referral Bar. One of the important responses to this was that the New South Wales Barristers Rules were substantially overhauled in 1994. A much clearer definition was introduced of what constituted barristers' work. The 'sole practitioner rule' was strengthened and enhanced.¹ This review of the Rules focused heavily on the two core aspects of a barrister's practice: arguing cases in court and providing opinions on how cases would be decided if they went to court. While mediation was not excluded from the definition of barristers' work², it nevertheless was given a minor place in the Rules.
3. Very few New South Wales barristers sought to offer themselves as mediators or to specialise in that area. Perhaps this was because, in New South Wales, the Law Society took the lead in mediation, establishing an ADR Committee in 1987 and running successful Settlement Weeks in 1991 and 1992. By contrast, in Queensland, senior barristers and their association immediately threw themselves into mediation and in particular offered themselves as mediators. There are some prominent exceptions but, as a general rule, in NSW the mediators in most complex disputes were taken from the ranks of retired judges. In other disputes involving family or other like matters, often the mediator came from solicitors' ranks or indeed from specialists trained in psychology who may not have a legal qualification.
4. The Senior Counsel Protocol was implemented in the early 1990s, when responsibility for the appointment of silks passed from the attorney general to the Bar Association. Again, while work done as a mediator or mediation advocate was not excluded from the protocol, it was given a minor prominence. Few barristers who made mediation a specialty obtained silk during the 1990s. This also meant that there was a lack of role models for new barristers attracted to mediation work.

5. Although the Bar Association introduced a CPD program in 2002, mediation was not identified as a separate strand. It is included in the Advocacy strand and there are some seminars there offered. However, it is fair to say that it is not given a great prominence in the programme or in the readers' courses. Anecdotal evidence suggests most barristers would have attended very few, if any, CPD seminars on mediation. Some may have attended external courses on mediation, but again the number is low.

There is a case for the association to obtain more accurate statistics, but I would venture from anecdotal evidence that about one per cent of New South Wales barristers regularly act as mediators; and less than 10 per cent of New South Wales barristers would appear as an advocate in mediations on more than five occasions per year. I would also venture that perhaps more than 50 per cent of those barristers who do act as advocates in mediations have never studied the art of mediation. Rather, they have learnt from doing and watching: not a bad way to learn, but not necessarily a complete education.

There is one final historical matter. For most barristers, mediation was never a part of the university curriculum, nor was there any teaching within legal history courses (to the extent they were part of law curriculum) of the role which mediation has played in the common law tradition and even earlier in the ancient world. A useful recent article by Derek Roebuck, 'The Myth of Modern Mediation'³, reveals that, in pre-capitalist societies, people of high as well as low status invested extraordinary amounts of time in mediation, an investment that proportionately far exceeds the resources devoted to the adjudication of disputes in our society. The article continues with a useful review of mediation in the English tradition from the twelfth century onwards. One particular proponent of mediation was Lord Mansfield. He would regularly attempt to have disputes referred for settlement through arbitration following mediation. The view is expressed by Roebuck that mediation continued into the nineteenth century but was largely hidden from view by lawyers hostile to it. The agnosticism, or worse hostility, of some modern barristers to mediation may in part arise from our ignorance of legal history.

Part 2: Belief

Now is the time for New South Wales barristers, individually and collectively, to fundamentally rethink our attitude to mediation. There are a number of reasons for this.

First, it is here to stay. It will not go away. The last 20 years has demonstrated that mediation is now a permanent fixture within the system and this is reflected in court Rules.

Second, while the adversarial system is familiar and serves very valuable purposes, we must accept that mediation may achieve lasting benefits, for the parties and the community, which the adversarial system may not. Mediation settles disputes at a very high rate. Those settlements are important from various perspectives. Save in unusual cases, a mediated dispute will cost the parties less than a fully litigated dispute and fewer community resources are devoted to the legal system. Chief Justice Spigelman has recently reminded us that, as lawyers, we must take seriously the task of reducing the cost of the legal system or else we will end up like the Easter Islanders,⁴ who cut down the last trees on the island on which their whole society depended.

However, settlements do more than produce a more efficient outcome. A settlement achieved through mediation can serve to rebuild trust and social capital between the disputants and sometimes within a larger group of the community.

Further, as mediators often point out, many legal disputes involve non-zero sum games. Through co-operation the parties are able to resolve

upon a settlement, which results in a higher joint payoff than either could achieve simply by having the matter decided by the court.

Finally, mediation plays a valuable role in managing the risks inherent in litigating a dispute to judgment. Plaintiffs often settle at mediation for less than they might be awarded by the Court because, by doing this, they avoid the risk of failing completely and paying two sets of costs. Defendants settle for similar reasons.

Accordingly, when one thinks of the benefits of obtaining more and earlier settlements - reduced cost, risk management, rebuilt trust and social capital, as well as additional payoffs through co-operation - we ought to accept readily the fundamental public good that can be achieved by mediation.

This is not to deride the adversarial system. Indeed, often the aversion which barristers have to mediation arises because of the stridency with which some mediators' opening comments point out the deficiencies of the adversarial system. There is much which a fully litigated dispute achieves for the parties and for the larger system of law that mediation does not achieve. A reasoned judgment provides a rational basis upon which legal rights have been ascertained and provides the parties with confidence and understanding in the application of law to their dispute. It also becomes the source material from which other parties can be advised upon their rights. If all cases were mediated or arbitrated and none went to court, that would significantly increase the cost and uncertainty lawyers, including barristers, face in providing advice to their clients on likely legal outcomes. Thus the system gains from a strong mediation component, but it can only be a component of a larger system.

Third, from a trade union perspective, there are many excellent barristers who, possibly with some focused training, would be able to achieve gainful employment through mediation, not only as an advocate but also as mediator, where their diaries may currently have some gaps. We have focused much over the last 5-8 years on the destruction of the personal injury bar affected by government reforms in the name of the cost of justice. Of those barristers affected, many have very finely tuned antenna to practical questions of how a judge would be likely to decide a dispute, what would be a fair settlement, and of how to bring the parties together.

I would like to see a very active effort to 'retrain' barristers in this category who, I am sure, would be very effective as mediation advocates and, at least in some cases, as mediators. In every mediation, there at least two parties needing representation. Often, there are more than two. Barristers who can effectively represent clients at mediation thus have a highly marketable skill. We accept that we have to learn how to represent clients in court. The time has come for barristers to accept that they need to learn how to represent clients at mediation. Elsewhere in this edition of *Bar News* is an article on effective representation at mediation. Much more needs to be done along these lines.

Fourth, and related to the third point, there are probably a significant number of barristers aged 50 or more who, after 25 years in practice, are looking for additional challenges and are conscious of the notion of public service. Some of them will never become judges. Some are not ready to become judges for another 5-10 years. However, the skills which they have honed over 25 years through fighting hard cases day in day out, advising on prospects and engaging in face to face settlement, ought to make a number of them eminent candidates as mediator. This is not to argue against the current model where retired judges dominate complex mediations. However, it is to urge that the retired judges should face stiffer competition from highly experienced barristers to perform the role of mediator.

One objection which may be raised to this is a question of independence. The solicitors arranging for the barrister to act as mediator may, on other occasions, be solicitors considering briefing the barrister as advocate in court, or indeed in a mediation. However, I do not think that this is, or should be, a real problem, given the strong professional standards which underlie the Bar and the fact that mediators do not have the power to impose a result on the parties. If we need to have specific seminars in the CPD programme focussing on these questions of independence, that should be done. But I do not think that we should simply yield to the retired judges the entire field of complex mediation on the ground that they have an independence that we lack. After all, retired judges who frequently are retained as mediators by large law firms themselves are open to the perception that they are expected to "produce results" for the clients of those firms.

Part 3: Practice

To make specific the case I have argued for in Part 2, I would suggest the following steps need to be taken fairly urgently by the Bar Association and by individual barristers. Some may be controversial and I accept that further discussion is required before they are adopted:

1. The CPD program should be restructured so that there is a separate mediation strand and every barrister must acquire at least one point in that strand each year.
2. This will require organising many more seminars, lectures and workshops in mediation so that barristers can obtain the necessary points. To the extent this requires assistance from professionals, academics or experts in mediation beyond the voluntary resources of members of the association, a budget should be set for this task. Elsewhere in this edition of *Bar News* is a description of an enhanced CPD curriculum on mediation for 2007-2008 developed by the Bar Association's Mediation Committee. I welcome this development and would like to see it taken much further.
3. A specific matter to be studied through the seminars is the role to be played by the barrister as mediation advocate within the context of mediation. Much work is now being done in England⁵ to identify the particular techniques, approaches and professional obligations to the client which the mediation advocate should adopt. We need to study and think about this more carefully than we currently do. For example, Craig Pollack has pointed out⁶ that the mediator's fundamental goal is to create a framework in which the reality gap between the parties is narrowed sufficiently so that settlement can take place on a realistic basis. It is the aim of the mediator to get the parties to a point, through aggressive reality testing, where they conclude that settlement is the only viable option and it has to take place there and then. This is described as the 'settlement frenzy'. Pollack points out that the mediation advocate has a very different duty from that of the mediator, namely a duty to ensure the client is advised that settlement on the day is not the only option available. This may mean standing up in forceful terms to the mediator. We need to discuss in seminars exactly what our role is in this situation.
4. Another matter to carefully consider through seminars is the role of the opening. Usually the reason the solicitor wants the barrister involved in the mediation is to give a concise but strong 15-20 minute opening which, without the full technicalities of the court opening, nevertheless shows that a powerful case has been assembled and is ready to go to trial. Sometimes there is a process of questioning between barristers as a result of the openings, partly to obtain information from the other and partly to probe weaknesses in the other party's case. We need to think far more closely about the utility of such openings. Often

they seem highly counter-productive. Indeed, what really is at stake here is a rhetorical question. In the court room we know instinctively that the audience we are addressing is primarily the judge or jury. In a mediation, the audience is much more multifaceted. For some purposes it is the mediator; or it could be the ultimate decision maker on the other side; or it could be the key witnesses on the other side who are being tested for the likely cross-examination ahead; or again it could be the solicitors or barristers on the other side who, if persuaded, might advise their clients to moderate their expectations. We need to think much more about who the audience is, which in turn will inform the style of address.

5. We also need to think about what is ultimately persuasive to the audience, however identified. Much research into game theory has identified that when people are being asked to agree to an outcome, fundamental questions of fairness intrude heavily in the decision.⁷ However strong the legal position taken into the mediation, the bargain ultimately being offered has to be one within a range of what the other side considers to be fair. How the range of fairness is identified, probed and tested is a critical skill for the mediation advocate.
6. Although most mediations are about money, very few mediations are solely about money. Even in the most hard fought, complex commercial dispute with many millions of dollars hanging on it, it is sometimes the case that what matters to the other side is not just the money – it may be an apology, it may be a recognition of fault, it may be a rebuilding of other commercial relationships. One of the most critical aspects of a mediation is to identify what the non-money aspects of the co-operative situation are and how to exploit them. This requires particular skills of the mediator but also of the barrister as mediation advocate.
7. Next, we need to think more closely about the different styles of mediation – is it to be an evaluative mediation; is it what is described in England as a med-arb, i.e., where the parties in the mediation at a certain point jointly appoint the mediator as an arbitrator to enter a final and binding decision in lieu of agreement by the court; or some other model. Should the parties determine this, or it be left to the technique of the individual mediator?
8. Also we need to think about timing: when is the best time to refer a dispute to mediation; should it be a fixed time for all matters ahead of the trial or determined according to the exigencies of the case?

Part 4: Conclusion

Now is the time to move from agnosticism to belief and implement it by practice. One way forward would be for a general meeting of the Bar to be called to discuss mediation, and related reform of the CPD programme. This could be assisted by the circulation of some papers in advance prepared by the Bar's Mediation Committee, together with the presence of some experienced mediators both from the Bar and retired judge circuit. We should not let this opportunity go by.

¹ *New South Wales Barristers Rules*, Rule 81.

² Rule 74(d) and (g).

³ (2007) 73 *Arbitration* 1 at 105-116.

⁴ 'Access to Justice and Access to Lawyers' 24 March 2007.

⁵ see the collection of articles in (2007) 73 *Arbitration* 1.

⁶ (2007) 73 *Arbitration* 1 at 21.

⁷ Beinhocker, *The Origin of Wealth*, 2006 at 119-120.

Mediation Committee offers curriculum of CPD seminars on aspects of mediation

For 2007 – 2008, the Mediation Committee of the Bar Association has created a mini-curriculum of CPD seminars dealing with aspects of mediation. The seminars as a whole are designed to cover most aspects of mediation but each seminar is self-contained.

Seminar 1: Introduction to mediation; how to get the most out of the pre-mediation conference; and preparing yourself, your client and your solicitor for mediation

This seminar will be co-ordinated by Graham Barter with the assistance of Peter Callaghan SC and is scheduled for July 2007.

Seminar 2: Mediation in specialised areas – Part 1

This seminar will deal with mediation in family law, de facto law, family provision and discrimination. It will be co-ordinated by Richard Bell and presented in August 2007.

Seminar 3: Native title

This seminar will be co-ordinated by Susan Phillips, and Professor Laurence Boulle of Bond University's School of Law is a speaker. It is planned to present the seminar in September 2007.

Seminar 4: Mediation in specialised areas – Part 2

The second specialised seminar will deal with mediation of retail lease disputes and mediation made mandatory by statute in other areas. It will be co-ordinated by Robert Angyal SC and presented in March 2008 at the Bar Association and also at the Sydney and/or Parramatta mini-conferences. Ms Candace Barron, deputy registrar of the Retail Tenancy Unit, has been invited to speak.

Seminar 5: Enforceability of agreements to mediate, confidentiality in mediation and the obligation to mediate in good faith

This seminar will be co-ordinated by Andrew Colefax SC and will be presented early in 2008 and also at several of the regional conferences organised by the Bar Association.

Seminar 6: Mediation in personal injury cases (including multi-party disputes) and dust diseases claims

This seminar will be presented by Michael McGrowdie at the Orange mini-conference on 29-30 March 2008.

Repeat sessions at mini-conferences

Most of the seminars will be repeated at the regional mini-conferences in 2008:

Seminar 1: Newcastle

Seminar 2: Canberra

Seminar 4: Sydney and/or Parramatta

Seminar 5: Lismore

Seminar 6: Orange (not a repeat)



Constructive mediation

By A W Street SC

Everyone has a different view about the role of mediation in litigation strategy. However, we are all bound by New South Wales Barristers Rule 17A to inform the client of the reasonably available alternatives to fully contested adjudication. In nearly all civil cases, one such alternative is the structured assistance to resolve the dispute through the process of mediation.

To measure the discharge of that duty owed by the barrister to the client there are, in my opinion, three essential criteria:

- ♦ the information must be imparted at the earliest reasonable opportunity;
- ♦ the information must provide a clear understanding of the nature of the mediation process so as to permit the client to make a decision about the client's best interests; and
- ♦ the client must receive adequate advice from the barrister about the prospects of success in litigation and the extent of the particular and inherent risks as to adverse outcome. This enables the client to evaluate their best interests in the context of the available litigious and mediation processes.

Whether these steps are being adequately taken might well in the future require a contemporaneous record by the barrister of the steps taken to fulfil the obligations under rule 17A.



Duty to provide a clear understanding of the mediation process

The most important feature of mediation is that the client is in control. This is in stark contrast to the rights-based outcome, in which the ultimate decision imposed is controlled by the court. Clients who understand this are less likely to be shackled by over-zealous lawyers.

Further, ensuring that the client is conscious of his or her ownership of the process, including determination of what, if any, consensual outcome is agreed, carries with it a breadth of scope for negotiation and resolution unconstrained by a court-imposed, rights-based decision. The client should be informed that the presence of the mediator permits a structured and controlled environment in which to explore the resolution of the dispute. This helps to avoid the particular and inherent risks, as well as uncertainty and delay, in a rights-based court adjudication.

...experienced practitioners skilled in the role of a mediator may well achieve the same outcome as a mediator with judicial experience.

Judicial experience of the mediator

There is a considerable advantage if the mediator has judicial experience, given the role to be played in private session, testing the client's grasp of the spectrum of best, worst or tolerable adjudication outcomes. Moreover an experienced judicial officer may provide the added clout needed to drive home to the client a sound grasp of the particular and inherent risks, as well as to sever any over-zealous control of the client by the lawyers.

Although a mediator with judicial experience does not participate in the mediation process as an adviser, the hypothetical reality checking drawing upon that judicial experience has a didactic and beneficial impact in relation to the client's grasp of the adjudication process. Personal views expressed by the mediator as to the perceived strength or weakness on a merits basis of the issues for adjudication when expressed in private session, can be extremely constructive. Where, however, the mediator expresses any such personal views in joint session, this is, in my opinion, most unfortunate and generally destructive of the mediation as it polarises the parties. The impartiality of the mediator in joint session and abstaining from entering into the well of the dispute from a partisan viewpoint is of the utmost importance to a constructive mediation process.

That said, it remains the position that experienced practitioners skilled in the role of a mediator may well achieve the same outcome as a mediator with judicial experience. I remain of the view that the gravitas of the mediator is of considerable importance. Indeed, in the context of litigation, the process of mediation should, in my opinion, always involve a mediator with legal qualifications. I suspect that legislative changes to ensure that legal mediators have maintained their professional right to practice given the pervasive importance of the process of mediation is not too far away.

The most important part of the barrister's brief opening statement is, to communicate the client's understanding of the alternative processes, their attendance in good faith and their genuine willingness to listen and explore areas of resolution. It is unhelpful to use the opening statement as an adversarial address or an opportunity to intimidate or interrogate. Equally, obstinacy as to understanding the other side's case and sparring on issues rarely creates a constructive atmosphere. The barrister's role should be to advance the client's control of the process, distinguish between commercial and legal issues, provide legal advice, assist in formulating offers capable of acceptance in effectively resolving the whole or desired part of the dispute, and settling / advising on any settlement documentation.

As to the issue of when to mediate, the Hon Mr Trevor Morling QC has said on a number of occasions 'It is never too early to mediate'. I agree.



A mediation miscellany

By François Kunc

Why is mediation indispensable today?

There is much anecdotal evidence of dissatisfaction with traditional adversarial dispute resolution, especially among the commercial community. The main reasons are concerns about costs and delay. In an era where most fields of human endeavour have benefited from reduced labour costs through technology, litigation remains intractably labour intensive and, therefore, expensive. Moreover, technology which has improved efficiency in many enterprises, such as photocopiers, word processing and e-mail, has simply served to increase the amount of grist for the litigator's mill. A famous economic analysis of the performing arts had to grapple with the fact that you couldn't save costs and achieve a satisfactory outcome by reducing a symphony orchestra to one amplified player per part or by only playing every second note. There is a similar irreducibility of labour costs which applies to litigation.

That being said, much of the cost and delay still arises from an unwillingness (no doubt in part driven by concerns of professional liability if no stone is left unturned) to embrace seriously the implications of 'just, cheap and quick' resolution of disputes and the obligations of s56 of the *Civil Procedure Act 2002*. An example of a recent judicial response to this problem is the testing of a 'fast track list' in the Victorian registry of the Federal Court. To encourage mediation is one of the most important ways of facilitating the just, quick and cheap resolution of disputes and reducing costs and delay for clients. Practitioners should not need the encouragement of the *New South Wales Barristers' Rules* to accept that they are doing the right thing by their clients to advise early in relation to mediation and to explore actively its use at all stages of litigation.

Why shouldn't mediation put barristers out of a job?

This question can be answered from two angles. First, it must be acknowledged that the New South Wales culture (unlike, say, Victoria) is for most significant disputes to be mediated by a retired judge. Nevertheless, I suggest there is considerable room for senior members of the NSW Bar to develop expertise as mediators. While even retired judges could benefit from formal training as mediators, the case for having training for senior barristers who wish to be mediators is, in my view, even stronger. This is because they do not exercise on a daily basis some aspects of the mediator's art which are closer to the dispositions and experiences gained through judicial service.

Second, contrary to the position that seemed to have popular currency some years ago, in my opinion the barrister who will ultimately conduct the trial is an essential participant in any mediation. While there are many highly experienced litigation solicitors who can give the client good advice about what might happen at trial, counsel who will run the case is uniquely qualified to provide advice as to possible outcomes if the matter does not settle. That being said, there is far more to a barrister's role in a mediation than advising as to prospects. Hence I strongly support ongoing training in mediation for counsel who are briefed to appear as advocates in that setting.

Should mediation be compulsory immediately upon filing suit (or, where applicable, immediately after the resolution of any urgent interlocutory relief)?

Accepting the truth of Morling QC's dictum that it is never too early to mediate, this is an important question. I have framed it as relating to the period immediately after the filing of suit so that upon service a defendant who might rebuff the invitation to mediation before litigation can be compelled to attend mediation once properly joined.

As I will go on to discuss, different types of dispute are more likely to be successfully mediated at different stages along the road to trial. For this reason I suggest it is not possible to lay down a blanket rule. On the other hand, thought should be given to developing categories of dispute which, *prima facie*, should be the subject of a compulsory mediation before the court permits further steps to be taken after proceedings have been commenced (but excluding disputes where the parties have voluntarily attempted mediation before action). One category might be disputes over a certain value. To allow for the multitude of circumstances, even in such a *prima facie* case, liberty would have to be reserved to a plaintiff to persuade a registrar, perhaps in writing, as to why the matter should not be mediated. In that situation a defendant who wanted an early mediation would have to be given an opportunity to respond.

Otherwise, when do you mediate?

This is a matter for professional judgment. Some disputes are obviously 'ripe' for mediation early in the interlocutory stages, especially where most of the key material is already in the possession of the litigants. Other cases need discovery to have occurred, while others are unlikely to be successfully mediated until statements have been served and parties have 'nailed their colours to the mast'. Some matters may even need a couple of attempts at mediation and, in all cases, participants in an unsuccessful mediation need to be reminded that formal and informal discussions can continue if and when the parties wish.

Assuming the idea of compulsory mediation on filing suit is not acceptable, there is one further question which I wish to pose in the light of the power of many courts to refer matters to mediation even over objection: in relation to matters where mediation has not been attempted, why shouldn't such matters be automatically referred to mediation as a precondition to being fixed for hearing? While space does not permit a reasoned consideration of this question, I suggest it is worthy of discussion.

Position paper or opening statement?

Time is at a premium in any mediation, which, of its nature, tends to be a slow process. Therefore, in my opinion a clear, but concise, position paper setting out a party's opening position is essential. The other useful piece of information which can be imparted in a position paper is that party's own estimate of its likely solicitor and client costs should the matter go to hearing so that each side can be given advice as to its possible costs liability should it be ordered to pay its opponent's costs. In an appropriate case it may even be desirable for a position paper to contain an opening offer.

My experience has been that a well crafted position paper is preferable to an opening statement as a means of informing one's opponents for the purposes of mediation. I am unconvinced about the utility of an opening statement as a means of exposing one's case or emphasising matters already set out in a position paper. Given that time is precious I suggest that the best form of opening statement for most mediations is to assume that the participants have read the position papers and to use the opportunity to set the tone by emphasising the client's realistic approach and willingness to explore alternative mechanisms to resolve the dispute at hand. In many situations it is also then better for the clients, if they are willing and able, to express in their own words their feelings about the dispute. This affirms their ownership of the process and can provide a sometimes very necessary opportunity for catharsis before constructive negotiation can begin.



Observations on a fused profession: the Herbert Smith Advocacy Unit

By David Sulan¹

Herbert Smith LLP is a market leading litigation firm and the first in the UK to establish an in-house advocacy unit. The firm's dedicated Advocacy Unit began in April 2005, with the recruitment of two leading London silks, Murray Rosen QC and Ian Gatt QC. The firm notes that the unit:

...allows Herbert Smith to offer clients a complete litigation service, in which legal teams of solicitors and barristers work together from the outset to prepare and present cases. We believe that, in appropriate cases, this integrated approach improves the efficiency of the litigation process and offers real benefits to clients in terms of the ability to manage cases.

We do of course always offer clients the option of instructing outside counsel and we retain strong relationships with the Bar. A member of our advocacy unit will only be recommended, as one of a number of options, where we believe that that individual is right for a particular case².

On joining Herbert Smith the silks became solicitor-advocates (whilst retaining their non-practising memberships of the Bar), since English barristers cannot practice as partners.

The associate solicitors recruited to the unit work closely with the silks. For associate solicitors in the unit the experience provides an opportunity, in a supervised environment, to improve skills in drafting pleadings and submissions and on occasion to appear in the High Court of England and Wales.

The Advocacy Unit may claim some advantages over the external Bar in the right sort of case. For example, efficiencies in flow of information between the advocate, solicitor and client may be achieved, maximising the focus and direction of a case from the outset which can be particularly important when dealing across time zones with international clients. Herbert Smith uses the Advocacy Unit as a focal point to encourage solicitors to improve their advocacy skills and confidence for court appearances.

The Herbert Smith Advocacy Unit has been in operation for over two years. Since it began it has expanded by adding a leading litigation partner. Other firms have announced the hiring of senior barristers and there is talk of some following Herbert Smith in setting up dedicated in-house advocacy units.

The creation of such advocacy units is, for a number of reasons, a natural step for a large London law firm with a significant international client base.

First, international clients, particularly those from the US and Japan, do not always understand the split profession. It is not uncommon for the client to be introduced to their advocate on the doorstep of the court at the beginning of the case. For the client, having spent the vast majority of the preparation time dealing directly with the solicitors involved, it must be a somewhat strange experience not to have a working relationship with the barrister appearing at the hearing.

Second, the international arbitration market in London is booming and a number of major firms with significant litigation practices have created separate international arbitration groups. The partners in these groups often conduct the advocacy and work as part of an integrated

team in taking the matter through to hearing. The advocacy unit represents, in some respects, an extension from arbitration to litigation of the 'one stop shop'.

Third, UK firms have an eye on their competitors across the Atlantic in the US. A number of US firms have set up offices in London. Of course, in the US, the split profession does not exist and the US firms operating in London will no doubt create trial lawyer departments when they become established in the London market. To maintain their competitiveness London firms will need the same capability as their US competitors.

Fourth, the charging structure at the London Bar has a lack of transparency. Barristers charge a brief fee payable on 'delivery' of a brief before trial. The brief fee is rarely refundable if the matter settles before trial. The brief fees involved represent the bulk of the trial costs and can often be extraordinarily high for heavy commercial cases. The barrister is thereafter usually entitled to a daily 'refresher' for each additional day of the trial.

The brief fee is often the subject of negotiation just before the trial commences at a time when the barrister is already fully integrated into the case. The timing of the negotiations often leaves the barrister (or more likely, their clerk who conducts negotiations on the barrister's behalf) in a strong negotiating position. The Advocacy Unit on the other hand charges at an hourly rate which is far easier to justify and explain to the client. If the matter settles or is adjourned significant costs are not borne by the client.

An advocacy unit for Sydney firms?

Is in-house advocacy an inevitability for Sydney firms? In my view the answer is no; at least not in the short to medium term. The reasons are largely because many of the justifications set out above do not currently apply in the Sydney market.

First, for an advocacy unit to work, the firm must be capable of supporting it. That means the firm must have a significant litigation practice, with the ability to continually refer work to the in-house advocates. That requires a mass of litigation and the right sort of cases. There is no point in the in-house advocacy unit being consumed by a huge piece of litigation that runs for years. The unit is at its best for shorter hearings and mid-sized cases. There are only a few firms in London that can realistically say they have enough of the right sort of cases to make it work. In Sydney, with the smaller market, it is unlikely that many firms would have the mass of litigation and right mix of cases to justify a dedicated unit.

Second, Sydney firms tend not to have the background in international arbitration. The focus on arbitration in London means that firms are geared up to conduct advocacy in-house with many of the partners possessing significant advocacy experience. The leap to provide an in-house capability for High Court litigation was not great. That arbitration platform does not generally exist in Sydney.

Third, there are fewer multinationals litigating in Sydney than in London. The split profession is generally understood by companies and other sophisticated users of legal services that are accustomed to seeing bewigged and robed women and men walking along Phillip St.

Fourth, the charging structure of the Bar in Sydney is very different to the brief fee system in London. There are greater transparency and disclosure requirements on barristers in Sydney compared to their counterparts in London. Moreover, the hourly and daily rates of the Sydney Bar mean that the use of counsel or a counsel team can often be more cost-effective for the client when compared to rates the client pays solicitors.

Finally, it is likely that it would be difficult for Sydney firms to attract members of the Bar to move in-house. In London, barristers tend to move directly into practice after university and Bar Finals without ever having set foot in a law firm. That means the step into a law firm may be seen for some London barristers as an untried career change. In Sydney, it is often the case that barristers have spent years at a firm before making the decision to move to the Bar. The experience of a firm will be well known to these barristers and the move into a firm would not be anything new.

An integrated approach

In my view, although the split profession should not be under threat in Sydney, the experience of London firms provides some worthwhile reminders for those at the junior end of the Sydney Bar. An integrated

team approach with the barrister working closely with solicitors and clients ensuring a good flow of information and ideas will almost always result in a more satisfied client. Such an approach will in turn help to ensure that the Bar remains a relevant and efficient provider of advocacy services for years to come.

¹ I have recently returned to Sydney to start at the Bar having spent the last 3 1/2 years working at Herbert Smith LLP in London. My last 18 months at Herbert Smith were spent in the firm's dedicated Advocacy Unit.

² <http://www.herbertsmith.com/Services/PracticeAreas/Disputeresolution/Advocacyunit.htm>

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Some perspectives on US litigation

By Christopher Withers*

In both the United States and Australia commercial litigation is an exercise in strategy within a framework of procedural rules. But the litigation landscape in the United States is very different to that which exists in Australia, notwithstanding the shared historical origins of the two countries. Many aspects of American litigation are seen as anomalous to outsiders: the constitutional right to a jury trial for civil causes of action worth more than twenty dollars, the absence of a 'loser pays' fee shifting rule and the right to cross examine witnesses outside of the confines of a court are perhaps the best examples. This article outlines some of the author's personal observations about litigation in the Supreme Court of New York and the United States federal courts. It focuses upon those American procedural principles and practices that work well – and might be considered for Australia – and those that do not and ought to be vigorously resisted.

Volume of law

One of the most striking differences between the Australian and American legal systems is the sheer volume of American law. Three hundred million people in the US, living in a highly litigious society, overpopulated by lawyers in need of business, in which the right to one's day in court is an entrenched constitutional principle means that no legal stone is left unturned. The most narrowly tailored LexisNexis search for what one might consider to be an obscure legal concept often produces a vast number of results. One has the strong sense that there are few legal principles that have not been the subject of extensive judicial analysis. That, of course, means an authority may be found in support of most sensible propositions one could argue. The flip side, of course, is that there is invariably authority going the other way.

Pleadings

Civil procedure in federal district court is governed by the Federal Rules of Civil Procedure. Rule 1 of the Federal Rules of Civil Procedure, introduced in 1938, requires federal district courts to construe and administer the rules 'to secure the just, speedy, and inexpensive determination of every action'. There is, of course, an obvious parallel with s56 of the *Civil Procedure Act 2005* (NSW) which states that the 'overriding purpose' of the Act and Uniform Civil Procedure Rules is to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'. The technical rules of pleadings have been abandoned in the federal civil courts. The US Supreme Court has held that the Federal Rules of Civil Procedure 'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to outcome and accept the principle that purpose of pleading is to facilitate a proper decision on the merits'.¹ Under Rule 8(a) of the Federal Rules of Civil Procedure a complaint must contain 'a short and plain statement' of the grounds upon which the court's jurisdiction depends, a claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. The policy underlying Rule 8 is well established:

The statement should be short because unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it, because they are forced to select the relevant material from a mass of verbiage. The statement should be plain because the principal function of pleadings under the Federal

Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial.²

Thus a complaint identifies the parties, the court's jurisdiction and then contains a chronological, narrative and often easily understandable description of the facts upon which the claims are based, followed by a summary of each of the different causes of action alleged.³ This flexible approach to pleadings enables the parties to deal with the key issue presented at that stage – whether the facts alleged adequately state a cause of action upon which relief may be granted. If they do not, the complaint is liable to be dismissed.⁴ Consequently, valuable time and effort is not wasted in debating compliance with technical pleading rules. Also importantly, business people who are the subject of factual allegations can readily understand the pleadings and assist counsel in preparing a defence.

Oral advocacy versus written submissions

As is well known, there is a greater emphasis on written submissions than oral advocacy in US courts than in Australian courts. In the US, written submissions (known as counsel's written 'brief' to the court) are extensive and oral argument is seen as the opportunity for the court to ask counsel questions that have arisen out of a close review of submissions.⁵

In the federal courts of appeal, it is generally assumed that the court will have read counsel's submissions and will be ready to address with counsel the critical issues in the case. Strict time limits on oral argument are rigorously maintained. The United States Supreme Court hears two arguments per day, at 10 and 11am, three days a week during the court term from September through April. Under Rule 28(3) of the Supreme Court Rules, counsel have half an hour for argument. The Rules specifically state that '[o]ral argument should emphasise and clarify the written arguments in the briefs on the merits. Counsel should assume that all justices have read the briefs before oral argument. Oral argument from a prepared text is not favoured'. Exceptions to the rule are unusual: under Rule 28(3) counsel seeking more time for argument must file a formal motion within 15 days of the filing of their written submissions setting out 'specifically and concisely why the case cannot be presented within



the half-hour limitation. Additional time is rarely accorded'. The time limit is strictly enforced by the marshal of the court who operates a light in front of counsel: red indicating time is up. The court issued instructions to counsel state '[w]hen the red light comes on, terminate your argument *immediately* and sit down'.⁶

A similar time limit exists in the New York Court of Appeal, which likewise limits oral argument to a maximum of 30 minutes per party and provides that 'counsel shall presume the court's familiarity with the facts, procedural history and legal issues the appeal presents'.⁷

Many trial court and appellate motions are decided on the basis of the written submissions alone. Whether to hear oral argument on a motion is generally a matter for the discretion of the trial judge in federal district court and state court proceedings. Counsel can request oral argument, but there is no guarantee the court will accede to the request. There is no right to oral argument on a motion seeking leave to appeal from the federal district court to the federal circuit courts of appeal.⁸ Further, the federal courts of appeal have the right to deny appellants oral argument on an appeal if 'the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument'.⁹ All petitions for a writ of certiorari to the United States Supreme Court (the mechanism by which permission to appeal is sought) are decided on the papers alone.¹⁰

As a result of their importance, written submissions in state and federal courts are often comprehensive and lengthy. Because of its brevity, oral argument cuts straight to the chase with little time (if any) for counsel to provide submissions on the background of the case or recount evidence – all of that information should be in counsel's submissions. In the Supreme Court counsel are specifically instructed: *'Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but to present the opportunity to stress the main issues of the case that might persuade the court in your favor.'*¹¹

In trial courts, the length of oral argument is primarily within the discretion of the trial judge, but it would be rare for argument in any case (at least in New York state courts and the federal courts) to extend beyond a matter of hours. Again, the emphasis is upon written submissions. It is becoming more common in interlocutory hearings in federal trial courts or in bench trials for the court to receive from counsel proposed findings of fact and law both pre and post hearing. The pre-hearing submissions outline the evidence obtained through documentary discovery, interrogatories and depositions. The post-hearing submissions concern the evidence adduced at the hearing. Those submissions are written in the terms counsel propose the court adopt and read exactly as the parties hope the judgment will. They also may include counsel's proposed judicial findings as to the credit of important witnesses. Obviously, such submissions are advocacy and do not limit the discretion of the judge one way or another, but they do appear to be popular as an efficient way of assisting the court to marshal the evidence in the case.

The heavy reliance upon extensive written submissions that is an integral part of New York state and federal court practice focuses counsel's oral argument on the critical strengths and weaknesses of

the case and assists the court in doing the same. The key issue in the proceedings is front and centre at oral argument and little time is spent recounting background facts and evidence that can be outlined in detail in written submissions. That facilitates the efficient disposition of cases, particularly those in which the facts are reasonably straightforward or cases in which oral argument adds little to the content of written submissions. Last but not least, reliance on written submissions affords judges more time to prepare judgments.

Depositions in civil cases

Depositions in civil cases are an integral part of the discovery process in the US, together with documentary discovery and written interrogatories, which likewise may be administered as of right.¹² Under Rule 30 of the Federal Rules of Civil Procedure, like most state procedural rules, each party to civil litigation has the power to require a party opponent or potential witness to submit to oral questions outside the presence of the court.

Depositions are taken either during, or at the end of, documentary discovery. A litigant may depose a witness for the other side who seems likely to be knowledgeable about the issues in the case. Such witnesses may be identified through interrogatory requests served on the opposing party, requiring identification of individuals who are knowledgeable about particular factual aspects of the dispute. Alternatively, witnesses may be informally identified through co-operation between the parties.¹³ Both sides exchange lists of witnesses considered knowledgeable on the subject matter and each side selects from the list individuals to be deposed.

While the court-sanctioned taking of witness evidence outside the courtroom may seem like an American anomaly, US litigators regard the entitlement to take civil depositions almost as their birthright. But there is a misconception outside the US that the use of civil depositions is subject to widespread abuse and that plaintiffs are able to use the deposition procedure as a litigation tactic to leverage a settlement by requiring hundreds of witnesses from opposing parties to be deposed, and that such depositions are oppressive and lengthy. While no system of discovery is free from potential abuse, in US federal civil litigation, as in many state jurisdictions, there are tight constraints on the use and availability of depositions that are designed to limit the potential for abuse. Most importantly, no more than ten depositions may be taken by each side absent the parties' agreement extending the number or the leave of the court.¹⁴ There is, therefore, no strategic advantage to be gained in deposing a witness who has little or no knowledge concerning the facts of the dispute and wasting one of only ten available depositions.

Further, the limit for each deposition is seven hours and may only be extended with the leave of the court.¹⁵ Opposing counsel defends the witness and may object, just as they would if the evidence were heard in court in front of a judge. If counsel defending the deposition objects, the witness must still answer the question, unless defending counsel instructs the witness not to answer, for example on the basis of a claim of legal professional privilege or because the question is oppressive, abusive or is otherwise intended to harass the witness. If counsel instructs a witness not to answer, it is possible to telephone a magistrate or judge to resolve the dispute at the time of the deposition.

Otherwise objections to the propriety of questions may be resolved at the trial or hearing. If an objection is sustained, the answer given at the deposition is not admitted into evidence. Consequently, there is also little advantage to asking improper questions, the answers to which will ultimately be inadmissible. A question that is purely intended to harass a witness will not be answered. In short, there is little if anything to be gained, and much to be lost, by deposing the wrong witnesses and asking irrelevant questions.

In addition, many depositions are now videotaped. If examining counsel does not treat the witness with respect and courtesy, then it will be evident at the trial or hearing, when relevant parts of the videotape are played to the court and/or jury.

There are significant advantages to pre-trial oral discovery. First, it reduces the length of trials and reduces the burden on the court system. In fact, civil depositions exist in part to ensure that there are not significant delays in the conduct of jury trials when new or unexpected evidence emerges during the proceedings. A party has the opportunity to cross-examine their opponent's witnesses prior to the trial for a prescribed period about the evidence obtained through documentary discovery or interrogatories and about the key issues in the case.

Once the deposition process is completed, the parties know the key evidence each witness is likely to provide to the court and/or jury. Opposing counsel can ask the witness in court the same questions asked in a deposition and expect to receive the same answers. If the answers at trial are different to those given at the witness' deposition, the witness can be impeached based on his or her prior statements. If a witness has been deposed for a full day, and opposing counsel knows the key evidence to be extracted on cross-examination, the examination will be far shorter and will use less of the court's time. In addition, 'designations' from the key parts of a witness' deposition may be introduced at the hearing as part of the opponent's case in chief (that is, as admissions of a party opponent). Of course, there is nothing to stop counsel asking questions that were not put to the witness in the deposition.

In some cases, litigants agree upon and supply to the court an edited version of a videotaped deposition containing the oral evidence to be proffered by each side at trial. In a bench trial or interlocutory hearing, the court can watch the videotape at its own convenience. In a jury trial, the videotape can be played at a convenient juncture in the trial. The videotape can make a powerful impression: where a witness contradicts earlier evidence given at a deposition, his or her prior inconsistent statements can be played back to the judge or jury in real-time.

Second, depositions enable the parties to more readily ascertain the merits of their respective cases, which enables counsel to give



focused, informed advice to clients on the likelihood of success in the case. Counsel also has the advantage of knowing how well particular witnesses (on both sides) can be expected to perform in court. For better or worse, that knowledge may facilitate the earlier settlement of litigation.

Third, if counsel suspects that critical documentary evidence exists but has not been produced by a party (either deliberately or through oversight), counsel has an opportunity in depositions to ask the witness under oath about the existence of such documents, which can in turn prompt their production. That reduces the likelihood that counsel will be taken by surprise by the discovery of missing evidence during the trial – and thus avoids any corresponding delays.

Fourth, the evidence obtained through depositions can be used as a basis for dispositive motions, most importantly, the motion for summary judgment which both sides usually make upon the completion of discovery.¹⁶

Fifth, depositions eliminate the need for witness statements, which are costly and time consuming to prepare. Moreover, through depositions, the evidence is presented in the witness's own words, and not those of the witness's lawyer.

Finally, expert witness depositions are of particular utility in narrowing the issues in the case. Prior to giving evidence at trial, each expert will have had the advantage of reading and considering the depositions of other experts in the case and will be in a position to agree or disagree with their conclusions. By the time the trial begins, the parties, the experts and the court know the areas in which the experts disagree and that is where the examination of each expert will start.

... with proper controls and constraints, similar to those that exist in US federal civil litigation, provision for civil depositions could be an extremely valuable addition to the civil procedure framework in New South Wales.

In sum, the use of civil depositions in the US is a valuable mechanism for the efficient administration of justice. The advantages pre-trial oral discovery brings to litigation far outweigh its perceived disadvantages (the potential for abuse) and with proper controls and constraints, similar to those that exist in US federal civil litigation, provision for civil depositions could be an extremely valuable addition to the civil procedure framework in New South Wales.

Scope of documentary discovery

The scope and volume of documentary discovery in the US is, in many instances, astounding. Under Rule 26(B) of the Federal Rules of Civil Procedure, '[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.' That provision is interpreted broadly. In large scale litigation between equally well financed litigants, the volume of documents exchanged can number in the hundreds of thousands, if not millions. Discovery in large complex cases is primarily electronic, with multiple disks of documents exchanged between the parties, each of whom use search terms to review the other side's documents. Generally, litigants try to reach an agreement as to the scope of discovery sought and leave disputes to the court for resolution. In federal court, the judge will often refer discovery disputes to a magistrate, who will decide the matter based on the parties' written submissions.

Court-imposed sanctions for non-compliance with a party's discovery obligations, together with a desire to be 'beyond reproach', often prompt attorneys in commercial litigation to simply take an image of the entire 'hard-drive' of a designated group of individuals at the company, likely to have documents relevant to the dispute. The documents are compiled into a database and are then reviewed and produced by a team of junior lawyers working around the clock. Parties often request and the court has the power to order a party to restore, review and produce documents from network backup tapes that exist off-site and are maintained for the purpose of disaster recovery, not litigation.

E-mails can be, undoubtedly, a highly relevant source of evidence in a case. Frequently, they can shed light on the parties' true understanding as to how a contract operates, or the strategic purpose of a course of action that is the subject of litigation, well before litigation is contemplated. One only has to review *the New York Times* to see the number of high profile cases in which the content of e-mails is a key issue. In that sense, finding the critical documents and correspondence is imperative and it may be unsatisfying to rely upon the opponent's search for relevant documents. But the scope of discovery comes at a huge financial cost in the US, it is an inordinate drain on litigants' resources and inevitably brings about delay.

Securities fraud class action litigation

To a foreign lawyer (at least to this foreign lawyer), perhaps the most disturbing feature of the US civil justice system is the manner in which securities fraud class action claims are litigated. Following the stock market crash in 1929, the United States Congress passed investor protection statutes, namely the *Securities Act of 1933* and the *Securities Exchange Act of 1934*. Those acts and the rules promulgated thereunder, provide a cause of action for investors defrauded by corporations through, among other things, false and misleading

public statements about the company's prospects.¹⁷ The statutory regime effectively empowers plaintiffs and their lawyers to act as private attorneys-general, deputising them to seek out fraud cases that resource constrained regulators may not be able to bring.¹⁸ Plaintiffs' attorneys are compensated primarily through contingency fees, usually in the range of 20-30 per cent of the amount recovered. In this regard, securities fraud actions can help deter corporate wrongdoing and can enable investors to collectively recover losses that are too small for individual plaintiffs to pursue, without the need for government action.

Under Rule 23(b) of the Federal Rules of Civil Procedure, a class of plaintiffs must be certified as a class before the action can proceed as a class action. The court must be satisfied that the individual plaintiffs constituting the class have suffered the same kind of injury as the absent class members and that liability and loss causation can be demonstrated by proof common to all class members. In addition, the class must be represented by named representative plaintiffs who are supposed to represent the interests of the class and to instruct the lawyers for the class. The proposed class representatives must pass an 'adequacy' test to determine whether they are sufficiently able to instruct their representatives. That is a low threshold.¹⁹ A basic level of knowledge about the facts of the case and a preparedness to be available to provide high level instructions to lawyers is all that is required. Because the named class representatives often only have a small stake in the outcome of the case, there is little incentive for them to actively monitor their lawyers.²⁰ As a result, class action counsel frequently have significant – if not unfettered – discretion to run the case as they see fit.²¹ High technology companies or bio-techs are often the target of such suits, because their share price is often sustained by predictions about the future value of their products.

In 1995, in response to the widely held view that securities fraud class actions were being abused by plaintiffs' lawyers filing non-meritorious lawsuits, Congress passed the Private Securities Litigation Reform Act²² ('the PSLRA'). The aim of the PSLRA was to reduce the costs that securities fraud proceedings impose on capital markets by creating a series of procedural requirements to make it more difficult for plaintiffs' attorneys to commence and maintain non-meritorious proceedings. Congress wanted to curtail the 'race to the courthouse' whereby class actions were the inevitable result of a decline in a company's stock price with little pre-suit investigation into the merits of the claim.²³ In short, lawyer-driven litigation was supposed to be replaced by client-driven litigation.²⁴

One of the principal reforms adopted by the PSLRA was the creation of new provisions for the appointment of lead plaintiffs and their counsel. Prior to the PSLRA, the lead plaintiff was selected on a first-come, first-served basis. Congress changed the law to require courts to appoint as lead plaintiff 'the most adequate plaintiff', which is (rebuttably) presumed to be the person or group of persons that 'has the largest financial interest in the relief sought by the class'.²⁵ It was thought that the person with the greatest financial interest in the litigation would act like a 'real client' and exert the greatest control over the lawyers.²⁶ The lead plaintiff is then supposed to choose counsel to represent the class,²⁷ but in reality, it is the lawyers that

have brought the lead plaintiff to court and so once selected, the lead plaintiff almost invariably nominates their counsel as lead counsel, subject to the court's approval. The position of lead counsel is highly sought after in any securities fraud class action because lead counsel effectively runs the litigation and is entitled to the biggest share of the financial recovery at the end. There may be more than one lead plaintiff and there may be joint lead counsel.²⁸

The end result of the changes to lead plaintiff provisions of the PSLRA was probably not what Congress hoped or expected. The inevitable race to the courthouse was followed by a race among plaintiffs' attorneys to find the investor with the greatest financial interest in the litigation.

To a foreign lawyer (at least to this foreign lawyer), perhaps the most disturbing feature of the US civil justice system is the manner in which securities fraud class action claims are litigated.

The process is as follows. A company through its management makes a public statement about a product, either in a public filing with the Securities & Exchange Commission, or through other statements made by the company in a public forum. If the company's stock price suddenly and sharply declines, the plaintiff law firms go to work. They trawl through the company's prior securities filings and public statements to try to find any prior public statements that turn out to be wrong or a prediction that failed to materialise and they race to the courthouse. The first plaintiff law firm to find an investor who holds the relevant company's shares and draft a complaint will file a class action on behalf of the investor and those 'similarly situated.' The complaint will allege securities fraud and that the company's officers and directors 'knew or should have known' that the relevant prior public statements were false or misleading, and that the public statements artificially inflated the company's stock price. Then numerous other plaintiff law firms follow – frequently they literally copy the same originating complaint and file it in the name of another investor.²⁹ Then the quest among the plaintiffs firms to become lead counsel begins with the search to find an investor with the greatest shareholding (and potential losses). The firms advertise heavily the fact that they have commenced a suit and invite plaintiffs to contact the firm and participate in the action.

Each of the numerous (often almost identical) complaints will be consolidated into one court proceeding and the court will conduct a hearing to determine who the lead plaintiff and lead counsel should be. Defence counsel is generally not involved at that stage. The process was best described and explained by Federal District Judge Jed S Rakoff of the United States District Court for the Southern District of New York in 2001 in a case called *In Re Razorfish, Inc.*³⁰ Razorfish was a defendant in 13 separate securities fraud complaints 'transparently copied from one another' alleging that the company and its management made false and misleading statements concerning the company's operations that artificially inflated the price of its stock. Three competing motions

were filed seeking to have the respective movants appointed as lead plaintiff and their respective counsel appointed as lead counsel, to conduct the consolidated class action litigation.

Rakoff J observed that 'a frequent accompaniment to the use of the securities class action device is lawyer-driven litigation by which counsel for the putative class seek to realise substantial recoveries for themselves'.³¹ Further, his Honour said, 'the counsel who dominate the securities plaintiffs' bar have developed practices that effectively undercut the goals and purposes of the Reform Act [the PSLRA]'.³² His Honour quoted at length the evidence given at the class certification hearing by counsel for one of the would-be lead plaintiffs concerning the commencement of suit and subsequent competition among plaintiffs' firms for lead counsel status:

People run to the courthouse. They file a complaint. They then publish their notice, which we're allowed to do under the Act, that says our firm has filed a lawsuit, if you're interested in joining, please call us. The minions at the firms then stand by the fax machines and the computers waiting for an inquiry from somebody with a large loss, and when that comes across the wire they jump up and down, they run to the partner, and they say we've got somebody with seven hundred thousand, they look like an institution, they might be an institution, you know, we've got – somebody else over here has five hundred thousand.

So you then have people that think – you have law firms that think we've got a good plaintiff, and we may get control of this case. Then what happens is since everybody knows who the other players are in the game, the firms start to call one another, and then you have a game of chicken, because you have firms that say well, I've got seven hundred thousand, so I think I could beat you because you only have six hundred thousand, and the guy with six hundred says yeah, but I'm gonna go in with Firm C that has five hundred, that's going to give us a million one, so we're gonna beat your seven. And then the guy says well, but aggregation, maybe the judge won't like aggregation, so why don't we just all get together.

And you heard Mr Barroway acknowledge that's really how it works. This is for the lawyers. It's not for the class.

After lead counsel is appointed, they file a consolidated amended complaint and the process of defending the action begins. The defendant will almost invariably file a motion to dismiss the claim contending that the complaint fails to state a cause of action based on the facts as pleaded, or based upon other defences available under the securities fraud legislation. In the event the motion to dismiss fails, discovery begins. The defendant then has the option of opposing certification of the action as a class action under Rule 23(B) of the Federal Rules of Civil Procedure. Finally, the defendant may file a motion for summary judgment, relying on the evidence obtained through discovery. If that is unsuccessful, the process of preparing a case for trial commences.

Defending securities class actions, in the author's experience, rarely has the feel of a quest for resolution of the plaintiff's claims on the merits at trial. Rather, it reflects the underlying quest by plaintiffs' counsel for a favourable pre-trial settlement for the class which secures for counsel the greatest possible recovery of attorney's fees. The conduct of the case is often controlled by plaintiff's counsel with little input or oversight from the client, with whom plaintiff's counsel

will often have sparse contact.³³ In those instances, the case becomes little more than a 'lawyer's playground'.³⁴ In cases of a defendant with limited assets, plaintiffs' counsel relentlessly pursue settlement before available insurance proceeds are depleted defending the action.

On behalf of the defence, the process reflects a desire to rid the company of 'nuisance' litigation which may be perceived as unmeritorious but which, if things go wrong, could potentially bankrupt the company. The risk for the company of defending an action to a jury verdict may be huge and at the end of the day, management may have to decide, for example, whether to pay a \$100 million settlement to the class, (\$30 million of which may go to lead counsel), partly funded by insurance or risk a billion dollar verdict which it could not possibly pay.

One empirical study in 2003 concluded that the available evidence suggests that the PSLRA has not had the effect of decreasing the number of class actions brought, if anything there has been an increase.³⁵ Securities fraud proceedings remain, predominantly, lawyer driven and for the benefit of lawyers, notwithstanding congressional attempts to remedy the situation. In two very recent cases the US Supreme Court has curtailed the rights of investors to commence antitrust class actions against corporations and imposed a higher pleading standard for securities fraud claims. In *Credit Suisse Securities (USA) LLC v Billing* (18 June 2007) the court held that federal securities laws impliedly preclude the application of antitrust laws to investor lawsuits alleging anticompetitive conduct by underwriters participating in syndicates to execute initial public offerings for technology related companies. In *Tellabs, Inc. v Makor Issues & Rights Ltd*, (21 June 2007) the Supreme Court held that the evidence necessary to establish the requisite fraudulent intent in a securities fraud action must be 'cogent and at least as compelling as any opposing inference of nonfraudulent intent'. Justice Ginsburg, delivering the opinion of the court in *Tellabs* observed: 'Private securities fraud actions...if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law' (at 1).

The High Court of Australia's judgment in *Campbells Cash & Carry Pty Ltd v Fostif*,³⁶ gave the green light to litigation funders to pay for and assume control over litigation in which they have no pre-existing interest. Litigation funders in Australia are thus now likely to be in a similar position to US plaintiff law firms to fund and effectively control litigation. When control of litigation is ceded by real parties in interest to third parties and litigation becomes a business, the US example demonstrates the potential for abuse.

It is not that we should necessarily fear litigation funders suborning witnesses, inflating damages and suppressing evidence.³⁷ The potential for harm lies in the fact that litigation funders fight disputes with a profit motive and without regard to the traditional business considerations (reputational risks, for example) and commercial constraints that guide the strategy of a reluctant party to commercial litigation. The risk of losing and having to pay the other side's costs is not a sufficient constraint on the conduct of litigation funders: that risk is something that they must accept as part of the cost of doing business. It is hoped, as the High Court contemplated, that Australian principles governing abuse of process and lawyers' obligations to the court are sufficient to prevent the onset of the kind of abuse of court processes that are a feature of US securities fraud class action litigation.³⁸

Jury trials in civil cases

The elephant in the room for most defence litigators in securities fraud actions, antitrust claims and many other types of lawsuit, is the prospect of a jury trial. Placing the fate of the company in the hands of a jury is a daunting prospect, particularly in jurisdictions recognised (based on their track records) as being unfriendly to defendants, where juries are willing to 'send a message' to corporate America through their verdicts. The notion of burdening jurors with complex commercial cases lasting several weeks if not months, when there may be a perfectly good judge with training and experience in fact-finding available to decide the matter, seems counter-intuitive. But it is the system in the US and it is entrenched by the federal Constitution.

Trial by jury was the only form of trial available in the courts of common law in England until 1854. After that, the law changed to allow litigants to elect to have their case tried by judge alone. Use of jury trials declined in England because litigants preferred to have civil cases decided by judges: in short, jury trials were not being requested.³⁹ By contrast, the availability of jury trials in the US has remained constant since the eighteenth century and has even increased since the advent of the Federal Rules of Civil Procedure in 1938. The difference between the US and English systems has been attributed to different perspectives in those countries on the concentration of government power. It has been said that '[t]he persistence of the civil jury in the United States reflects a distrust of concentrated governmental power'.⁴⁰ That distrust of government power harkens back to the eve of US independence, when 'juries had become a means of resisting the Crown's control over colonial affairs and British attempts to circumscribe jury powers were seen as a further cause of grievance'.⁴¹

The right to a jury trial in civil cases was added to the US Constitution by the Seventh Amendment as one of the Bill of Rights, ratified in 1791. The Seventh Amendment provides: '[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. Rule 38 of the Federal Rules of Civil Procedure states that '[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate'. Those provisions only apply in federal litigation, but the right to a jury in civil cases has been entrenched into the constitution of the states as well.⁴²

The right to a jury trial encompasses more than the common law forms of action recognised in 1791. It includes 'suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone are recognised, and equitable remedies [are] administered'.⁴³ It covers all claims with the exception of those in admiralty and those in which purely equitable relief is sought. It also extends to statutory causes of action created by Congress.⁴⁴ To determine whether a jury trial may be demanded for a particular cause of action, a court must first examine whether the action is analogous to a suit available at common law in England in the eighteenth century, prior to the merger of the courts of law and equity (that is, whether the analogue would have given rise to a jury trial at that time or earlier). Second, the court examines the remedy sought in order to determine whether it is legal or equitable in nature.⁴⁵ While the former inquiry may seem out of place nowadays given how far removed the US legal system is from eighteenth century England, it is

one which the Supreme Court insists upon. Pragmatically, the second inquiry is more important than the first.⁴⁶

The United States Supreme Court has pronounced, on more than one occasion, that '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'.⁴⁷ Surveys of attorneys, judges and the general public indicate that the civil jury maintains widespread support in the US.⁴⁸

There also exists a cottage industry in jury consultants, often with training in psychology, who, for not-insignificant fees, will advise counsel as to the types of jurors counsel should want on the jury, in terms of their background, demographics and the like. They will also prophesise as to a jury's likely reaction to anything put before them in the case, ranging from expert evidence to the colour of counsel's suit in opening argument. For well-funded litigants, jury consultants will arrange mock juries in mock court rooms before a mock judge and counsel will prepare and conduct mock examinations of potential witnesses in the case to gauge the jury's reaction. The mock jurors possess hand response meters through which they record their reaction to the evidence in the case and that information is provided by the jury consultants, with analysis, to counsel in the case. In bench trials, some jury consultants will also offer a psychological appraisal of the judge hearing the case, based on his or her background, writings, and even demeanour in court.

No empirical analysis has been published as to how often jury consultants' predictions are accurate or their recommendations useful. The fact that they continue to earn a healthy living in the US could be a measure of the value of their advice or it could be a product of the fact that some litigants will spend whatever they can to try to gain an advantage, no matter how small, over their opponents. The jury is still out, so to speak.

For as long as the right to a jury trial remains entrenched in the Constitution, the prospect of delivering a complex civil case into the hands of a jury will remain a fundamental consideration in counsel's litigation strategy. No matter how powerful a party's case, the client can best be served with a timely reminder that their fate is to be decided by a group of strangers, the collective wisdom of whom is impossible to predict and that their rights to appeal the verdict (especially on liability), are extremely circumscribed. Upon hearing that advice once again on the eve of trial, the faint-hearted litigant will look for the nearest exit strategy.

The absence of the rule in *Browne v Dunn*

The rule in *Browne v Dunn*⁴⁹ does not appear to have made it across the Atlantic from England.⁵⁰ There exists in some jurisdictions a limited obligation on counsel to impeach a witness with prior inconsistent statements (particularly in criminal trials) but there is no general rule of fairness requiring a witness to be impeached in the way the rule exists here and in England. Instead, counsel may avoid asking impeaching questions of witnesses and can simply ask the finder of fact to disbelieve the witness' evidence based on other evidence adduced in the trial or inconsistencies in the witness' evidence, without giving the witness an opportunity to respond. The absence of such a rule places a heavy onus on counsel to address on re-examination points that opposing counsel has 'set up' but not put to the witness on cross-examination. The Australian and English rule is inherently fairer to the



witness and ensures genuine explanations for seeming inconsistencies in a witness' evidence are not lost because the witness is never given an opportunity to explain them.

The absence of fee shifting

The traditional English and Australian 'loser pays' rule for the costs of litigation does not exist in the US. It was abandoned by the US Supreme Court in 1796 in favour of what is now known as the American rule, by which each party to a lawsuit pays its own attorneys' fees, irrespective of the result.⁵¹ The American rule was reaffirmed in 1977.⁵² There are some exceptions, namely where a fee-shifting statute permits a prevailing plaintiff to recover reasonable attorneys fees. The best known example is s4 of US Clayton Act,⁵³ which permits plaintiffs in antitrust treble damages claims under the Sherman Act⁵⁴ to recover such fees.⁵⁵ In 1994 the Supreme Court reaffirmed that the American rule applies absent express statutory authorisation of an award of attorneys fees.⁵⁶

A prevailing defendant usually only recovers attorneys fees from a losing plaintiff when the plaintiff's case is 'frivolous, unreasonable, or without foundation'.⁵⁷ In addition, Rule 11 of the Federal Rules of Civil Procedure, authorises fee shifting and sanctions against attorneys for commencing and maintaining frivolous litigation or otherwise acting in bad faith.⁵⁸

The difference in treatment of plaintiffs and defendants stems from the theory that awarding attorney's fees to winning plaintiffs encourages individuals to seek relief from the courts when their rights have been violated, compared to a defendant whose rights have not been infringed.⁵⁹ Further, many fee-shifting statutes were enacted to encourage litigation that pursues the substantive goals underlying statutes, including civil rights and environmental laws.⁶⁰ More broadly, the American rule is a manifestation of what is recognised in the US as a 'deep rooted historic tradition that everyone should have his own day in court'.⁶¹

The net result is that lawsuits in the US are 'easy to maintain and tolerable to lose'.⁶² It seems likely fewer lawsuits would be commenced in the US if the plaintiff risked having to pay the attorney fees of the prevailing defendant. The American rule seems appropriate and may be justified where the lawsuit concerns the enforcement of individual rights. But in other instances, such as securities fraud cases, the risk of having to pay attorney's fees may make class members and lead plaintiffs focus on the merits of the claim and cause them to exercise proper oversight over the litigation. There also seems little policy

justification for the application of the American rule when one well financed corporation has sued another and lost. Why should the shareholders of the winning company have to pay what may be the substantial costs of defending unmeritorious litigation?

The absence of an independent Bar

Finally, as is also well known, there is no independent bar in the US. One could spend considerable time discussing the virtues of the Australian/English system versus that of the United States, but it suffices for present purposes to simply convey some American attitudes the author encountered towards our system. There is bewilderment by some, but perhaps envy among others, about barristers' courtroom attire. American attorneys also find it perplexing that a solicitor who has worked up a case from its inception, and gone through the pain of discovery, would then hand the most interesting parts of the case (advocacy) to independent counsel. But more importantly for Australian barristers working with American attorneys, there is a perception among many US lawyers who have worked with barristers in the past (in England, primarily) that they are unreceptive to strategic input from American instructing attorneys. That is particularly problematic given American attorneys are unused to relinquishing any control over the case to independent counsel.

Conclusion

Notwithstanding their shared history, the civil justice systems of the US and Australia have developed along markedly different tracks. Many of the American procedural and substantive rules discussed above are unique products of America's history and are unlikely ever to descend upon our shores. The advent of a securities fraud bar of the kind that exists in the US ought to be vigorously resisted.

On the other hand, at least two procedural rules are worthy of consideration. First, the relaxed pleading standard focuses the court and the parties' efforts on whether the statement of claim adequately states a cause of action, rather than whether the pleading complies with formalistic rules. It saves costs and time. Second, and most importantly, civil depositions are a highly effective mechanism for the efficient resolution of proceedings that benefits both litigants and the court alike. Subject to the implementation of rules to avoid their abuse (as exist under the Federal Rules of Civil Procedure), it is hoped that consideration will be given to their introduction in New South Wales.

* Seven Wentworth. The author practised as a commercial litigator at Davis Polk & Wardwell in New York City from 2001-2007.

I am grateful to Mark Leeming SC, James Watson and Jonathon Redwood for their comments on an earlier draft.

¹ *Conley v Gibson* (1957) 355 US 41.

² *Blakely v Wells*, 209 Fed. Appx. 18; 2006 US App LEXIS 31031 (2nd Cir. 2006) (citations omitted).

³ Under Rule 8(b) defences should consist of a 'short and plain' statement of a party's defences to each claim asserted and an admission or denial of the allegations, or a statement that the party has insufficient knowledge to admit or deny an allegation.

⁴ Rule 12(B)(6) Federal Rules of Civil Procedure.

⁵ The local rules of different state jurisdictions impose page limits on briefs which vary depending on the type of brief being filed and are too numerous to set out here. In federal district court, page limits are usually found in each individual judge's rules. They can vary, but are typically 35 pages for the moving and opposition briefs and 10 pages

for the reply. Page limits can be extended with the leave of the court. Pre and post-hearing briefs often have no page limit. See for example, the local rules of Judge Lewis A. Kaplan, Southern District of New York, at http://www1.nysd.uscourts.gov/cases/show.php?db=judge_info&id=121. For appeals to the federal circuit courts of appeal, the page limit is 30 pages for moving and opposition briefs and 15 for the reply. See Rule 32, Federal Rules of Appellate Procedure.

⁶ United States Supreme Court, *Guide for Counsel* at 5, available at www.supremecourtsus.gov/casehand/guideforcounsel.pdf

⁷ Rule 500.18, Court of Appeals State of New York Rules of Practice (22 NYCRR Part 500).

⁸ Rule 5(b)(3), Federal Rules of Appellate Procedure.

⁹ Rule 34(a)(2), Federal Rules of Appellate Procedure.

¹⁰ Rule 16, Supreme Court Rules.

¹¹ United States Supreme Court, *Guide for Counsel*, op cit n6 at 8 (emphasis in original).

¹² Rule 33 of the Federal Rules of Civil Procedure provides that each party to litigation may serve written interrogatories, no more than 25 in number, on another party to litigation, without the leave of the court. Subject to objections, answers to interrogatories must be provided in writing under oath.

¹³ Rule 30(b)(6), Federal Rules of Civil Procedure.

¹⁴ Rule 30(2)(A), Federal Rules of Civil Procedure.

¹⁵ Rule 30(d)(2), Federal Rules of Civil Procedure.

¹⁶ Summary judgment is available under Rule 56 of the Federal Rules of Civil Procedure 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In federal civil litigation, there is a policy in favour of summary judgment in appropriate cases, where the requirements of Rule 56 are satisfied. See e.g., *Freeman v Continental Gin Co.*, 381 F 2d 459 (5th Cir. 1967).

¹⁷ The private damages action for securities fraud has been implied by the courts from § 10(b) of the *Securities Exchange Act of 1934* (15 USCS § 78j(b)) and Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5). The basic elements of a private federal securities fraud action for publicly traded securities include: (1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as transaction causation; (5) economic loss, 15 USCS. § 78u-4(b)(4); and (6) loss causation, i.e., a causal connection between the material misrepresentation and the loss. See *Dura Pharmaceuticals, Inc v Broudo et al*, 544 US 366 (2005).

¹⁸ M A Perino, *Did the Private Securities Litigation Reform Act Work?* 2003 U Ill L Rev 913 at 918.

¹⁹ The named plaintiff and the attorneys who seek to represent absent class members or shareholders must also demonstrate that: (a) the named plaintiff's claims are 'typical' of the claims of the absent class members or shareholders; (b) the named plaintiff has no interest in the outcome of the action that is antagonistic to, or in conflict with, the interests of the absent class members or shareholders; (c) the named plaintiff is not subject to unique defences that could become the focus of the litigation to the detriment of the absent class members or shareholders; and (d) the named plaintiff's attorneys will be able to fairly and adequately represent the interests of the absent class members or shareholders. The court's determination that a lawsuit may proceed as a class action or shareholder derivative action is referred to as the 'certification' of the action.

²⁰ See generally J R Macey and G P Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U Chi L Rev 1 (1991).

²¹ It has also long been suspected that certain lead plaintiffs participating in class actions were receiving from plaintiff law firms special payments for agreeing to serve as class representatives (such payments are illegal under New York law) or otherwise had special relationships with plaintiff firms which created disincentives for them to actively monitor their attorneys. On 18 May, 2006, the leader of the plaintiffs' bar, Milberg Weiss Bershad Schulman LLP and two of its name partners were indicted for paying undisclosed 'kickbacks' to individuals from 1981-2005, in return for their agreement to act as lead plaintiffs. Milberg Weiss was charged with obstructing justice, perjury, bribery and fraud.

See indictment at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/classactns/usmlbrg51806ind.pdf>

²² 15 USC § 78u-4(a)(3)

²³ M A Perino, *op cit*, n. 18 at 915

²⁴ *Aronson v McKesson HBCO, Inc.* 79 F Supp 2d 1146, 1152-54 (ND Cal 1999)

²⁵ 15 USC § 78u-4(a)(3)(B)(iii)(1)

²⁶ *In Re Razorfish, Inc. Securities Litigation*, 143 F. Supp 2d 304 (SDNY 2001)

²⁷ 15 USC § 78u-4(a)(3)(B)(iii)(II)(v)

²⁸ *Weltz v Lee*, 199 F.R.D. 129, 2001 WL 228412 at *4 (S.D.N.Y. 2001)

²⁹ In 2002 Milberg Weiss Bershad Hynes & Lerach LLP began asserting copyright over its complaints so that they would not be copied verbatim and filed by the firm's competitors for lead counsel status in the same proceedings. Milberg Weiss reportedly sent cease-and-desist letters to firms it says copied its complaints and threatened litigation on account of losing lead counsel status to copycat firms. See B H Kobayashi and L E Ribstein, *Class Action Lawyers as Lawmakers*, (2004) 46 *Ariz. L. Rev.* 733 at 738.

³⁰ *Securities Litigation* 143 F Supp 2d 304 (2001).

³¹ *Razorfish*, 143 F Supp 2d at 306.

³² *Razorfish*, 143 F Supp 2d at 309-10.

³³ The degree of contact between plaintiff's counsel and the lead plaintiff may be ascertained through the class certification process under Rule 23(B) of the Federal Rules of Civil Procedure. The lead plaintiff must demonstrate their preparedness to oversee the litigation, which may have been going for a long time before the certification process starts. The proposed lead plaintiff may be asked under oath about their level of oversight at the class certification deposition and plaintiff's counsel may be required to produce a log of privileged communications between counsel and the client.

³⁴ *Razorfish*, 143 F Supp 2d at 311.

³⁵ M A Perino, *op cit*, n18 at 913.

³⁶ (2006) 229 ALR 58.

³⁷ See discussion in *Fostif* (2006) 229 ALR at 82 [93] per Gummow, Hayne and Crennan JJ.

³⁸ *ibid*.

³⁹ R L Marcus, *Putting American Procedural Exceptionalism in a Globalized Context* (2005) 53 *Am J Comp L* 709 at 712-13.

⁴⁰ Yeazell, *The New Jury and the Ancient Jury Conflict*, (1990) *U Chi Law Forum* 87, 106.

⁴¹ O G Chase, *American 'Exceptionalism' and Comparative Procedure*, 50 *Am. J. Comp. L.* 277 at 290 (citing Jeffrey Abramson, *We, the Jury* (1994) at 57-95).

⁴² For the state of New York, see *New York Constitution*, Article I, section 2 and *McGurty v Delaware*, 158 NY Supp. 285 at 287 (4th Dept 1916) (the Constitution of the State of New York 'preserves in the parties a right to trial by jury in each instance where such right existed prior to

the adoption of the Constitution. (Const. art. 1, § 2.) This right still obtains, and there is no power in the Legislature to take it away.'

⁴³ *Parsons v Bedford*, 3 Pet. 433, 447 (1830).

⁴⁴ *Tull v United States*, 481 U.S. 412, 417 (1987).

⁴⁵ *Pernell v Southall Realty*, 416 U.S. 363, 378 (1974); *Tull v United States*, 481 U.S. 412 at 417-18 (1987).

⁴⁶ *Granfinanciera, SA v Nordberg*, 492 U.S. 33, 42 (1989), n4.

⁴⁷ See *Dimick v Schiedt*, 293 U.S. 474, 486 (1935); *Beacon Theatres Inc v Westover*, 359 US 500, 501 (1959) and *Chauffeurs, Teamsters and Helpers Local No 391 v Terry*, 494 US 558 (1990).

⁴⁸ See collection of surveys discussed in Hans, 'Attitudes Toward the Civil Jury: A Crisis of Confidence?' in *Verdict*, (Robert E. Litan ed., 1993) at 248. See also G L Priest, 'Justifying the Civil Jury' in *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* at 20-21 ('Among the various mechanisms and institutions of American democracy, there are two it seems unthinkable to criticize: the right to vote and the system of trial by jury, both civil and criminal').

⁴⁹ (1893) 6 R 67.

⁵⁰ There appears to be only one reported case in which the rule in *Browne v Dunn* was applied in the U.S. It was a 1914 decision of the Surrogate's Court of New York, New York County and concerned the disputed will of a testator who perished on the Titanic. *In Re Smart*, 84 Misc. 336 (1914).

⁵¹ *Arcambel v Wiseman*, 3 US 306 (1796) is frequently cited as the first case to recognise the general rule that attorney fees are not recoverable absent specific legislation permitting an award. See R. Stanley, *Buckhannon Board and Care Home, Inc. v West Virginia Dept. of Health and Human Resources: To the Prevailing Party Goes the Spoils and the Attorney's Fees!* (2003) 36 *Akron L. Rev.* 363; Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *Law & Contemp. Probs.* 9, 11 (1984).

⁵² *Alyeska Pipeline Serv. Co. v Wilderness Society*, 421 US 240 (1975).

⁵³ 15 USC § 15.

⁵⁴ 15 USCS § 1.

⁵⁵ See also, e.g., *Civil Rights Attorney's Fees Act* (1976), 42 USC § 1988 and *Fair Housing Act* (1990) 42 USC 12101.

⁵⁶ *Key Tronic Corp. v United States*, 511 US 809 (1994).

⁵⁷ *Christiansburg Garment Co. v EEOC*, 434 US 412 (1977).

⁵⁸ Rule 11, which came into force in 1983 in response to widespread concern about the problem of frivolous litigation, requires attorneys to refrain from commencing litigation for improper purposes, to be candid with the court and to perform a reasonable investigation of the law and facts regarding all papers submitted to the court. Sanctions are mandated if those obligations are not met.

⁵⁹ Because costs do not follow the event under the American rule, there is no equivalent to the security for costs rule in New South Wales under UCPR, r 42.21. In some states and federal jurisdictions, local court rules provide for the payment of security for the defendant's costs and expenses, including attorney fees, where there is a good chance that the defendant will ultimately succeed in proving that the plaintiff is prosecuting action in bad faith and that the defendant will be unable to recover expenses for bad faith prosecution against a non state resident plaintiff. See e.g., *A. & M. Gregos, Inc. v Roberatory* 70 FRD 321 (1976, ED Pa).

⁶⁰ *R Stanley, op cit*, n51 at 363.

⁶¹ *Martin v Wilks*, 490 US 755, 762 (1989).

⁶² N H Klausner, *The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility* (1986) 61 *NYUL Rev* 300 at 302.

Anything to disclose?

By Arthur Moses and Bruce Miles

All practising barristers have recently renewed their professional indemnity insurance. The NSW Court of Appeal recently considered the meaning of an exclusion clause relating to 'known circumstances' in a barrister's professional indemnity insurance: *CGU Insurance Ltd v Porthouse* [2007] NSWCA 80.

Background

In May or June 2000, the barrister was briefed to advise in relation to a client who had been injured while performing work pursuant to a community service order. It became known that amendments to the Workers Compensation Act would commence on 27 November 2001. The barrister did not advise of the need to file a statement of claim prior to 27 November 2001.

The client's claim against the State of New South Wales was successful at arbitration and the Crown applied for a re-hearing before the District Court. The client was again successful before the District Court and the Crown appealed to the NSW Court of Appeal. The Crown's appeal was successful with a verdict for the defendant.

The client subsequently commenced proceedings in the District Court against the solicitors and the barrister for negligence. The barrister was found to have breached his duty of care by failing to advise his client of the need to commence proceedings prior to 27 November 2001.

The barrister had cross-claimed against his insurer who had denied liability on the basis that known circumstances were excluded from the policy, being

any fact, situation or circumstance which: ... a reasonable person in the Insured's professional position would have thought, before this policy began, might result in someone making an allegation against an insured in respect of a liability, that might be covered by this policy

The proposal form was completed on 30 May 2004 and the policy began on 30 June 2004. At this time, the Crown's appeal to the NSW Court of Appeal had been lodged and submissions filed. The barrister knew that if the Crown's point was correct, the client would lose his case. The appeal was not heard until 19 July 2004 and the decision was handed down on 27 August 2004.

In relation to the negligence action, Judge Balla held that the insurer had not shown that, at 30 June 2004, a reasonable person in the barrister's professional position would have thought that the client might make an allegation against him in respect of a liability which might be covered by the policy.

The appeal

The issues before the Court of Appeal were (1) whether the test posed by the exclusion clause was objective or subjective, and (2) whether, on the facts, the insurer had established that a reasonable person would have considered that there is a reasonable possibility that an allegation might be made.

All three judges held that the test was an objective one. Both Hodgson JA at [31] and Young CJ in Eq at [52] held that examining the subjective views of the insured and asking if they were unreasonable was a permissible exercise to the extent that it assisted the court in considering what a reasonable person in the insured's professional position would have thought. Hunt AJA held at [97] that the test was solely objective and in forming a view as to whether the test was met does not consider at all the subjective views of the insured.

Each judge reached a different conclusion as to whether Balla J was in error in concluding that the insurer had not established that a reasonable person would have considered that there is a reasonable possibility that an allegation might be made.

Hodgson JA simply concluded at [33] that he was not satisfied that Balla J had erred and found some support for this by considering at [34]-[35] whether a reasonable person would have issued a notice to their existing insurer of facts that might give rise to a claim, bringing into effect section 40(3) of the *Insurance Contracts Act 1984* (Cth).

Hunt AJA reached the opposite conclusion, holding at [97]-[98] that Balla J had erred in applying the wrong test and the Court of Appeal should make its own finding of fact. His Honour noted at [102] that if the client was unsuccessful in the Crown's appeal, he would know that this was due to the failure of his solicitors and barristers to commence the proceedings before 27 November 2001.

Accordingly his Honour was of the opinion that, while the Crown's appeal was still pending, the reasonable person in the barrister's professional position would have contemplated the real possibility that the client would, at the very least, make an allegation of negligence against his barrister.

Young CJ in Eq agreed with Hodgson JA in the result, but for different reasons. His Honour appears to hold at [56]-[57] that Balla J erred in finding that the test was not entirely objective. If her Honour had fallen into error in this regard, it did not affect the result as he would have reached the same conclusion.

Summary

For those of us at the Bar not specialising in insurance law, this case is a good illustration of the nature of a 'claims made and notified' policy such as our professional indemnity insurance. The dissenting judgment of Hunt AJA is that on 20 May 2004 when the barrister completed the proposal form, he should have answered yes to the question 'Are you aware of any circumstances which could result in any claim or disciplinary proceedings being made against you?'. That answer would have the effect that the new policy would not cover claims arising out of those facts.

However this then raises the question as to what a barrister's obligation is to notify his insurer under a then current claims-made policy. In that respect Hodgson JA made some useful observations at [35]:

A finding that a reasonable person in the position of the respondent would have thought that there existed circumstances that might give rise to a claim means that such a reasonable person would have believed it appropriate to give notice as contemplated by s40(3) under any existing claims-made policy. And while I think a reasonable person in the professional position of the respondent may well have believed it appropriate to give notice under s40(3), I do not think it can be said that such a person would have believed it appropriate to do so.

It is apparent from this reasoning of Hodgson JA that if there are circumstances that may give rise to a claim, the prudent approach may be to give notice of those circumstances under the current policy, bringing into effect s40(3) for the *Insurance Contracts Act 1984* (Cth). This would avoid the potential for time consuming and unnecessary litigation between a barrister and his or her insurer.

This case is a warning to barristers to err on the side of caution in notifying your current insurer, prior to the expiration of cover, of any facts and circumstances that may give rise to a claim.

Some reflections on Supreme Court judges of the 1940s

On 1 February 2007 the Honourable J P Slattery AO QC spoke at the Supreme Court Judges' Dinner. The following is an edited version of that address.

It is a great personal pleasure to be able to accept the Chief Justice's invitation to speak tonight of my own reminiscences of judges of the Supreme Court.

In August 1988 when I retired from the court at the age which former chief justice, Sir Leslie Herron called 'the age of statutory senility', I was recalled immediately from what Justice David Hunt then called 'the mothball bench' to sit as an acting judge and royal commissioner to enquire into matters connected with the former Chelmsford Private Hospital and mental health services. However, a more serious event was to follow. The authoritative *Law Almanac* declared in 2000 that I had died on 12 October 1999. At the power and direction of the present chief justice I was 'resurrected' in a subsequent *Law Almanac*. I hope to maintain the status quo for some time.

As it is almost sixty five years since I was admitted to the New South Wales Bar there are many judges of this court about whom I could reminisce. I thought it could be of interest and on safer ground for me to refer to judges in my earlier years in the law.

My relationship with Sir Frederick Richard Jordan KCMG and other judges of his era provide obvious subjects. This is especially so in the case of Sir Frederick. Most judges present tonight have probably had the need at some stage to read his judgments published in the State Reports between 1934 and 1949. If so, you would have great respect for his legal learning, his judicial excellence and his superb style of writing judgments. Also, most would have heard stories about his general demeanour in public but very little about his private life to which I will devote the greater part of my address. I will also speak briefly about several judges of his era who were not mentioned by Tom Hughes AO QC in his address last year.

Any study of judges of this period requires brief reference to the conditions then prevailing.

At the outbreak of the Second World War in September 1939 Australia was emerging from the Great Depression of the 1930s. Only people living in this decade can understand fully the dreadful and devastating effects the Depression had on our nation and its people.

When I became associate to Sir Frederick in June 1943, the NSW Bar comprised approximately 34 silks and 255 juniors of whom approximately one-third were engaged in defence service. One of the younger silks then was Garfield Barwick KC (Chalfont Chambers). His successful challenges to the validity of the National Security Regulations brought him into prominence. He was a most persuasive counsel who appeared in all courts and all jurisdictions from the Court of Petty Sessions (now the Local Court) to the Privy Council. He possessed the great ability to present succinct submissions in court in a pleasant conversational style which seemed to appeal to judges. He was never verbose in his presentations to the court. He always



The Hon John Slattery AO QC

came quickly to his main points and when he was satisfied the court had understood his submissions he resumed his seat. Later he served as president of the Bar Council and along with Ken Manning (later Manning J) and others he was instrumental in acquiring the land in Phillip Street for the building of Wentworth Chambers.

He embarked upon a political career in the 1950s as a member of the House of Representatives and held several ministerial portfolios. He was appointed chief justice of the High Court of Australia in April 1964 on the retirement of Sir Owen Dixon PC GCMG OM.

In the 1940s barristers' chambers were located in Phillip Street between Hunter and King Streets. The only buildings remaining today in that section are the APA Building on the corner of Martin Place and Phillip Street and the adjacent old 'Sun' newspaper building.

In June 1943 the Supreme Court comprised the chief justice and 10 puisne judges who had chambers in the old Supreme Court building and the Hyde Park Barracks buildings. The chief justice occupied chambers adjacent to the Banco Court. Justices Davidson, Halse Rogers, Street, Owen, Maxwell, Edwards and Herron also had chambers in this building, while justices Nicholas CJ in Equity, Bonney and Roper had chambers in the barracks building. The salary of the chief justice was then £3,500 (\$7,000) pa while the salary of a puisne judge was £2,600 (\$5,200) pa. When I was appointed to the court in January 1970, my salary was approximately \$17,500 pa.

Sir Frederick arrived in Australia at the age of five, with his parents from England. He was educated at Sydney Boys High School. On leaving school he was employed in the NSW Public Service until 1907 during which time he graduated in the faculties of Arts and Law (second class honours). He practised at the Bar, mainly in equity while lecturing in several subjects for many years at the law school, taking silk in 1928 and marrying in the same year.¹ On 1 February 1934 he was sworn-in as chief justice. He was appointed lieutenant governor in 1938.

Sir Frederick presented very differently in his public and his private life. He was seen publicly by the legal profession in the 1940s as a cold and chilling person. A high pitched voice, thin-rimmed glasses and a small grey moustache added to the severity of his public presentation. When walking in public, he looked straight ahead seemingly not observing

anything on either side. He also presented as an aloof figure in court where he was well respected and feared for the questions he asked to elucidate or destroy a submission.

In and away from chambers with family and friends, he was a much different person. He was quietly spoken, of calm disposition, kind and relaxed but not much given to expressing emotion. Outside this scene and in public, he was less relaxed and appeared almost ill-at-ease at times.

At a gathering in the Banco Court on 8 November 1949 to pay tribute to Sir Frederick, Acting Chief Justice KW Street spoke of the private man that so few knew:

He was a reserved man and an undemonstrative man. He did not wear his heart upon his sleeve; but beneath the outward form he was intensely human and we, his brethren who came closely in contact with him, knew also the man of kindly nature and innate courtesy, of broad sympathy and tolerant understanding, who lived behind the scholar and the lawyer.²

Sir Frederick maintained unrelenting self-discipline in his working life as a judge. In my three years with him he did not take holidays away from Sydney. He spent a good amount of his court vacations in chambers, reading and noting up recent law reports and publications and noting-up textbooks. He was given all appeal books a week or more prior to the scheduled hearing date in the full court. Without any pre-hearing submissions from counsel he prepared in many cases a pre-judgment often in shorthand from which he was able in many appeals to give an extempore judgment or to form the basis of a judgment which he would dictate to a court reporter soon after the completion of the appeal.

By modern standards the life of a chief justice in the 1940s was one of startling administrative simplicity. Sir Frederick was not provided with a car as part of his office. On most working days he travelled to and from the court by tram from Vaucluse. He used this time to read foreign language classics. In the late afternoon, usually around 5.15 - 5.30pm, he left chambers and boarded a tram in Queens Square to travel to the terminus at the western end of King Street for the purpose of being assured of a seat for his return journey home.

Sir Frederick's obvious courtesy and respect for his associate's own time was greatly appreciated. He never called upon me or even accepted my offers to undertake tasks outside my normal working hours. On those days when Sir Frederick and I were in chambers at the same time during vacation, my offers to do any messages for him or to purchase his lunch, were always very courteously rejected. He would subsequently go out and do his own shopping.

Under rationing provisions pursuant to the National Security Regulations, Sir Frederick was entitled to a specified number of petrol ration coupons per month which were delivered to him. It was my duty to receive and sign for them. On taking them to Sir Frederick he usually retrieved any unused coupons – quite often all the month's quota – from a drawer and destroyed them in my presence.

When he was the lieutenant governor exercising all the powers of a governor, occasions arose when he asked me to select one or two bottles of wine from the Government House cellars for an official

dinner party at his home. It was not unusual for one or both to be returned to the cellars.

Surprising as it may now seem, in a time of actual war, security measures to protect the chief justice and judges were virtually non-existent. Elderly sheriff's officers attended in the full court when in session and for limited periods around the court building. It was not uncommon for the officers to fall asleep in court and occasionally to snore and receive judicial attention. There was also a resident court keeper who kept several beehives in the chief justice's garden. Otherwise there was no court security at night.

The chief justice's chambers were actually then easily accessible to anyone entering the building from King or Elizabeth streets. On one occasion, a man found his way to my room adjacent to the chief justice's room to air a grievance and a desire to speak with the chief justice. After considerable attention and persuasion I directed him to the appropriate authority to deal with his complaints. Later the same day I received a telephone call from an officer of that authority, informing that this man had duly arrived and had threatened him with a knife.

Even more surprising to current citizens, security at Government House at this time was no better. Apart from a police officer who manned the main gate and patrolled the grounds day and night there was in fact no security at all.

Sir Owen Dixon, when retiring from the High Court in 1964, said that one tragedy in the life of that court was the failure of the Commonwealth Government of the day to appoint Sir Frederick to it.

In the 1943-1946 period Sir Frederick presided in the full court and Court of Criminal Appeal, sitting generally with Davidson, Halse Rogers until his death in 1945, and Street JJ. In certain types of appeals, e.g., equity, divorce, a judge sitting in the relevant jurisdiction was called up.

It may have intrigued some of you as to why it was that Sir Frederick never sat on the several appeals in the celebrated case of *Hocking v Bell*. Ordinarily it would have been expected that the chief justice would do so in such a case. His personal friendship with the defendant, Dr Bell, was the reason for this. The case which commenced in January 1941 ultimately took almost seven years to determine.

Sir Frederick's patience was often tried, but his understanding nature prevailed. By 1943 Mr CE Weigall KC was an elderly and very deaf solicitor general. When he appeared for the Crown in the Court of Criminal Appeal he often spoke very loudly as his instructing officer conveyed to him in writing a question from the bench. Typical responses from Mr Weigall were 'what do they want to know that for?', 'that's trite law' and 'that's nonsense'. Sir Frederick remained mute awaiting a response to the court's question.

Sir Frederick also asserted the independent role of judges. To many of you I expect that the following incident may be familiar. Before travelling to a circuit sittings in Grafton with Sir Frederick, I applied to the accountant of the Department of Attorney General for the approved daily rate of £7.10 (\$15.00) to cover accommodation with a private dining and sitting room and meals for the chief justice, the tipstaff and myself. On return from the circuit sittings, the accountant wrote to me requesting an account as to how the daily allowance had been spent. I showed the letter to Sir Frederick. He said 'Don't they know it is my allowance. Tell them I have no intention of accounting as to how I spent my allowance.' I carried out instructions. Nothing further was ever heard of the matter. As a judge I always followed Sir Frederick's example in this matter.

Travel to and from circuit courts in the 1940s was generally by train. Before departure from Central Station, Sir Frederick and staff were met there by the station master who escorted us to a reserved compartment (a sleeping one where appropriate). Apart from occasional conversations during the journey, Sir Frederick read Italian, German or French classics pausing from time to time to consult a dictionary and make a notation in the book.

The life of a chief justice in the 1940s was quite monastic. On arrival at a circuit town Sir Frederick was met by a senior police officer, either a superintendent or an inspector, and escorted to a police vehicle for travel to an hotel where, with some difficulty for the proprietor, he was provided with a room for private dining, a lounge room and a bedroom. On the return journey, the Central Station master met him at the train and escorted him to his car.

During circuit sittings I accompanied Sir Frederick on walks around the town – always without any escort or security. When discussions during those occasions precipitated a recall of a poem or classic work he had read, a recital of a poem or work would often ensue. He had an excellent recall of works he had read. These occasions demonstrated his great ability to relate a good story, recite a poem at length and his dry sense of humour.

In the 1940s a considerable amount of court time was expended in appeals by way of the prerogative writs, prohibition, mandamus, certiorari and statutory prohibition, mainly involving the National Security Regulations. In many of his judgments Sir Frederick dealt severely with them.

Sir Owen Dixon, when retiring from the High Court in 1964, said that one tragedy in the life of that court was the failure of the Commonwealth Government of the day to appoint Sir Frederick to it. Sir Owen then added something about Sir Frederick that has always seemed odd to me and not a sound insight into Sir Frederick's personality or legal outlook. He said: 'This highly scholarly man and very great lawyer eventually took some queer views about federalism. But I do not think he would have taken them if he had been living amongst us'.³

There was a view abroad in the legal folklore of the 1940s and even later that Sir Frederick was a states rights supporter and opposed to Commonwealth rights. Much of this view appears to be due to the views he expressed about the National Security Regulations during the World War II years.

Sir Frederick never discussed with me his views on federalism or state rights. I have thought about this question over the years. I think that his judgments concerning Commonwealth delegated legislation through the National Security Regulations resulted solely from his interpretation of these regulations, his strict requirement for regulations to be drafted with complete clarity and precision, especially in cases affecting the civil rights and liberties of the individual. In argument it was clear that he was strongly opposed to 'sloppy' and imprecise drafting. It must have been painful for him as an Australian judge to make such adverse decisions at a time when Japanese forces were carrying the war to the Australian mainland. In my view he made his decisions on his conscientious interpretation of the law irrespective of whether they were made in peace or in war time. Nothing he said either privately or in the course of argument in court indicated he was moved by any other doctrines.

To him, the rule of law and due process were not suspended during a war. No doubt, if the said regulations had been drafted without ambiguity and with lucidity he would have upheld them. I, therefore, respectfully do not agree with a view that Sir Frederick's decisions were based on a preconceived opinion of federalism or state rights.

Sir Frederick was always friendly with and most accessible to other judicial officers. High Court Judge Sir George Rich, who was then in his eighties, telephoned and also called upon Sir Frederick at regular intervals. He was always available to members of the Supreme Court, either in person or on the telephone. Occasionally, a member of the District Court called upon him. I well remember Judge Frederick Berne calling on Sir Frederick to lodge a complaint about a group of drunken and rowdy soldiers kicking in the door of the sleeping car of the train conveying him to Sydney from Narrandera. He was received and listened to with much patience.

His social life was confined to formal receptions and dinners at Government House and dinners with close friends at his home. Although he was a member of several clubs, he never seemed to use them. There were then no judicial conferences, legal conventions, seminars, Bench and Bar dinners, or bar and solicitors functions requiring his attendance, e.g., the Law Society's opening of law term dinner.

Sir Frederick took good care of his health by modern standards. He enjoyed swimming at Nielsen Park at Vaucluse in summer and sword fencing with a Captain Stewart in the city. Often when he returned to chambers after fencing, usually about 5.30, he looked as though he had experienced vigorous exercises.

Sir Frederick never discussed religious matters with me, except when he expressed his doubts about whether he had the requisite religious qualifications to be the godfather at the baptism of a friend's child years previously at the same Catholic Church where Margaret and I were married in 1946. He and Lady Jordan honoured us by attending our wedding. He avoided discussing political issues and maintained only formal meetings with politicians. An exception was with the Honourable Reg Downing MLC, acting attorney-general in the absence of the Honourable CE Martin KC on war service. Sir Frederick seemed to have a good rapport with him.

With the departure of the governor of the state, Lord Wakehurst, in June 1945, Sir Frederick assumed that office during the interregnum. This was not expected to be a long period. He did not take up residence at Government House at all. However, the house was kept open with a restricted domestic staff, an aide-de-camp, a private secretary and a chauffeur. I was appointed his private secretary. The official secretary resided in an adjacent building. Sir Frederick used the house for late afternoon receptions, levees, occasional official dinners, especially for formal calls by diplomatic and consular members of foreign countries and distinguished visitors to the state, mostly high-ranking British and American military officers. Executive Council meetings were held in the chief secretary's building in Macquarie Street and all official documents were signed by him either at Government House or the Supreme Court.

Because of Sir Frederick's judicial pre-eminence there has been a regrettable tendency for accounts of his life to overlook other judges of the period.

Sir Frederick carried out the dual duties of governor and chief justice including attendance at formal public functions, e.g., Anzac Day ceremonies, the opening of the Graving Dock by the Duke of Gloucester, special church services, etc. His gubernatorial duties had minimal effect on his court work.

Sir Frederick was not a horse racing enthusiast. During my two years as his associate he never visited a racecourse. However, later when fulfilling his vice-regal duties he attended Royal Randwick on special days as a matter of duty. This required him, his staff and guests to sit in a small open vice regal enclosure about one metre in height situated in the large public stand, with members of the public closely surrounding the enclosure and again without any security. He was not a 'punter', only occasionally sharing a five shillings tote bet with Alexis Albert, an aide-de-camp or with me. However, he had a good knowledge of the various methods of betting. He never followed a race with binoculars and during a race it was not unusual to observe him looking in the opposite direction to the winning post as the horses approached it. He also sashed the winners of the main races.

Sir Frederick wore good quality suits mainly tweed and a grey felt hat which was old and well-shaped to meet his tastes. He never wore a Homburg hat which was fashionable for men in that era. On commencing his interregnum, he was prevailed upon to buy a new felt hat which he wore for a short time until one day his old one reappeared at Government House and remained first choice.

Delay in the appointment of a governor to replace Lord Wakehurst was of considerable concern to Sir Frederick and the subject of many cables between the governments of New South Wales and the United Kingdom. I was not privy to them, but it was reported at the time that the respective governments were unable to agree on an appointment. It was thought that the British Government wanted an

English person, while the state government wanted an Australian for the office. His niece informed me that Sir Frederick had declined the offer of an appointment. The *Sydney Morning Herald* reported on 26 February 1946 that it was rumoured Sir Frederick had informed the premier, Mr WJ McKell that he wished to be relieved of the office of lieutenant governor as soon as possible. Finally, after almost fourteen months interregnum, a consensus was reached with the appointment of Lieutenant-General Sir John Northcott, then commander of the British Commonwealth Occupation Forces (BCOF) in Japan following its surrender in August 1945. When Sir John Northcott was sworn in as governor of the state at Government House by Davidson J on 1 August 1946 Sir Frederick was happy to devote himself once more solely to court duties.

Sir Frederick's health began to decline from 1946 and it was not aided when in August 1947 he was knocked down in Elizabeth Street Sydney by a bicycle. According to his niece, he had planned to take an overseas holiday on his retirement which was overtaken by his death on 4 November 1949 at the age of 68 years.

Because of Sir Frederick's judicial pre-eminence there has been a regrettable tendency for accounts of his life to overlook other judges of the period. I will speak now briefly about some of them. Another outstanding judge in 1943 was the Senior Puisne Judge Colin Davidson, who had been a member of the court since February 1927. His judgments and reports as a royal commissioner are testimony of his judicial qualities. Except for a short history by his sister Phyllis Davidson very little has been written about him.⁴ Miss Davidson recorded that their father, a Mudgee solicitor, had been a classmate at the West Maitland High School with Samuel Griffith (later Sir Samuel Griffith, first chief justice of the High Court). She also claimed that he was the first graduate of the Sydney University Law School to be appointed to the Supreme Court. He was quietly spoken, always courteous, patient and easily accessible. I found this to be the case when I was reporting full court judgments for the *State Reports* and *Weekly Notes* in the 1940s. In what was almost an item of judicial uniform during this period he wore a Homburg hat. He was highly regarded by his judicial colleagues and members of the Bar.

In 1945-1946 when the coal industry was experiencing considerable industrial turmoil Davidson J, who had acquired great knowledge of the industry over several years was again called upon to conduct a royal commission into that industry. His report was well received.

Following the death of Professor Archie Charteris in late 1940 and the retirement of Professor Sir John Peden, from the law school in 1941, Davidson J, then a member of the Sydney University Senate, and two fellow members of the Senate, Justice Sir Percival Halse Rogers (chancellor) and Sir Henry Manning, were outvoted in their stand to defer any permanent appointments to replace Charteris and Peden until after the war. After their wise counsel was ignored, all three resigned from the Senate.

In the 1943-1946 years Davidson J sat regularly in the full court. He wrote excellent judgments, sometimes in agreement with and at other times in dissent from the chief justice. The *Law Reports* from 1927 to 1948 are a record of most of his leading judgments. I feel that they have never received the full recognition which they deserved, no doubt due to the leading judgments of the chief justice. Like Sir

Frederick he was dedicated to the study and practice of the law and his judicial office. Like other judges of his era he took no part in any public affairs or undertakings. He retired from the bench in November 1948 (not 1949 as appears in the *Law Almanac*). He was knighted in 1952 and died in 1954.

Justice Percival Halse Rogers was the third most senior member of the court in 1943 having been appointed in 1928. I remember him as being a rather rotund figure. It is recorded he had been a Rhodes scholar studying at Oxford University. He was also chancellor of Sydney University from 1936 to 1941 when he resigned as mentioned earlier. He sat mostly in the full court. He was always alert and courteous on the bench and generally relaxed. He died suddenly in office in October 1945.

Ernest David Roper was appointed a judge of the court at the age of 36. He was the judge of the Land and Valuation Court in 1943. Later he was appointed chief judge in Equity. Roper J was one of the more regular visitors to Sir Frederick in chambers. They had a firm friendship. Their respective spouses were close friends. Roper J who was about six feet in height walked with a measured and purposeful gait. He had the reputation of being dispassionate and judicial but almost to the point of being remote. He was always courteous and patient in court rarely interrupting proceedings. This was not always appreciated by counsel who were thus unable to assess the judge's likely thinking. He also had the reputation of being a brilliant

Another judge of the time who is not much remembered now was Henry George Edwards, who had come to the Supreme Court from the Industrial Commission of New South Wales. He was a judge of the Supreme Court from 1940 to 1952, sitting in Divorce. When other judges of the court who had been involved in earlier hearings of *Hocking v Bell*, or who had been excused from sitting due to friendship with the defendant, Edwards J was called upon to preside at the re-hearing with a jury in 1944. In fact he had no recent experience in conducting common law trials. The hearing occupied 36 days, resulting in a verdict for the plaintiff for £800. Any apprehension that may have been felt about his lack of recent experience in civil hearings proved ill-founded. Successive appeals against the verdict were finally dismissed by the Privy Council which referred to his Honour's careful summing-up.⁵

Another judge of the 1943-1946 years was Harold Sprent Nicholas (1938-1948), chief judge in Equity and grandfather of Henric. My meetings with him were infrequent. His chambers (now demolished) were located at the rear of the barracks building. He called on Sir Frederick at intervals, but communications were mostly by telephone. He also sat in the full court mostly with Sir Frederick or Davidson J. I remember him as a tall gentleman who was courteous. Unlike justices Davidson, Owen and Street, who generally wore Homburg hats with dark suits, Nicholas J was seen in a grey felt hat whose brim was even more wavy and distorted than Sir Frederick's.

In 1965 the recently elected Coalition government established by legislation the Court of Appeal with a president as its head and next most senior judge after the chief justice, and six appellate judges. The existing full court was abolished. It was the first court of its kind in Australia. The new court in itself was not so controversial, but it became so when the names of the first judges nominated for the court were announced.

mathematician. Although I never saw it myself, it was often said he engaged himself with mathematical problems during court hearings. From time to time he was called to sit in the full court. He died in office in June 1958.

Reginald Schofield Bonney KC, who practised in patents, trademarks and copyright matters – a rather small jurisdiction in the 1930s – was appointed the judge in Divorce in August 1940. He was a quietly spoken 'old worldly' gentleman who had a keen sense of the dignity of his court and who conducted it with the utmost decorum and adherence to protocol. He was always courteous to members of the profession, litigants and witnesses. He also sat as a member of the full court in divorce appeals.

An incident which was the subject of comment at the time illustrates the judge's keen sense of judicial dignity. It occurred when he was being driven in his car by his tipstaff to a circuit sittings of the court at Newcastle. On arrival at the boundary of the City of Greater Newcastle his vehicle stopped and he refused to proceed without a police escort into that city. There he waited its arrival.

In 1943, the junior judge was Herron J who was appointed in February 1941. I had the great pleasure of being sworn-in by him as a judge in February 1970. He was a competent civil and criminal trial judge with twenty-one years judicial experience when he was appointed chief justice in 1962 following the resignation of Dr HV Evatt as chief justice. He was an avid sportsman and he also held the presidency in numerous sporting bodies while a judge, e.g., Australian Golf Club, NSW Rugby Union and the Cricket and Sports Ground Trust.

This gregarious and very well-known judge had the ill-fortune to serve part of his time as chief justice in one of the most disruptive periods of the court which had serious and long term repercussions for relationships within the court.

In 1965 the recently elected Coalition government established by legislation the Court of Appeal with a president as its head and next most senior judge after the chief justice, and six appellate judges. The existing full court was abolished. It was the first court of its kind in Australia. The new court in itself was not so controversial, but it

became so when the names of the first judges nominated for the court were announced.

Judges had always taken precedence in order of seniority on the bench. The elevation of Wallace J, a member of the court since March 1960 to the office of president and a junior member of the court to many judges, especially the senior puisne judge, Sugerman J, created a chasm in the bench. Relationships and friendships were strained, if not shattered. Several judges would not attend formal events in the Banco Court if certain members of the Court of Appeal were in attendance. When I was sworn in as a judge in February 1970, a member of the court then with whom I had read on commencing practice in 1946 and a few other disaffected judges did not attend. All had communicated with me to explain their absence.

The extent of the chasm was further demonstrated by a small but important arrangement within the court. A room, formerly a witness room for the Banco Court, was provided as a robing room for Wallace P when he sat in the Banco Court or No 1 Court, then used as the President's Court, thereby allowing him to avoid contact with other judges in the consultation room.

With the retirement of Wallace P in January 1970 and the appointment of Bernard Sugerman JA as president, there was the basis for better relationships within the court although a few judges still maintained strong opposition to some members of the Court of Appeal and would never sit en banc with them.

Bernard Sugerman, who had been my lecturer at the Sydney Law School in the 1930s in contracts and torts, had appeared regularly for the Commonwealth Government in the full court and the High Court, especially in appeals challenging the validity of National Security Regulations.

He was elevated to the Commonwealth Arbitration Court in 1947 before accepting an appointment later in the same year to the Supreme Court as a judge in the Land and Valuation Court. He held that office until 1961 when he transferred to the equity jurisdiction.

Sugerman P, respected highly by his colleagues, was a kind and generous man who accepted with good grace and dignity being passed over as the first president of the Court of Appeal. It was not unusual for him to deliver, both at first instance and in the Court of Appeal, an extempore judgment for an hour or more, with frequent references to law reports, evidence and exhibits. In delivering his

lectures and judgments he had the habit of moving his jaws and mouth in a way which gave the appearance he was chewing on his thoughts before delivering them in a clear but ponderous tone. He was hardworking always approachable and ready to advise and assist his colleagues. He made a great contribution to the court and the law as his many judgments attest.

Gordon Wallace P (later Sir Gordon) who had practised first as a solicitor in Albury came to the Bar in 1928 where he established a big practice in appellate courts and in equity and in liquor matters. As a judge in 1960 he sat in the common law jurisdiction before being elevated to become the first president of the Court of Appeal over many of his more senior judicial colleagues. As mentioned earlier this appointment precipitated a deep division among members of the court, strong undercurrents and lack of co-operation and harmony. It was a trying time for all judges including Wallace P.

I have touched briefly upon the lives of only a few former judges of the court. From my enquiries at the Supreme Court Library, there is a dearth of material available about judges of this court. Maybe this is the way former and current judges want it! However, I think not. Former judges including myself and probably current judges tend not to acknowledge the importance of providing, maintaining and keeping an up-to-date personal history for the court. This could be a future challenge for the court and its judges.

¹ *Australian Dictionary of Biography*, vol 9 (1891-1939) pp 522-523.

The Australian Encyclopaedia, vol V p 145.

Portraits of the Chief Justices of New South Wales (1824-1977), by J M Bennett pp 43-45.

² (1949) 49 SR. For a further tribute to Sir Frederick: see the foreword by Sir Lionel Lindsay to the publication of Sir Frederick's personal views on many subjects under the title 'Appreciations and parallels' (1950) Supreme Court Library Rare Books Section. Sir Frederick's comments therein which were apparently written for his own edification provide excellent reading.

³ (1964) 110 CLR pxi.

⁴ Supreme Court Library 923.43 Bay 900.

⁵ *Hocking v Bell* (1947) 75 CLR 125 (Privy Council).

Mary Gaudron portrait takes rightful place in the Bar's art collection



The latest addition to the Bar's rich collection of portraiture was unveiled at a formal ceremony in the common room on 21 February. President Michael Slattery QC described the painting as 'a truly remarkable work, which will become one of the enduring public images of Mary Gaudron throughout Australia'.

The Hon Mary Gaudron QC, former High Court judge, was joined by artist Sally Robinson at the unveiling. The Hon Justice Ian Harrison, a former president of the Bar Association, crowned the evening's honours by presenting Mary with her certificate of life membership of the organisation.

Perhaps the most striking and unusual feature of the painting is the screen-printed wording from section 75(v) of the Australian Constitution: that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. It was, Mary said, unique among the constitutions she had studied and the provision which ensured that there could be no repetition of Guantanamo Bay under the Australian legal system.



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Bashful wins the 2006 Great Bar Boat Race



On 18 December 2006 the annual Great Bar Boat Race commenced from the traditional starting point at Shark Island. A fleet of 33 competitors, spread across a number of divisions, negotiated the harbour course under the careful eye of the officials from the Cruising Yacht Club. The favourable sailing conditions allowed all competitors to enjoy Sydney Harbour at its best. Once again the Bar Association would like to thank Thibault de Polignac and his colleagues from Thomson Legal and Regulatory for their generous support of this event. In a close fought race Roger Hamilton SC and the crew of *Bashful* took overall honours. The prize giving ceremony was conducted on Store Beach, Dennis Wheelahan QC presenting the prizes to the winners under the careful supervision of Hayden Kelly SC. Profits from the event have been donated to the Indigenous Barristers' Trust Fund.





Bench & Bar Dinner 2007

On Friday, 11 May 2007, more than 650 members of the Bar Association and distinguished guests attended the annual Bench and Bar Dinner, which took place for the first time at Sydney's Hilton Hotel.

Everyone was treated to a visual display featuring notable events from the year past and sometimes quirky photographs of leading members of the Bar. This was followed by more traditional entertainment, with speeches from 'Ms Junior', Sandra Duggan, 'Mr Senior', Peter Garling SC and the guest of honour, the Hon Michael McHugh AC QC.



Michael Slattery QC



Jodi Steele, David Wilson, Toni Berberian



The Hon Sir Gerard Brennan AC KBE and Anna Katzmann SC



James Stevenson SC and Philip Durack SC



Left to right: Michael Slattery QC, Peter Garling SC, Sandra Duggan, the Hon Michael McHugh AC QC



Sophie York, Kate Traill, Rhonda Bell



'Mr Senior' Peter Garling SC



Guest of Honour, the Hon Michael McHugh AC QC



Justin Gleeson SC, Cameron Moore, Robert Dick, Sera Mirzabegian, Carol Webster



Sophie Walsh, his Honour Judge Toner SC, Erin Kennedy, Elizabeth Olsson SC



'Ms Junior' Sandra Duggan

Readers 01/2007



Top row, left to right

Elizabeth Picker
Alan Conwell
Michael Staunton
Terry Mehigan
Craig Simpson
Lyndon Reid
Rohan Higgins
Anthony Robinson
Sean O'Brien

Third row, left to right

Greg Horan
Jennifer Chambers
Clifford Ireland
Georgina Wright
Huw Baker
Michael Seck
Kellie Stares
Julie Taylor
Houda Younan

Front row, left to right

Sophia Beckett
Reg Graycar
Fenja Berglund
Eva Elbourne
Nicola McGarrity
Phoebe Arcus
Julie Veloskey
Carl Boyd
Spiro Tzouganatos

Second row, left to right

David Sulan
Larissa Behrendt
Jamie Darams
Angela Petrie
Paul Folino-Gallo
Patrick Rooney
David Mackay
Nicholas Furlan

Fourth row, left to right

Jonathan Cohen
Darrell Barnett
Daniel Moujalli
Sophie Callan
Angela Ketas
Craig Lambert
Jan Alewood
Lynda Davids

Absent: Justin Williams

A paler shade of white

By Keith Chapple SC

How do you think you'd feel?

Forty years ago you wrote a pop single that did it all. Number one in the UK. Number five in the United States. It sold 6,000,000. It was a monster.

But it kept on going – forever. It's on every compilation ever made. And it has now received the ultimate accolades – it's the music in a Nissan ad and can be downloaded for a mobile phone ring tone.

Then someone else comes along in the twenty-first century and says 'I wrote it'. Or more correctly, 'I wrote it as well and I want a credit and some of the money'.

This was the background to Justice Blackburne's judgment in *Fisher v Brooker and Onward Music Ltd* [2006] EWHC 3239 (Ch) late last year.

A Whiter Shade of Pale was one of the most successful singles of the sixties. Recorded by Procol Harum it was released in 1967 to universal acclaim. The writers of the song until December 2006 had always been regarded as lyricist Keith Reid and music writer Gary Brooker. In, with respect, an erudite and well written judgment, Justice Blackburne found that the plaintiff Matthew Fisher, the Procol Harum organist, was the co-author of *A Whiter Shade of Pale* and a joint owner of the musical copyright. He awarded him a 40 per cent share of future earnings.

In an extraordinary case there were two amazing features.

The first was, of course, that it had taken Matthew Fisher almost 40 years to stake his claim. There was apparently a conversation in 2003 between Brooker and Fisher [referred to at paragraph 79 in the judgment] where Fisher seemed to talk himself out of any real claim to earnings. The next year, after what proved to be very valuable advice, lawyers' letters were exchanged and a short time later the case was up and running. The colour must have drained from Gary Brooker's face when he took the call from his solicitor in 2004 telling him that Fisher had started proceedings.

The second feature was that during the course of the hearing, equipment was provided in the courtroom for people to play on and illustrate their musical contributions.

The judgment sheds valuable insight on the rights of those involved in the sort of collaborative effort that goes into the construction of many pop hits.

There seems no doubt that Reid and Brooker wrote what Mr Justice Blackburne called 'the song' – Reid the words and Brooker the music. The song is a very different thing to the end product, 'the work' that is 'A Whiter Shade of Pale' as performed by Procol Harum, the smash hit. Of major importance is the very distinctive organ part on the record.

It seems that Gary Brooker called on Matthew Fisher in early 1967 after seeing an ad in *Melody Maker*. Fisher appeared to be one of the few people in England with his own Hammond organ and was advertising his services with it. At that stage Brooker was able to play a far more basic version of the song himself on a piano for Fisher, who went on to become one of the main members of Procol Harum with Brooker for many years.

A short time after Brooker and Fisher's first meeting, Procol Harum rehearsed in school and church halls in the English countryside, 'inventing' and 'improvising' with the song as they cut it down from its original 10 minute length to its final four minute form. Integral to the end result was Fisher's contribution to the work. In essence, it seems that the original song as written by Brooker had touches of JS Bach's *Air on a G String*. On the final recording, Fisher's tweaking of Brooker's song and his own contributions to the striking organ part, said to be inspired by a choral prelude again by Bach *Wachet auf, ruft uns die Stimme* (Sleepers awake, the voice is calling), were seen by the judge as elements which qualified him for the title co-author.

The judge noted [at para 38] that Keith Reid's view when interviewed in 1982 seemed to be fairly straight forward, namely

that it was Matthew Fisher who wrote the organ part.

I must have heard the record as much as anybody else and it's perfectly clear that the most dominant feature of it is the organ part. Dominant features are not unusual in pop records. The opening chords of *Gloria*, the relentless guitar riff in *The Last Time* and the start of *Eagle Rock* spring to mind as well. There are plenty of other examples.

One major revelation in the judgment was that apart from Matthew Fisher and what Mr Justice Blackburne described as a 'languorous drum beat', there were in fact other musicians playing on the recording, including Brooker himself on piano. I defy anybody to hear them, that's how good the organ part is.

Because of the protracted history over the decades since 1969, Mr Justice Blackburne had to consider other issues such as acquiescence, laches and estoppel. As for estoppel, he provides a useful application of what was referred to by Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 151 outlining what must be established by a party who seeks to set up an estoppel and the need for detriment.

The end result is that the plaintiff now has 40 per cent of the future of *A Whiter Shade of Pale*. For Fisher, it is vindication.

So that was the music side of *A Whiter Shade of Pale*. What about Keith Reid's impenetrable lyrics I hear you ask as you wander through your playing cards?

Well, there's only one response to that: there is no reason and the truth is plain to see.



Matthew Fisher, (C) the organist in the 1960s British pop group Procol Harum, arrives at the High Court in London, 13 November 2006. Photo: AFP Photo: Leon Neal / NewsPix

Max Beerbohm's *Dulcedo Judiciorum*

If the first qualification of a commentator is a misanthropic or vicious streak, Max Beerbohm fails. He is too self-deprecating, his barbs too gentle, altogether, he takes a view that the role of the critic is not to criticise, but to inform and to humour.

Among his essays is 'Dulcedo Judiciorum', found in a collection first published in 1909, *Yet Again*. Its interest lies in the author's perception of the court as theatre, including his comparison of the styles of Sir Charles Russell and Sir Rufus Isaacs. At a century's distance, we may be inclined to think that all advocates prior to television tended either to Thomas Erskine or to Edward Marshall Hall.

Beerbohm was a noted critic, and had the impresario Henry Beerbohm Tree as an elder half-brother. The latter counted among his achievements the natural fathering of Carol Reed, director of *Oliver!* and *The Third Man* and the stepfather of the holder of the only female role in *Dr Strangelove*, and of Peter Reed, in turn father of Oliver.

The following is the essay as was, but for some section heading and paragraphing to soothe the televisual reader. As a semi-literate barrister of the twenty-first century, my Latin is of the canine variety, but I think '*Dulcedo Judiciorum*' means something like 'The sweetness of judges'. He was a wit.

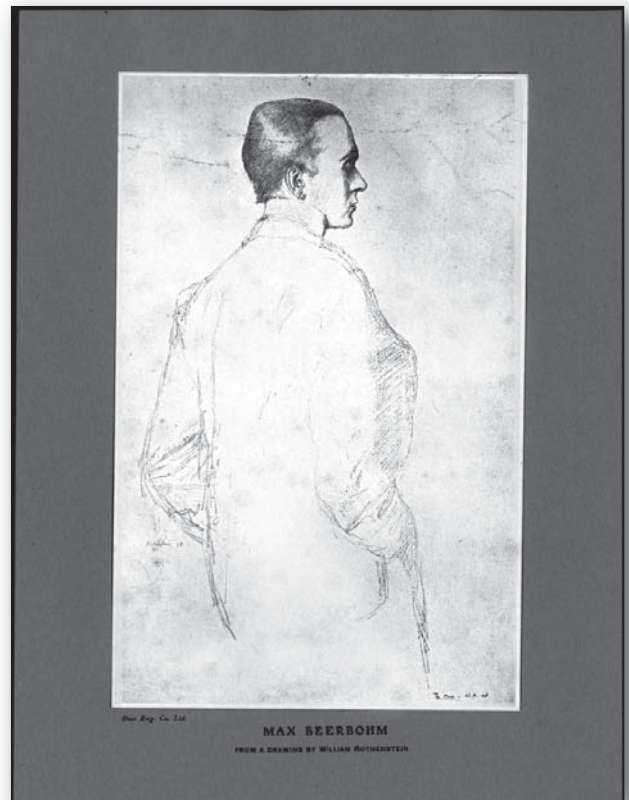
David Ash

The study of fellow creatures

When a 'sensational' case is being tried, the court is well filled by lay persons in need of a thrill. Their presence seems to be rather resented as a note of frivolity, a discord in the solemnity of the function, even a possible distraction for the judge and jury. I am not a lawyer, nor a professionally solemn person, and I cannot work myself up into a state of indignation against the interlopers. I am, indeed, one of them myself. And I am worse than one of them. I do not merely go to this or that court on this or that special occasion. I frequent the courts whenever I have nothing better to do. And it is rarely that, as one who cares to study his fellow-creatures, I have anything better to do. I greatly wonder that the courts are frequented by so few other people who have no special business there.

I can understand the glamour of the theatre. You find yourself in a queerly-shaped place, cut off from the world, with plenty of gilding and red velvet or blue satin. An orchestra plays tunes calculated to promote suppressed excitement. Presently up goes a curtain, revealing to you a mimic world, with ladies and gentlemen painted and padded to appear different from what they are. It is precisely the people most susceptible to the glamour of the theatre who are the greatest hindrances to serious dramatic art. They will stand anything, no matter how silly, in a theatre.

Fortunately, there seems to be a decline in the number of people who are acutely susceptible to the theatre's glamour. I rather think



Portrait of Max Beerbohm, from a drawing by William Rothenstein, National Library of Australia

the reason for this is that the theatre has been over-exploited by the press. Quite old people will describe to you their early playgoings with a sense of wonder, an enthusiasm, which – leaving a wide margin for the charm that past things must always have – will not be possible to us when we babble to our grandchildren. Quite young people, people ranging between the ages of four and five, who have seen but one or two pantomimes, still seem to have the glamour of the theatre full on them. But adolescents, and people in the prime of life, do merely, for the most part, grumble about the quality of the plays. Yet the plays of our time are somewhat better than the plays that were written for our elders. Certainly the glamour of the theatre has waned. And so much the better for the drama's future.

Business and pleasure

It is a matter of concern, that future, to me who have for so long a time been a dramatic critic. A man soon comes to care, quite unselfishly, about the welfare of the thing in which he has specialised. Of course, I care selfishly too. For, though it is just as easy for a critic to write interestingly about bad things as about good things, he would rather, for choice, be in contact with good things. It is always nice to combine business and pleasure. But one regrets, even then, the business.

If I were a forensic critic, my delight in attending the courts would still be great; but less than it is in my irresponsibility. In the courts I find satisfied in me just those senses which in the theatre, nearly always,

are starved. Nay, I find them satisfied more fully than they ever could be, at best, in any theatre. I do not merely fall back on the courts, in disgust of the theatre as it is. I love the courts better than the theatre as it ideally might be. And, I say again, I marvel that you leave me so much elbow-room there.

The best type of cases

No artificial light is needed, no scraping of fiddles, to excite or charm me as I pass from the echoing corridor, through the swing-doors, into the well of this or that court. It matters not much to me what case I shall hear, so it be of the human kind, with a jury and with witnesses.

The equity acrobat

I care little for Chancery cases. There is a certain intellectual pleasure in hearing a mass of facts subtly wrangled over. The mind derives therefrom something of the satisfaction that the eye has in watching acrobats in a music-hall. One wonders at the ingenuity, the agility, the perfect training.

Like acrobats, these Chancery lawyers are a relief from the average troupe of actors and actresses, by reason of their exquisite alertness, their thorough mastery (seemingly exquisite and thorough, at any rate, to the dazzled layman). And they have a further advantage in their material. The facts they deal with are usually dull, but seldom so dull as facts become through the fancies of the average playwright. It is seldom that an evening in a theatre can be so pleasantly and profitably spent as a day in a Chancery court. But it is ever into one or another of the courts of King's Bench that I betake myself, for choice.

The prisoner in the dock

Criminal trials, of which I have seen a few, I now eschew absolutely. I cannot stomach them. I know that it is necessary for the good of the community that such persons as infringe that community's laws should be punished. But, even were the mode of punishment less barbarous than it is, I should still prefer not to be brought in sight of a prisoner in the dock. Perhaps because I have not a strongly developed imagination, I have little or no public spirit. I cannot see the commonweal. On the other hand, I have plenty of personal feeling. And I have enough knowledge of men and women to know that very often the best people are guilty of the worst things. Is the prisoner in the dock guilty or not guilty of the offence with which he is charged? That is the question in the mind of the court. What sort of man is he? That is the question in my own mind. And the answer to the other question has no bearing whatsoever on the answer to this one.

The English law assumes the prisoner innocent until he shall have been proved guilty. And, seeing him there a prisoner, a man who happens to have been caught, while others (myself included) are pleasantly at large after doing, unbeknown, innumerable deeds worse in the eyes of heaven than the deed with which this man is charged – deeds that do not prevent us from regarding our characters as quite fine really

– I cannot but follow in my heart the example of the English law and assume (pending proof, which cannot be forthcoming) that the prisoner in the dock has a character at any rate as fine as my own. The war that this assumption wages in my breast against the fact that the man will perhaps be sentenced is too violent a war not to discommode me. Let justice be done. Or rather, let our rough-and-ready, well-meant endeavours towards justice go on being made. But I won't be there to see, thank you very much.

The familiarity that spices

It is the natural wish of every writer to be liked by his readers. But how exasperating, how detestable, the writer who obviously touts for our affection, arranging himself for us in a mellow light, and inviting us, with gentle persistence, to note how lovable he is! Many essayists have made themselves quite impossible through their determination to remind us of Charles Lamb – 'St Charles,' as they invariably call him. And the foregoing paragraph, though not at all would-be-Lamb-like in expression, looks to me horribly like a blatant bid for your love.

I hasten to add, therefore, that no absolutely kind-hearted person could bear, as I rejoice, to go and hear cases even in the civil courts. If it be true that the instinct of cruelty is at the root of our pleasure in theatrical drama, how much more is there of savagery in our going to look on at the throes of actual litigation – real men and women struggling not in make-believe, but in dreadful earnest! I mention this aspect merely as a corrective to what I had written. I do not pretend that I am ever conscious, as I enter a court, that I am come to gratify an evil instinct. I am but conscious of being glad to be there, on tiptoe of anticipation, whether it be to hear tried some particular case of whose matter I know already something, or to hear at hazard whatever case happen to be down for hearing. I never tire of the aspect of a court, the ways of a court. Familiarity does but spice them. I love the cold comfort of the pale oak panelling, the scurrying-in-and-out of lawyers' clerks, the eagerness and ominousness of it all, the rustle of silk as a KC edges his way to his seat and twists his head round for a quick whispered parley with his junior, while his client, at the solicitors' table, twists his head round to watch feverishly the quick mechanical nods of the great man's wig – the wig that covers the skull that contains the brain that so awfully much depends on.

The mummy of some high tyrant

I love the mystery of those dark-green curtains behind the exalted bench. One of them will anon be plucked aside, with a stentorian 'Silence!' Thereat up we jump, all of us as though worked by one spring; and in shuffles swiftly My Lord, in a robe well-fashioned for sitting in, but not for walking in anywhere except to a bath-room. He bows, and we bow; subsides, and we subside; and up jumps some grizzled junior – 'My Lord, may I mention to your lordship the case of *Brown v Robinson and Another?*'

It is seldom that an evening in a theatre can be so pleasantly and profitably spent as a day in a Chancery court. But it is ever into one or another of the courts of King's Bench that I betake myself, for choice.

It is music to me ever, the cadence of that formula. I watch the judge as he listens to the application, peering over his glasses with the lacklustre eyes that judges have, eyes that stare dimly out through the mask of wax or parchment that judges wear. My Lord might be the mummy of some high tyrant revitalised after centuries of death and resuming now his sway over men. Impassive he sits, aloof and aloft, ramparted by his desk, ensconced between curtains to keep out the draught – for might not a puff of wind scatter the animated dust that he consists of?

No creature of flesh and blood could impress us quite as he does, with a sense of puissance quite so dispassionate, so supernal. He crouches over us in such manner that we are all of us levelled one with another, shorn of aught that elsewhere differentiates us. The silk-gownsmen, as soon as he appears, fade to the semblance of juniors, of lawyers' clerks, of jurymen, of oneself. Always, indeed, in any public place devoted to some special purpose, one finds it hard to differentiate the visitors, hard to credit them with any private existence.

Some are young, others old, by the calendar. But the old ones have an air of physical incorruptibility – are 'well-preserved,' as by swathes and spices; and the young ones are just as mummified as they. Some of them are pleased to crack jokes; jokes of the sarcophagus, that twist our lips to obsequious laughter, but send a chill through our souls.

Cast your eye around the tables of a café: how subtly similar all the people seem! How like a swarm of gregarious insects, in their unity of purpose and of aspect! Above all, how homeless! Cast your eye around the tables of a casino's gambling-room. What an uniform and abject herd, huddled together with one despondent impulse! Here and there, maybe, a person whom we know to be vastly rich; yet we cannot conceive his calm as not the calm of inward desperation; cannot conceive that he has anything to bless himself with except the roll of bank-notes that he has just produced from his breast-pocket. One and all, the players are levelled by the invisible presence of the goddess they are courting.

Well, the visible presence of the judge in a court of law oppresses us with a yet keener sense of lowliness and obliteration. He crouches over us, visible symbol of the majesty of the law, and we wilt to nothingness beneath him. And when I say 'him' I include the whole judicial bench. Judges vary, no doubt. Some are young, others old, by the calendar. But the old ones have an air of physical incorruptibility – are 'well-preserved,' as by swathes and spices; and the young ones are just as mummified as they. Some of them are pleased to crack jokes; jokes of the sarcophagus, that twist our lips to obsequious laughter, but send a chill through our souls.

There are 'strong' judges and weak ones (so barristers will tell you). Perhaps – who knows? – Minos was a strong judge, and Aeacus and Rhadamanthus were weak ones. But all three seem equally terrible to us. And so seem, in virtue of their position, and of the manner and aspect it invests them with, all the judges of our own high courts.

I hearken in awe to the toneless murmur in which My Lord comments on the application in the case of '*Brown v Robinson and Another*.' He says something about the Court of Crown Cases Reserved... Ah, what place on this earth bears a name so mystically majestic? Even in the commonest forensic phrases there is often this solemnity of cadence, always a quaintness, that stirs the imagination... The grizzled junior dares interject something 'with submission,' and is finally advised to see 'my learned brother in chambers.' 'As your lordship pleases.'... We pass to the business of the day. I settle myself to enjoy the keenest form of aesthetic pleasure that is known to me.

The aesthetic of it all

Aesthetic, yes. In the law-courts one finds an art-form, as surely as in the theatre. What is drama? Its theme is the actions of certain opposed persons, historical or imagined, within a certain period of time; and these actions, these characters, must be shown to us in a succinct manner, must be so arranged that we know just what in them is essential to our understanding of them. Very similar is the

art-form practised in the law-courts. The theme of a law-suit is the actions of certain actual opposed persons within a certain period of time; and these actions, these characters, must be set forth succinctly, in such-wise that we shall know just as much as is essential to our understanding of them. In drama, the presentment is, in a sense, more vivid. It is not – not usually, at least – retrospective. We see the actions being committed, hear the words as they are uttered. But how often do we have an illusion of their reality? Seldom. It is seldom that a masterpiece in drama is performed perfectly by an ideal cast.

In a law-court, on the other hand, it is always in perfect form that the matter is presented to us. First the outline of the story, in the speech for the plaintiff; then this outline filled in by the examination of the plaintiff himself; then the other side of the story adumbrated by his cross-examination. Think of the various further stages of a law suit, culminating in the judge's summing up; and you will agree with me that the whole thing is a perfect art form.

Drama, at its best, is clumsy, arbitrary, unsatisfying, by comparison. But what makes a law-suit the most fascinating, to me, of all art-forms, is that not merely its material, but the chief means of its expression, is life itself. Here, cited before us, are the actual figures in the actual story that has been told to us. Here they are, not as images to be evoked through the medium of printed page, or of painted canvas, or of disinterested ladies and gentlemen behind footlights. Actual, authentic, they stand before us, one by one, in the harsh light of day, to be made to reveal all that we need to know of them.

The most interesting witnesses

The most interesting witnesses, I admit, are they who are determined not to accommodate us – not to reveal themselves as they are, but to make us suppose them something quite different. All witnesses are more or less interesting. As I have suggested, there is no such thing as a dull law-suit. Nothing that has happened is negligible. And, even so, every human being repays attention – especially so when he stands forth on his oath. The strangeness of his position, and his consciousness of it, suffice in themselves to make him interesting. But it is disingenuousness that makes him delightful. And the greatest of all delights that a law-court can give us is a disingenuous witness who is quick-minded, resourceful, thoroughly master of himself and his story, pitted against a counsel as well endowed as himself.

The most vivid and precious of my memories is of a case in which a gentleman, now dead, was sued for breach of promise, and was cross-examined throughout a whole hot day in midsummer by the late Mr Candy. The lady had averred that she had known him for many years. She called various witnesses, who testified to having seen him repeatedly in her company. She produced stacks of letters in a handwriting which no expert could distinguish from his. The defence was that these letters were written by the defendant's secretary, a man who was able to imitate exactly his employer's handwriting, and who was, moreover, physically a replica of his employer. He was dead now; and the defendant, though he was a very well-known man, with many friends, was unable to adduce any one who had seen that secretary dead or alive. Not a soul in court believed the story. As it was a complicated story, extending over many years, to demolish it seemed child's play. Mr. Candy was no child. His performance was masterly. But it was not so masterly as the defendant's; and the suit was dismissed. In the light of common sense, the defendant hadn't a leg to stand on. Technically, his case was proved. I doubt whether I shall ever have a day of such acute mental enjoyment as was the day of that cross-examination.

The presence of a judge is always, as I have said, oppressive. The presence of three is trebly so.

The stuff to stand up

I suppose that the most famous cross-examination in our day was Sir Charles Russell's of Pigott. It outstands by reason of the magnitude of the issue, and the flight and suicide of the witness. Had Pigott been of the stuff to stand up to Russell, and make a fight of it, I should regret far more keenly than I do that I was not in court. As it is, my regret is keen enough. I was reading again, only the other day, the verbatim report of Pigott's evidence, in one of the series of little paper volumes published by *The Times*; and I was revelling again in the large perfection with which Russell accomplished his too easy task.

Especially was I amazed to find how vividly Russell, as I remember him, lived again, and could be seen and heard, through the medium of that little paper volume. It was not merely as though I had been in court, and were now recalling the inflections of that deep, intimidating voice, the steadfast gaze of those dark, intimidating eyes, and were remembering just at what points the snuff-box was produced, and just how long the pause was before the pinch was taken and the

bandana came into play. It was almost as though these effects were proceeding before my very eyes – these sublime effects of the finest actor I have ever seen.

Expressed through a perfect technique, his personality was overwhelming. 'Come, Mr Pigott,' he is reported as saying, at a crucial moment, 'try to do yourself justice. Remember! You are face to face with My Lords.' How well do I hear, in that awful hortation, Russell's pause after the word 'remember,' and the lowered voice in which the subsequent words were uttered slowly, and the richness of solemnity that was given to the last word of all, ere the thin lips snapped together – those lips that were so small, yet so significant, a feature of that large, white, luminous and inauspicious face. It is an hortation which, by whomsoever delivered, would tend to dispirit the bravest and most honest of witnesses.

The presence of a judge is always, as I have said, oppressive. The presence of three is trebly so. Yet not a score of them serried along the bench could have outdone in oppressiveness Sir Charles Russell. He alone, among the counsel I have seen, was an exception to the rule that by a judge every one in court is levelled. On the bench, in his last years, he was not notably more predominant than he ever had been. And the reason of his predominance at the Bar was not so much in the fact that he had no rival in swiftness, in subtlety, in grasp, as in the passionate strength of his nature, the intensity that in him was at the root of the grand manner.

And the change of time

In the courts, as in parliament and in the theatre, the grand manner is a thing of the past. Mr Lloyd-George is not, in style and method, more remote from Gladstone, nor Mr George Alexander from Macready, than is Mr Rufus Isaacs, the type of modern advocate, from Russell. Strength, passion, sonorousness, magnificence of phrasing, are things which the present generation vaguely approves in retrospect; but it would titter at a contemporary demonstration of them.

While I was reading Pigott's cross-examination, an idea struck me; why do not the managers of our theatres, always querulous about the dearth of plays, fall back on scenes from famous trials? A trial-scene in a play, though usually absurd, is almost always popular. Why not give us actual trial-scenes? They could not, of course, be nearly so exciting as the originals, for the simple reason that they would not be real; but they would certainly be more exciting than the average play. Thus I mused, hopefully.

But I was brought up sharp by the reflection that it were hopeless to look for an actor who could impersonate Russell – could fit his manner to Russell's words, or indeed to the words of any of those orotund advocates. To reproduce recent trials would be a hardly warrantable thing. The actual participators in them would have a right to object (delighted though many of them would be).

Vain, then, is my dream of theatres invigorated by the leavings of the law-courts. On the other hand, for the profit of the law-courts, I have a quite practicable notion. They provide the finest amusement in London, for nothing. Why for nothing? Let some scale of prices for admission be drawn up – half-a-guinea, say, for a seat in the well of the court, a shilling for a seat in the gallery, five pounds for a seat on the bench. Then, I dare swear, people would begin to realise how fine the amusement is.

Farewell to the Hon Justice Kenneth Handley AO

On Friday, 15 December 2006 a formal ceremony was held to mark the retirement of Justice Kenneth Handley as a judge of appeal in the Supreme Court of New South Wales.

After graduating from the University of Sydney with distinctions in arts and with first class honours in law in 1959, Handley JA became an associate to Justice Bruce Macfarlan. His Honour was thereafter called to the Bar, where he read with Sir Laurence Street. His career at the Bar – over fourteen years as a junior and seventeen as a silk – was extraordinarily busy and successful, appearing on innumerable occasions in the High Court and the Privy Council. His Honour was appointed as a judge of the Supreme Court and judge of appeal on 31 January 1990.

His Honour's contribution to the law and the community at large was not restricted to practise as a barrister and his service as a judge: he was an active member of the Bar Council, and served as president of the New South Wales and Australian Bar associations. His Honour also published many articles in Australian and overseas journals, and during his time on the Bench published three books of high repute. He also maintained a life-long association with the Anglican Church, which he has served in many capacities, most notably as chancellor of the Anglican Diocese of Sydney for 23 years and as a member of the Appellate Tribunal of the Anglican Church from 1980 to 2004. Since 1994, his Honour has also served on the council of Cranbrook and has been its president since 1999. His Honour also maintains a commission on the Court of Appeal of Fiji and was a member of the Court of Appeal which determined in February 2001 that the 1997 Constitution of Fiji remained the supreme law of Fiji – which decision ultimately resulted in the dissolution of parliament and the calling of a general election in that country.

At the farewell ceremony for Handley JA, Chief Justice Spigelman spoke on behalf of the court, the Hon Bob Debus MP, attorney general of New South Wales, spoke on behalf of the government, and Ms June McPhie, president of the Law Society of New South Wales on behalf of the state's solicitors.

Spigelman CJ lamented the loss to the court and the community of such a prodigious and accomplished talent who was 'by force of statute required to retire as a fulltime judge of the court'. Spigelman CJ noted that his Honour's 'energy and mental acuity attests that an increase in the age to seventy-five for judges and seventy-eight for acting judges is now appropriate' and welcomed his Honour's decision to continue to serve the court beyond formal retirement as an acting judge. Spigelman CJ also paid tribute to his Honour's insistence on bringing to every endeavour a capacity for hard work, conscientiousness, a strong sense of civic duty, personal loyalty, generosity and trustworthiness. Spigelman CJ described Justice Handley as the 'quintessential lawyer's lawyer' before paying tribute to his prolific work as a barrister and as a judge:

Your Honour's encyclopaedic knowledge of the law is of such breadth as to inspire admiration by lawyers throughout Australia and in England. Perhaps your most notable characteristic, to which anyone who has seen you at work will attest, is your astonishing recall of the detail of cases and of the order of events in times past.

This extends not only to the precise volume of the *Commonwealth Law Reports*, and often enough the very page, on which a principle or a telling phrase is to be found but also to the decisions of the higher courts of England extending to obscure volumes reporting Privy Council cases and Indian appeals of the late nineteenth century.

No-one who appeared in the Court of Appeal over the last seventeen years was in any doubt of the significance of the single volume with its single place mark of a report, not on anyone's list of authorities, which your Honour strategically placed before you as the case commenced or which your Honour called for with precise reference during the course of a hearing....

Your legal learning is, of course, also reflected in the judgments your Honour has delivered over the course of seventeen years, many of which will stand the test of time and which as a collective body of work will long remain a monument of your Honour's term of office. Your judgments manifest your prodigious work ethic, your intensity of application to the task at hand, and your unerring eye for the point.

...

At your swearing-in you concluded with a reference to the prophet Micah, explaining that what you would seek to do as a judge was, then quoting from the Old Testament: 'to act justly, to love mercy and walk humbly with my God'. You have achieved all three in a long and distinguished judicial career and we all look forward to your continued contribution of the same character.

The attorney general noted that he had been lobbied 'three times today, once publicly concerning the statutory age of the retirement of judges' and proceeded to speak of his Honour's reputation at the Bar and on the Bench:

I am advised that you were also extremely fit and preferred walking up the ten or so flights of stairs to your chambers instead of taking the lift. Your former colleague, Justice Meagher, was not known to share your embrace of the stairwell. In one very substantial litigation exercise I am informed involving several prominent banks, you led a team of barristers, including David Bennett, Arthur Emmett and Tony Meagher, vast amounts of work were completed in a dwelling which became affectionately known as 'Camp Handley'. 'Camp Handley' was an egalitarian establishment where everyone did their bit, except David Bennett who took the liberty of having smoked salmon shipped in. You were a talented and quite exceptionally hard-working leader who knew how to get the best out of people. You were known to be a dedicated learned and formidable counsel.

You were appointed to the New South Wales Court of Appeal sixteen years ago. I am told by those who have served with you that when you arrived in the Court of Appeal you repeatedly demonstrated an encyclopaedic knowledge of case law. Your only rival in this respect was the now retired Justice Michael McHugh. Whenever a point arose you would name the relevant cases and their citations and most disconcertingly of all, the place on the page where the governing principle was stated. His Honour the chief justice has also referred to this characteristic. In an age of Google, mobiles and text messages Justice Michael Kirby reminds me that we will never again see such a sharply focused intelligence and recollection of the case books....

You have a loving wife, Di, four sons, David who is the founder of Sculpture by the Sea, Duncan, John and Mark, and four grandchildren. I am told that your wife has taught you everything you know about art and, what is more, taught you to appreciate it as well.

One thing is sure: as the chief justice has just demonstrated, you will not be idle in your retirement. Your energies will be consumed in further appearances in this court but also I hope in your interests of trekking, swimming and art.

In reply Handley JA expressed the view that the speakers had not been ruthlessly honest in their portrait of him:

Speakers and victims on these occasions avoid the ruthless honesty of Oliver Cromwell who wanted his portrait painted warts and all. The much lamented Harold Glass had a very different view. He said that flattery of the judiciary was so important that it had to have priority over all other court business...

Counsel's increasing irritation with a judge's inability to see the obvious merit in his or her argument is masked, as we know, by growing obsequiousness which moves from 'with respect your Honour' step by step to 'with the most profound respect your Honour', which cannot be translated in polite company. A short tempered judge will be told at his much awaited retirement 'your Honour did not suffer fools gladly'. I'm glad no one used that expression of me today. Some years ago the presiding judge in the Court of Appeal gave a short extempore judgment endorsing in fulsome terms the judgment of the trial judge and finishing 'and there is nothing that I can possibly add'. The second judge immediately said 'I agree' and the third judge said he agreed with the second judge. It will not surprise you to know that Mr Justice Meagher was the second judge.

My two really important achievements are not in print. Twice I persuaded colleagues to leave things out. A draft judgment in a family provision case included the sentence 'the deceased left a modest estate of \$800,000'. I said to the author that some would kill for less and, happily, modest came out. In the other case, a family dog charged a bicycle and its rider was injured. His action against the dog owner succeeded and the case came to us, but the court was divided. Roddy Meagher, whose own dog had a well deserved reputation for ferocity, would have allowed the appeal because the accused was only being playful. His colleagues disagreed, but judgment was delayed for a considerable time until I managed to persuade Roddy to tone down a sentence which read 'the accident occurred at X street in Y which the court was informed was a suburb of Sydney'.

My great failure has been to persuade colleagues to write shorter judgments. I am a disciple of Blaise Pasquale, the 17th century French philosopher, who once apologised saying he would have written a shorter letter if he had more time.

His Honour also reflected on judicial life and the importance of senior lawyers being able to pass on their intellectual capital through writing:

I found judicial life fulfilling and did not look back. At the Bar I had years in the scrum which was hard work and I was ready for the quieter life of a referee. If you know most of the rules and are fair most of the time, you don't get booed too often. I have fulfilled my

ambition to stay off the front page of the *Sydney Morning Herald*. It is the old story, if the bridge stays up there's no news. Life in the Court of Appeal is hard work, but we are a happy court with a great collegiate spirit. We respect our differences and know that none of us is as smart as all of us. Judicial life gave me the great privilege of long leave, which enabled me to write my books. Senior lawyers build up a lot of intellectual capital, but it becomes a wasting asset. Scholarly articles and books can capture this intellectual capital, preserve it and pass it on.

His Honour made some revealing comments about statutory bills of rights – a controversial topic currently exercising the minds of lawyers, policy makers and human rights advocates:

I have not had to apply a Human Rights Act and I am grateful for that. There is no such thing as a free human right. Every one comes at a cost which must be borne by the community or other individuals. The reach of laws against terrorism, the legalisation of the abortion pill, scientific experiments with human embryos and of euthanasia raise political and moral questions which cannot and should not be settled by judicial decision. Most people have opinions on these matters and a judge's opinion is no better than that of anyone else.

Judges do not have democratic legitimacy. We are not elected by the people and, except in extreme cases, we are not accountable to them. We have no business deciding political questions. The statutory text enacted by parliament has democratic legitimacy, but under the rule of law its meaning and application are proper questions for a court. The court seeks to be faithful to the text of ordinary legislation and parliament is the master. The position is different with Human Rights Acts because of the wide general language in which they are expressed. They are a blank canvas onto which judges can and do project their moral and political views. The process was described by Humpty Dumpty in *Alice in Wonderland*: 'When I use a word it means just what I choose it to mean, neither more or less. The question is who is the master.' Under a Human Rights Act the court is the master.

Human rights are the flavour of the month for some, but the public should realise they are a sugar coated pill. An accurate title for such an Act would be *The Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act*. Politicians and others who advocate a Human Rights Act do so either because they do not understand what would happen or because they understand only too well. The latter hope to increase their power and achieve legal and social change through the courts that they cannot achieve through parliament. This is government by litigation and when change occurs in this way no one is accountable, not the judges and not the politicians.

Farewell to the Hon Justice John Bryson

The Hon Justice John Bryson retired as a judge of the Supreme Court of New South Wales on Wednesday, 28 February 2007, when a ceremonial sitting was held in the Banco Court.

Bryson JA 'decided to work towards the Bar' at age 11 – even though he had 'little idea what barristers did'. His Honour attended Fort Street Boys' High School and began working in the state public service in 1954 at age 16.

I first worked on the site of this court building in the Department of the Attorney General and Justice as assistant record clerk doing very humble things, and took the opportunity to read all the ministers' letters in and out to get some idea of how the community was governed. I attended lectures in the mornings and evenings at the law school in Phillip Street. There was no possibility of leisure or time for reflection.

Next year I was assistant staff clerk and became adept in calculating recreation leave balances. I proceeded to the State Crown Solicitor's Office. While my contemporaries were acquiring culture and wisdom in academe, examining the unexamined life and distributing the undistributed middle, I was attending taxations of costs before Mr Deputy Prothonotary Cyril Herbert, a taxing experience in at least two senses, in multiples of six shillings and eight pence with typewriting at one shilling per folio of 72 words.

Without any training I was given responsibility for managing litigation, scores of very large and very small law suits and almost all about motor accidents. This was a strange task to give to an untrained undergraduate aged 18 but I learnt a lot of practicalities in a short time. I read a lot of medical reports and files about injuries, minor to catastrophic, when I was 18 and 19 and this gave me habits of caution and a profound sympathy for disability.

I travelled the state by steam train to instruct counsel before District courts at remote places before impatient judges who plainly yearned for home. There were no funds for air travel. District Court judges in that age ranged very widely in ability, from polite scholar gentlemen with learning to grace any court, to those who entered court at 10.00am purple with fury and stayed that way all day.

Over several years from 1956 I often instructed Kenneth Gee in cases in Wollongong District Court before a judge whose personality was as difficult as any I've encountered. I classify that judge, long dead, as a perverse genius. Ken Gee showed me the appropriate conduct of a barrister in difficult situations.

After leaving government service at the end of 1959, Bryson JA worked in what he described as 'two very different law offices, a small family firm doing the legal work of ordinary suburbanites to whom every expenditure was a challenge, and several years in the litigation mill of Allen Allen & Hemsley where the clients were large corporations from Australia and overseas, banks, charities, churches and schools, which were pillars of society governed by partners of the firm. This



The Hon Justice John Bryson

introduced me to the big end of town and large scale litigation, hearings that lasted months and years.'

In February 1966, Bryson JA embarked on practice at the Bar and took silk in 1986. His Honour was appointed to the Supreme Court in 1988 and sat in the Equity Division until appointment to the Court of Appeal in 2003.

Spigelman CJ recalled that 'what transformed pleasure into delight' when appearing before Bryson JA 'was your Honour's personal style – in essence, a black letter lawyer with élan – which style was, quite simply, inimitable, in the strict sense that it defies imitation'.

Your Honour has an inexhaustible supply of arcane anecdote, informed by a wide ranging intellectual curiosity, a keen eye for the ribald and the ridiculous and a fascination, bordering at times on the world weary, for human fallibility.

Everyone in this room has relished your Honour's mode of expression: cliché free, pregnant with insight, deliciously unpredictable, devoid of malice, uncluttered by excessive verbiage, manifesting a love of language and exuberantly sprinkled with wit – that form of humour which illuminates the truth.

Spigelman CJ put 'two examples from my time at the Bar on the record':

I once attended a conference on 'Law and Literature' at a time when, from my ignorance, I thought that this sphere of discourse had something to do with 'literature' rather than, in the post modernist fashion, a preoccupation with something called 'texts'.

I was sitting next to your Honour during an address by a feminist scholar – it was early days in the process of gender sensitising lawyers. The scholar announced to the assembled audience that it was essential that in the future all lawyers should be 'femocrats'. Immediately, your Honour put your head in your hands and said: 'How can she mix those Latin and Greek roots like that? The correct word, if any, is "gynaecrat".'

I give one other example of your Honour's style. An issue arose in a case as to whether or not certain water licences fell within the extent of the security under a mortgage of rural properties. I handed to your Honour an extract from the 9th edition of the English text Fisher & Lightwood on *Mortgages* which stated, without citation of any authority, that 'all incidental rights ... will follow the security'.¹ I then handed to your Honour an unreported judgment of your brother Mr Justice Young, who quoted that sentence and applied it to conclude that a licence for an abattoir was within the mortgage.² Finally, I handed to your Honour the 10th edition of Fisher & Lightwood on *Mortgages* which contained exactly the same sentence but, on this occasion, had a footnote attached to the words 'all incidental rights', namely a reference to the unreported judgment of Mr Justice Young.³

Your Honour inspected each of the three documents, looked up and said: 'This is going to be very difficult to stop'.

The chief justice said Bryson JA brought to the judicial task 'a profound understanding of, and empathy for, the role of legal practitioners, which you had acquired over many years of practice both as a solicitor and as a barrister'.

You were always aware that matters are not always as they appear to be, particularly by the time a dispute reaches an appellate court. Your Honour's insight in that respect was no doubt informed by your role as instructing solicitor for the state crown, appearing for the GIO, in the classic case of *Jones v Dunkel* when the High Court, somewhat scornfully, commented on the failure of counsel to call or explain the absence of the defendant and crucial witness, being the truck driver accused of negligent driving. You maintain to this day that the High Court should have taken into account the possibility that there may have been such an explanation that could not have been safely adduced before a jury. Indeed there was. In that case, it was difficult to explain to the jury that had to decide whether the defendant had been driving negligently, that he could not be called as a witness, because he was in prison interstate having been convicted on a charge of culpable driving causing death.

Bryson JA said he had 'heard *Jones v Dunkel* misquoted every week of my appellate career...We lost three to two and we had Dixon on our side'.

Spigelman CJ said Bryson JA's long service as a judge of the Equity Division meant that his Honour's judgments covered the entire range of that diverse jurisdiction.

You have delivered judgments on patents and trademarks, company takeovers, special investigators, disclaimers by liquidators, the disqualification of company directors, the validity of meetings, the efficacy of a deed of charge, the interpretation of contracts, the incidents of a joint venture, the interpretation of wills, the fiduciary obligations of solicitors and partners, the law of landlord and tenant, the role of equitable rights under the Torrens system, the interpretation of superannuation trust deeds, the law of estoppel by convention, the rights of patients to access their medical records, the requirements for the admission of documents into evidence, too many permutations of Family Provision Act conflicts to mention

and numerous other matters covering the full panoply of equity jurisprudence.

Your Honour brought to the appellate process your long experience as a trial judge and emphasised the respect required of an appellate court for judicial discretion. However, your elevation was accompanied by a noticeable restriction on your Honour's usual list of conversation topics. We all lost the benefit of your running commentary on the inadequacies of the Court of Appeal.

This appointment broadened your Honour's caseload: returning to an early practice with personal injury law, where your Honour displayed a compassion for plaintiffs that few had predicted. In your three years on the court you delivered judgments of significance on such matters as the law of defamation, the liability of public authorities and the law of fiduciaries, notably observations about the threat to proper principle occasioned by the restitution industry.

'Designation of a relationship as fiduciary,' you said, 'is not a signal for exercise of judicial bounty'.⁴ No one else has put it quite like that.

[Bryson JA had] rejected the proposition that it was negligent for two parents to go to sleep at midnight on the basis that it was not reasonably foreseeable that the guests at their teenage son's party would attempt to reignite a barbeque at 2.00am and proceed to douse it in methylated spirits'.

Your Honour produced the definitive judgment on what was reasonably foreseeable conduct by teenage males in such circumstances. You identified as foreseeable: 'Horseplay, leapfrogging, dancing on tables, swinging on tree branches and arm wrestling'⁵ but not throwing metho on a barbeque'.

Noting that Bryson JA had agreed to return as an acting judge of the court, to sit both at first instance and on appeal, the chief justice said: 'Your continued presence will maintain the strength of this court.'

Speaking of his early days of practice, Bryson JA said: 'I mainly learnt law by doing it but I read some marvellous books on the way.' He continued:

Justice Hutley told various people that I learnt law from Tidd's Practice, which was commended by Uriah Heep to David Copperfield, 'He's a great writer, that Master Tidd.' The fact is, however, I have never read Tidd's Practice. The first law book I ever read was Henry Maine's *Ancient Law* which I bought from Tim Studdert in 1954 with a job lot of first year text books he'd just finished with, I think I paid him ten pounds. Of all the people now associated with the court Justice Studdert is the one I've known the longest. Henry Maine showed me the interaction of legal rules with the workings and development of human society within cultures, and interested me in learning some law which was closer to life's practicalities than the law Henry Maine dealt with. I have always looked at law from the perspective of its history, and during quiet periods early at the Bar I read Holdsworth's *History of English Law*, much of it twice over.

Bryson JA recalled that while at the Bar, he had some involvement with constitutional law, 'a fascinating and fluent subject, more unregulated

and difficult to predict the closer it is examined. Constitutional cases tend to start at the top, so less than most other fields is constitutional law polished in the appellate process.’ His Honour added:

I saw something of the electoral and senate litigation of the Whitlam era. Some advice which I joined with McHugh QC in giving to the state about its legislative powers appears to have won me a modest place in history as it is mentioned in Anne Twomey’s *Chameleon Crown*. To my mind the advice then given was as obvious and unremarkable as anything I have ever set my name to, yet the historian found it interesting.

I had one or two brushes with history through membership of the Tenth Floor Wentworth Chambers. Adulation rang out at our dinner to celebrate the appointment of Sir John Kerr as governor-general. Sir John Kerr and the then prime minister had both practised on the tenth floor. The prime minister spoke well. While ladling butter from alternate tubs Stubbs butters Judkins, Judkins butters Stubbs.

Late in His Honour’s bar career he had many cases about professional duty, ‘a long series of disaster stories in which my clients diverted trust accounts, built dams which fell over, buildings the facades of which collapsed in the street, put houses on the wrong block and gave the wrong horse pills to racehorses which promptly laid down and died. The expression in the trade was “became recumbent”.’

‘I was happy to leave this for the Equity Division. There are only 10,001 equity suits and when 18 years had passed I had heard them all and I was able to find my way through them with no great difficulty’, his Honour said.

Bryson JA said that, as a judge, his object had been ‘to produce work conforming to the current authorities with appropriate attention to the arguments put forward’.

It has not been my object to display originality or brilliance, but to come to grips with and resolve what the litigants understood to be their controversy and their problem, work of good artisanal quality, to be the good of which the best is mysteriously the enemy.

Judges make law but it has not been my object to make any. There are many judges and the chaos if more than a few of them made some law is alarming. I know that the mood, the approach and the outcome change greatly with generational changes and I have seen much of this transformation.

The court and the law have made immense transforming journeys while I have been observing them. I have not been happy with all legal rules, and I think of the *Evidence Act 1995* as a late work of the committee which designed the camel.

I first had some colleagues of whom I was slightly awestruck and I mention Hope and Glass and Needham. There are others I forebear to name as they are still with us, people significantly older than I schooled in the old practice before 1972. That pleading system had a high value which has not been destroyed by my perception that the present system is a better one.

At 67, his Honour was the oldest person ever to have been appointed to the Court of Appeal.

I had to revisit law which I had not looked at for a while. It was challenging but amenable to hard work, energy and application. Appeals brought me back to personal injuries litigation with which I had had so much to do in an earlier era. The juries had vanished, changing everything. I find litigation about personal injuries very harrowing, the impact on lives and feelings is so profound. I hope it’s true that negligence law makes people more careful in their behaviour. The thought that this may be true has assisted me. On the Court of Appeal I think of myself with T S Eliot:

No, I am not Prince Hamlet, nor was meant to be, am an attendant lord, one that will do to swell a progress, start a scene or two, advise the prince; no doubt an easy tool, deferential, glad to be of use, politic, cautious and meticulous, full of high sentence but a bit obtuse.

Those of you who know it may finish the passage if you think it’s appropriate.

The Bar Association’s president, Michael Slattery QC, recalled that when Bryson JA had left the Bar, His Honour was heard to say, ‘It’s such a good life. Don’t tell too many people. They’ll all want to do it.’

Your Honour further explained, ‘It’s the last refuge of the true eccentric.’ Your own life on the bench perhaps proves that the bench too has one or two eccentrics.

Your Honour brought many things to the bench. Special among them is your sense of humour. To remember your Honour’s judicial humour is to capture an instant in one’s own life. Your Honour’s humour is the humour of the moment, this often a moment of insight into all human pretension and absurdity. Your Honour’s remarks are captured and fondly remembered and then savoured by the profession in joint reminiscences for years. These moments often celebrate your Honour’s deep sense of humility. One such moment is forever remembered by one senior counsel who was appearing before your Honour in an interlocutory application in chambers some years ago. All counsel were ushered into your Honour’s chambers. Seated, your Honour commenced to read the court file. It took some time. Counsel remained standing for a period. One of them then said, ‘Does your Honour mind if we sit down?’ To this your Honour said, ‘Feel free. You can kneel if you wish.’ As if that wasn’t enough your Honour then added, ‘But I shouldn’t offer you those temptations.’

¹ Fisher & Lightwood’s *Law of Mortgages* 9th ed London, Butterworths 1977 at p 37.

² *Daniels v Pynbland Pty Ltd* NSW Supreme Court, unreported, 12 April 1985.

³ Fisher & Lightwood’s *Law of Mortgages* 10th ed London, Butterworths 1988 p 57 fn(m).

⁴ *Blythe v Northwood* [2005] 63 NSWLR 531 at [211].

⁵ *Parissis v Bourke* [2004] NSWCA 373 at [52].

The Hon Justice Ian Harrison

On 12 February 2007 Ian Gordon Harrison SC was sworn in as a judge of the Supreme Court of New South Wales.

The Hon Justice Harrison was educated at Normanhurst Boys High School and graduated in law at the University of Sydney. He obtained articles from Hall & Hall in 1974 before being admitted as a solicitor in 1975. His Honour then lectured at the UNSW Faculty of Law, before being called to the Bar in 1977. He read with the Hon James Wood, formerly chief judge at common law.

His Honour was appointed senior counsel in 1995. In 1996 he was appointed by the Commonwealth attorney-general to conduct an inquiry into allegations of corruption in the Australian Federal Police, and in 2004 was made an assistant commissioner to the ICAC. His Honour was also chairman and director of the Neuroscience Institute for Schizophrenia and Allied Disorders, and in 2003 was made a director of the Law Council of Australia and also a member of the Legal Practitioners' Admission Board.

His Honour chaired one of the Bar Association's professional conduct committees from 1998 to 2001, during which period he was successively treasurer and junior vice-president of the Bar Association, becoming president in 2004.

The Hon Bob Debus MP, attorney general of NSW, spoke on behalf of the NSW Bar Association and Geoff Dunlevy for the solicitors of NSW. Harrison J responded to the speeches.

The attorney paid tribute to Harrison J's remarkable achievements to date, having led a distinguished career in the law and public life, and referred to his Honour's capacity for leadership and his integrity and professionalism. The attorney said that Harrison J led the AFP inquiry scrupulously and with great skill, in recognition of which the then Commonwealth attorney-general said:

I take this opportunity to publicly acknowledge the work of Mr Harrison and his team in the conduct of this important Inquiry. The standing and reputation of the AFP is a matter of public importance. His contribution to ensuring the basis for continued public confidence in the AFP is significant.

Mr Debus also referred to his dealings with Harrison J whilst president of the Bar Association, saying:

As attorney general I had the privilege of many robust exchanges with you over issues relevant to the welfare of your members, as well as issues of principle in the civil and criminal law.

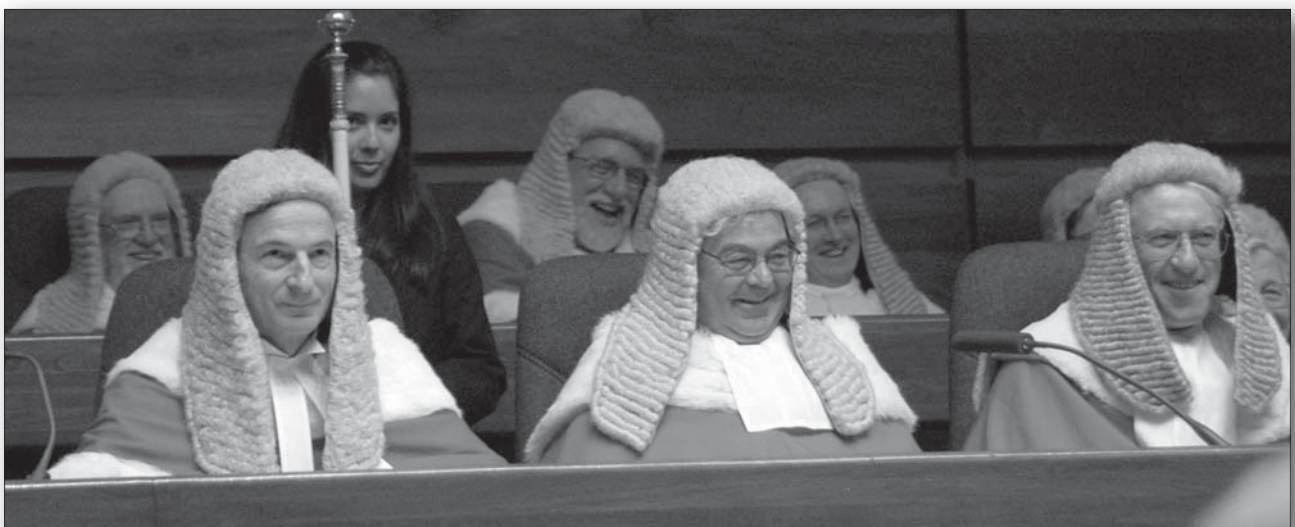
At contentious late night meetings in parliament house to debate tort law reform to which the Bar had taken exception, we would try to break your spirit with cups of weak instant coffee or – the ultimate weapon against a noted connoisseur – lukewarm parliament house moselle. Even Philip Ruddock would define that as torture within the meaning of the Act. Your politeness in the face of these insults was unfailing but the next morning you would be back on the radio denouncing the government in tones as reasonable as they were compelling.

I found you to be a fearsome opponent in public debate, but a steadfast and persuasive ally when you believed the cause was just.

The attorney referred to his Honour's well-known Monaro:

You have the great good sense to spend the weekends in Blackheath, without doubt one of the most beautiful but certainly the best electorally-represented town in the state. You travel there in what has been said to be the true love of your life, your yellow Monaro.

The sales slogan for the first Holden Monaro (in 1968) was 'Out to Drive you Wild', which your Honour then was. In younger, less responsible times, the Blue Mountains highway patrol had a creed, 'Only God can make a tree, and only Ian Harrison can drive past it at 160 kilometres an hour'. Your Honour is a reformed man in that respect – sort of.



Left to right: Hamilton J, Harrison J, Adams J, Spigelman CJ, Austin J, Mason P.

But such is the environmental destructiveness of your chosen method of transport that you have your own chapter in the Kyoto Protocol. It is now easy to check with the Environment Protection Authority on the impact one's car has on our precious environment. Your Honour's 'muscle car' emits over 10 tonnes of greenhouse gas per year and scores three out of 10 in terms of limiting pollution. (A Toyota Prius scores nine out of 10.)

A little known fact is that as partial repayment to the planet you thus despoil, you do spend many weeks a year in a rustic hideaway on Mount Freycinet in Tasmania, documenting the habits of Australia's largest honeyeater, the Yellow Wattle Bird. This bird is described in reputable texts as a repellent-looking, streaky grey with two long yellow wattles, one hanging down each side of its face and a call reminiscent of a violent hacking cough.

Another favoured object of your ornithological pursuits is the Orange Bellied Parrot – the third most endangered parrot in the world. (There are only 128 left anywhere.) It, too, inhabits Tasmania and is attracted to the Yellow Wattle Bird. On one occasion your Honour took your car to the Apple Isle on the *Spirit of Tasmania*. The subsequent drive down the coast saw an Orange Bellied Parrot mistake your Yellow Monaro for a Yellow Wattle Bird. The parrot was, as John Cleese might say, 'deceased'. To say the least, your Honour had a Road to Damascus experience.

Mr Dunlevy referred to addresses given by his Honour at ceremonial sittings of the court:

A former president of the Law Society of New South Wales, Gordon Salier, has reminded me of your Honour's address at the retirement of the then Registrar Berecny. At the time your Honour said that like the Income Tax Act the registrar would be a very hard act to follow. The solicitors of New South Wales are confident that a similar rationale will not apply to your Honour's judgments.

Similarly, at another judge's swearing-in ceremony your Honour was quick to remind that judge on the ways to avoid adverse publicity in any event. I thought it was incumbent as the president of Law Society to echo your Honour's remarks on that ceremonial occasion, and so I reiterate your Honour's remarks, in order to avoid controversy – a judge should avoid going to conferences and should never take annual leave.

Under no circumstances should your Honour travel overseas. In fact it is probably best to avoid travel at all costs, except for the purposes of country sittings. When I last enquired, country sittings were considered to be an act of judicial duty and not a 'judicial perk'.

Harrison J returned to this theme, referring to the ceremony to mark the retirement of Justice Meagher:

I suggested that when I was appearing before him in court one day he had told me that he was going to go to sleep and that he didn't expect me to be there when he woke up. Some sections of the media seized upon that anecdote as fact and ran it in support of a vigorous campaign apparently aimed at raising the standard

of judicial conduct. The story, of course, was completely false, blatantly invented by me for comedic effect.

His Honour also reflected on his early days at the Bar:

For any number of reasons, barristers commencing practice these days don't seem to get quite the same opportunities to appear in trials that existed when I started out. This is unfortunate, as there is nothing that quite compares with being thrown in at the deep end. I well remember my first trial. It was in Wagga Wagga and my opponent was Tim Studdert, now Justice Studdert. If ignorance were bliss, then in 1977 I was teetering on the brink of ecstasy. I appeared for a plaintiff claiming damages for personal injury suffered by him in an industrial accident. I think I managed to open the case to the judge without apparent incident and to ask a few preliminary questions in the same way. Then, from memory, I asked the following question:

'Q. Mr O'Neill, is it the fact that on 29 June 1971 you were employed by the defendant as a sheet metal worker at its premises in Junee when, in the course of performing that work, you were injured as the result of the negligence and/or breach of duty on the part of the defendant, its servants and agents, when your hand became trapped in a vice which had not been properly maintained or guarded, as a result of which you suffered severe and continuing injury and disability, loss and damage including loss of enjoyment of life, pain and suffering and loss of income and you have otherwise been greatly damnified in your domestic, social, cultural and sporting activities for the rest of your life so help you God?'

Studdert objected. I couldn't believe it! Whatever happened to the camaraderie of the Bar, which I had heard so much about! As if to make matters worse, the judge rejected my question. I thought he must have been one of Studdert's old mates off the Seventh of Wentworth! During the remainder of the day I had cause to reflect upon the wisdom of my career choice. My bliss was receding at about the same rate as my ignorance. I wish I didn't know now what I didn't know then!

His Honour concluded by paying tribute to the system of justice in this country:

It is the nature of its work that it will produce results with which not all, and sometimes not any, parties or observers are happy. We should, however, be slow to embrace the notion, that the extent to which the outcome in a particular case manages to satisfy various sections of the community is always, or ever, an important indicator of the standard of justice which is delivered.

The Hon Justice David Hammerschlag



On 30 January 2007, David Jacob Hammerschlag SC was sworn in as a judge of the Supreme Court of New South Wales.

His Honour had had a dynamic and flamboyant career at the Bar, specialising in commercial law but also in white collar crime, both on the defence and prosecution sides. Born and educated in South Africa, his Honour matriculated to university in 1971 at the age of only 15 and by 18 and 21 respectively, had graduated in arts and law from the University of Witwatersrand. By the age of 26, he had been made a partner at Werksmans, a large commercial law firm in Johannesburg, and went to the Bar in South Africa in 1983. Following his emigration to Australia in 1985, he rapidly became a partner of Freehil Hollingdale and Page before moving to the New South Wales Bar in 1991 and taking silk in 2000.

In the finest traditions of such ceremonies, Slattery QC unkindly remarked at his Honour's swearing-in that 'Leaving the Dutch-Roman system was not always plain sailing for your Honour. Shortly after

commencing at Freehills you prepared a draft affidavit for the late Peter Hely QC, as he then was. Hely looked it over, handed it back and commented that it appeared to him you had drafted it in Boer.' In the same vein, Slattery QC referred to his Honour's high profile practice in corporate crime, noting that he was 'always able to get [his] message across to juries, loud and clear. In the middle of one criminal case, the jury sent a note to the judge. The judge read it out to the court. It said, "Would all counsel other than Mr Hammerschlag please speak more loudly"'.

Slattery QC continued:

By some whimsy of fate, your Honour was gifted with a surname which translated into English actually means, 'hammer blow'. Your Honour's cross-examinations always gave due honour to this heritage. They were strong, unflinching and determined but nevertheless economical. You asked the hard questions, whatever they were. Your solicitors gathered in anticipation to watch you perform. You became widely known to them as 'the hammer' or even 'the Messerschmitt'. Time on your feet was known as 'hammer time', no doubt for the witnesses under your examination 'getting hammered' developed a whole new meaning.

Your Honour is a man of conspicuous idealism, conspicuous faith and conspicuous commitment to the community. You balance your work with family time and leisure time. A few years ago you decided to take a sabbatical for six months. Apart from your golf you spent much of your time as a volunteer ferrying elderly and immobile residents of Ku-ring-gai to and fro. They were immensely entertained later to find out that they had been transported about by senior counsel. They will be even more astonished to discover their driver is now one of Her Majesty's judges.

The Bar has been privileged to have the benefit of your Honour's professional energy and dedication for the last sixteen years. Now the people of this state will have the privilege of you serving them as a judge.'

The president of the Law Society, Mr Dunlevy, also rightly observed that his Honour 'has been known to display continually superior professionalism, utmost integrity and an encyclopaedic knowledge of all things legal [and] has always been regarded as the barrister upon whom solicitors call when the cards are really down. This is because he possesses a unique talent for finding solutions when none seem apparent. And his Honour never shies away from cases which others deem to be too hard.'

Replying, his Honour recalled his transition to Australia, his happy time at Freehills and then his early encounter with the Hon Andrew Rogers QC, then the chief judge of the Commercial List. His Honour recalled:

Shortly after I was admitted, I found myself having to appear before the chief judge of the Commercial Division as it then was, in a contested matter, counsel having become unavailable on short notice. I received a lukewarm reception. I initially put it down to the fact that the chief judge was having difficulty with my foreign accent or maybe because I was having difficulty with his. Things did, I must say, seem to change rapidly when due to an ingrained habit I called him 'my Lord'.

His Honour also observed that he had been 'the recipient of kindness and friendship across the spectrum of the profession and more than anything what my friends and colleagues in Australia have given me is a background and history in my new country without which today would be inconceivable. By 3000 year old tradition a man should have a teacher and a friend.' His Honour said that he had been fortunate enough to have had many teachers and friends in his professional life, and noted his good fortune in South Africa to be mentored by a solicitor, David Judah, a leading practitioner and as a barrister by I A Maissels QC whom he described as 'undoubtedly one of the greatest practitioners ever in that country, known for his defence of Nelson Mandela in the first treason trial.'

The Hon Justice Elizabeth Fullerton



On 19 February 2007, Elizabeth Fullerton SC was sworn in as a judge of the Supreme Court of New South Wales.

Her Honour commenced a graduate arts/law degree at Monash University in 1978. She moved north in 1980 and received a graduate law degree in June 1983 from the University of New South Wales. Her Honour was admitted later that year, and commenced practice in the Women's Room in Frederick Jordan Chambers. She had originally trained as a primary and infants teacher at Coburg Teachers College and then taught kindergarten and primary school in 1975 - 1976, before working for part of 1977 on a kibbutz near the Golan Heights.

Her Honour was appointed senior counsel in 1999, and practised substantially in criminal law, appearing also in disciplinary and medical negligence cases. Spigelman CJ referred to her Honour as having become, over recent years, one of the leaders of the criminal bar of this nation.

The president of the Bar Association, Michael Slattery QC, took up that theme:

Within each generation at the Bar, a handful of pre-eminent counsel refine and mould to their own style the very idea of what it is to be an advocate. Without doubt your Honour stands among those leading counsel in the present generation.

Ordinary measures of performance do not fully explain your Honour's remarkable success as an advocate. Your Honour is by nature a leader in the courtroom. You are dynamic. You are strong. You are incisive. Such descriptions though, do not do full justice to your Honour. There is something else.

That something else can best be understood by a scene from the life of another former New South Wales barrister. West Australians have long remembered the opening of one official visit that Prime Minister Gough Whitlam made to Perth in about mid 1974. The prime minister had descended from his RAAF jet and was leading his entourage through the airport security screening. As he walked through, suddenly he set all the security alarms ringing. The prime minister paused just for a moment, turned to all the rather startled staffers and journalists present and explained, 'It's my aura'.

Like Gough Whitlam, your Honour too has an aura. You were a charismatic advocate. Your presence changed every courtroom in which you appeared. Wherever you were, you were the undisputed queen of the Bar table. Now of course you will be queen of your own courtroom. Your Honour's better opponents and colleagues always saw you as frighteningly competent. To the rest at times you could simply be frightening.

Her Honour was briefed in the royal commission into the conviction of Lindy Chamberlain in 1986 and 1987, as junior to Ian Barker QC and Michael Adams (now Adams J), on behalf of the Northern Territory Government. She then accepted a term as the first of two in-house counsel for the Commonwealth director of public prosecutions in 1988, a position subsequently held by Buddin J and Mark Ierace SC, now by Wendy Abrahams QC.

Since that time her Honour has prosecuted and defended. Slattery QC said that her Honour's accomplishments in practice 'have earned you a reputation among your fellows not unlike the generous compliment paid by Sir Patrick Hastings KC, the great English advocate in the 1920s when speaking of his good friend and fellow advocate Norman Birkett'. Hastings said of Birkett:

if it had ever been my lot to decide to cut up a lady into small pieces and put her in an unwanted suitcase, I should without hesitation have placed my future in Norman Birkett's hands. He would have satisfied the jury (a) that I was not there, (b) that I had not cut up the lady and (c) that if I had she had thoroughly deserved it anyway.

Slattery QC referred to her Honour's recent practice: managing the prosecution of multi-defendant drug and conspiracy trials; coming into the long running Ronan trial before Whealy J after the conviction of the defendants and running the sentencing hearings with refreshing efficiency; and acting as counsel assisting the TJ Hickey inquest (the Redfern Riots) with firmness and sensitivity. Slattery QC referred as well to her Honour's recent 'boutique practice':

in using your charismatic authority to persuade captains of industry to face the unpalatable truth and plead guilty to complex corporate crimes. Your sentencing hearings for Adler, Oates and a number of others became masterpieces of set piece theatre where everything possible was done for your clients.

Mr Dunlevy referred to her Honour's dedication, determination and compassion, and said that she would not only maintain but enhance the intellectual rigour of the bench for benefit of the members of our community.

Fullerton J reflected on a private promise made to herself when admitted in December 1983:

to be true to myself whilst doing the very best I could to be a good lawyer, to advance and defend the rights of others. Since then I have been consistently surprised and humbled at how resilient people are when faced with the reality of losing their liberty or losing a battle against other odds, and how appreciative they are to have someone fight for them.

The Bar is full of fighters and I will miss being amongst them. I can hardly believe I have made the leap out of the ring and I do fear that a complete transition might be years off. The mother of one of my very dear friends has expressed great concern at my appointment, as much at how I will be able to refrain from interrupting as to how I am going to remain seated.

Today with you and in the company of now my sister and brother Judges I make another public promise. I will also continue to try to be true to myself and I will do my very best to be a good Judge. Those women and fewer men who have suffered me at close range over the years know that above all else I do genuinely respect and defend the system of justice that adheres in this state and the other states and territories where I have had the privilege to appear over the last twenty-three years. How could any of us do otherwise than to embrace a legal system that strives to endorse and to reflect us as a fair and humane people while recognising as we must the gravity of the failures of that same system to afford equity to all.

Justice Fullerton paid tribute to those who had guided and supported her, including:

Justice Adams for taking the red pen to my drafts during the Chamberlain Royal Commission and more recently promising to write my judgments only if I refrain from cooking; Justice Simpson for allowing me to complete a year of reading with her even with the knowledge that Horler QC sacked me before the first month was out, I think for interrupting; Justice Bell for giving me my first brief, a winner of a case involving a pub stoush at Cronulla; and Justice Sully for introducing me to a love of the opera.

Others to have guided me are judicial officers of other benches, many are senior barristers, some even very old, Barker QC being the

oldest man I know and noticeably absent: something about Italy and wanting to be made over as the Renaissance Man.

The best who have saved me from in-court exposure are the solicitors I have worked with. I thank them one and all for thinking ahead, for knowing all I needed to know and somehow making sure I knew what I needed to know when I needed it most and for being patient long into the night as I have grumbled and groaned about this or that current hopeless case or this or that current hopeless argument. I sincerely apologise for causing William O'Brien irritable barrister syndrome, a condition from which he will, as of today, make a lasting and miraculous recovery.

From practice at the Bar I have learnt that courts in this Commonwealth are where a particular form of justice is the ideal, where the adversaries put the arguments and where the people or the people's representatives resolve issues of proof. Where judges at first instance adjudicate but do not urge an outcome, where judges on appeal listen, sometimes first to untangle the arguments but ultimately to strike a balance after a verdict or adverse findings have unsettled the unsuccessful. My contribution to these faces of the forum and the process from which they are assured, I hope, a just resolve in this state, is for me a fresh challenge. I will do my very utmost to honour your faith and your trust in me.

Recent appointments to the District Court

By Keith Chapple SC



His Honour Judge Toner SC

The District Court of New South Wales has had four warmly received appointments during the first half of this year.

Judge Peter Zahra SC was sworn in on 30 January 2007. His Honour practised extensively in criminal law for many years and since 2001 was the senior public defender appearing in major murder and

drug trials throughout the state. As an advocate he won cases that established Battered Women's Syndrome as a defence to murder and extended the defence of mental illness in New South Wales. His Honour is also well-respected as a legal author.

Judge Richard Cogswell SC was appointed from 6 February 2007. His Honour was at the private bar in New South Wales and also a crown prosecutor for many years. At the time of his appointment he was the crown advocate and had carried on the high traditions of that office. A Rhodes scholar from Oxford, he also has connections with Tasmania and Canberra and is well remembered at the Australia National University Legal Workshop from the mid-seventies where he was involved in major advancements in legal education. His Honour was also a member of the Bar Council for eight years.

Her Honour Judge Leonie Flannery SC was sworn in on 20 March 2007. Her Honour was a criminal law specialist and had a background as a solicitor with the Legal Aid

Commission and was a public defender for many years. The president spoke on behalf of the Bar Association at the swearing in. He referred to her Honour's tireless work in many difficult cases and her exemplary courtroom manner. He also mentioned that her Honour's appointment is a 'legal first' for the state, her Honour being the daughter of the well-respected former District Court Judge Paul Flannery.

Judge Robert Toner SC was sworn in on 16 April 2007. His Honour has had wide experience at the Bar in many fields including criminal trials and civil appellate work. Judge Toner was an officer bearer on the Bar Council on many occasions and at the time of his appointment was the treasurer for 2007. He has been a prominent worker for barristers throughout this state especially over the years when great changes have taken place at the Bar. The work he has been involved in has done a great deal to help the profession at a critical time in its history. He has also written articles with Barker QC which have made valuable contributions to public debate on current legal topics.

Nicholas Gye (1958 – 2006)

By RJ Ellicott QC

There are moments in our lives when we hear what we do not ever want to hear. They are usually moments accompanied by disbelief. It happened to me on 29 December when Maurice Neil gave me the news of Nick's passing.

I speak today on behalf of myself and all of Nick's other colleagues at Sixteenth Floor Wardell Chambers. Indeed, judged by the presence of so many here today I think I can properly say that I speak on behalf of the profession itself.

May I first express our deepest sympathy to his parents, Professor Gye and Mrs Gye, his sons Henry and Oliver, his wife, Georgina, his sister Louise, her husband Colin and all the members of Nick's family and close friends. Nick was very dear to us and we share your grief. But we also share your admiration of his life and his achievements, indeed the sheer joy and rewards of having known him and spent so much time with him.

A floor of barristers like 16 Wardell which has enjoyed relative stability in its membership for over 20 years, develops a life of its own. We share each others joys and hardships, our successes and losses in court (although mostly our successes) we learn of and meet family and friends and of some of the personal events which crowd each others lives. Some spend holiday times together. On occasions we have to try to encourage or mentor each other. The reality is we spend the majority of our waking hours in chambers or in court.

So it was with Nick.

After graduating in law at Sydney University in 1986, and practising for a time as a solicitor with Sly and Weigall, he joined us on Sixteenth Floor Wardell Chambers shortly after his admission to the Bar on 3 August 1990.

From the very beginning it was clear that this was his chosen profession. Throughout his life at the Bar he evinced absolute commitment to its ideals, its independence and its vital role in our free society.

Like most of us, he was a greenhorn when he started. He needed guidance in court procedure, the rules of evidence and cross-examination before he could be set loose. With this in mind, a moot was organised in the late Frank Gormly QC's chambers in which Nick was counsel for the plaintiff in a motor accident claim. Under the guidance of Carr as judge, Drummond as counsel for the defendant, and with a client economical with the truth, and an uncontrollable witness in the person of Haffenden, he was blooded and ready to face the only teacher the Bar can really offer in these matters – experience.

Being the son of Professor Richard Gye, Nick was well aware of the demands professional life could have. In a sense, life at the Bar can be more demanding than other professions. Commitment followed by success can lead to long hours, late nights, early morning conferences, reading and preparing advices, argument and cross-examination. Such a life requires a special understanding by family and friends.

Although Nick started off with the stated intent of doing negligence work, in particular medical negligence, as often happens, it was not to be. His practice took a different turn and his main areas of expertise became equity and many other aspects of commercial law.



Nicholas Gye, second from left. 'Throughout his life with us...he retained his infectious and delightful sense of humour'.

Over time his work in these areas increased and he developed a solid commercial practice which could have led within a few years to his taking silk. He was widely respected by members of the Bar and bench.

Nick did not see his practice simply as a means of earning income.

Apart from his two sons, Henry and Oliver, the Bar remained at the centre of his life. It was obviously a passion, and represented for him the pursuit of excellence. He was endowed with a high intellectual capacity, an inquiring mind, and an amazing memory including for cases and transcript. I did several appeals with him. If I wanted a reference to transcript or an authority, on many occasions he could quote the reference, the page or even the line. He had a rare capacity for incisive legal thought.

In his case, the scope and depth of his texts in his library were a perfect indication of his interest. If one needed to research a subject you would head for his room and invariably be given or discover the text that answered your query. It was indicative of the depth of his interest in legal principles and their development.

Entry into his room was however a different matter. It was in sharp contrast to his mind – a scene of chaos! Particularly in more recent years, trolleys full of files relevant to his cases, were likely to appear in the corridor just outside his small room. Law reports, papers, texts and parts of briefs usually littered his table and his dog-eared carpet was a hazard essential to avoid. Out of it all, however, phoenix like, rose his personal computer, his digital dictating machine and his smiling boyish face and the pursuit of excellence prevailed!

Recently his practice began to grow in significant ways. He was retained by a federal government department and he increasingly appeared in cases in the Federal Court and Supreme Court in Sydney and elsewhere. He began advising on constitutional issues. He was presenting papers on request at lunch time seminars.

In the weeks before Christmas he expressed to me and others on our floor his growing confidence in the future. He was happy. He shared in Christmas festivities with friends from the floor. Miles Condon's last minute frenzied efforts to finish up for the year were punctured by Nick's infectious laughter five rooms away! He was a junior barrister in full flight. He was on a roll!

His enthusiasm for his practice continued till the last. On that day he was due to appear in the Supreme Court sitting in vacation.

Nick's interests outside the law were also quite remarkable.

He read widely and in depth on many subjects – art, history, politics, philosophy and theology. He had a deep love of music both classical and modern. I am told he even enjoyed Jimmy Hendrix!

Sometimes I went to his room, around lunchtime, to enquire about a particular case we were in, having been told he was there. Almost invariably when I arrived it was locked and there was no response to my attempt to enter. I could not understand it. His neighbour, John Carr has now explained it all. He tells me:

Nick would often take a break from working on a brief to read a book for a while. He loved history. He also often closed his door after lunch to enjoy a postprandial lapse into the arms of Morpheus for half an hour or so before setting about, reinvigorated, the preparation of an advice or his case for the next day.

His knowledge of and interest in people outside the law was in my experience also extraordinary. He knew of, had met or was friendly with many people in quite different fields of endeavour.

As a student his thirst for knowledge, by report, must have been insatiable. Professor Gye recalls that as an arts student he was privately tutored in Hebrew in order to make his own interpretation of the Old Testament and related documents. But more than that. He established a friendship with Rabbi Apple. On one occasion he read the lesson in Hebrew at the Great Synagogue, at the request of the rabbi, as there was no one available at the particular time to do so.

... he developed a solid commercial practice which could have led within a few years to his taking silk.

On occasions he would enter our common room, pick up the thread of an ongoing conversation on subjects within or outside the law, quickly and intelligently contribute to it and – without being a know all – even dominate it.

He was naturally gregarious. He generated a broad range of friendships. And people warmed to him.

At the age of 15 Nick was at school in Oxford. He was infected in an epidemic of encephalitis. He made a slow recovery. Several months later he developed severe and incapacitating epilepsy. However his parents made an important life-changing decision. They returned to Australia and his condition was successfully controlled by medication by Professor James McLeod. Nevertheless he had to live with it for the rest of his life.

In his later years, as I observed it, he became involved in a constant struggle between the effects of his medication, his obvious need to lose weight but also his constant but perhaps unrealistic desire to live what otherwise might have been, for his age, a normal life.

It was evident from his demeanour that this struggle required a great deal of personal courage but it was taking its toll.

On the morning of 29 December last Nick suffered a seizure while taking a shower prior to going to court. He fell heavily in the shower it would seem and the effects of this and of not being found for several hours led to his passing.

Throughout his life with us and despite his health he retained his infectious and delightful sense of humour and regaled us with his stories. He was a clever impersonator of people like Peter Ustinov, Sydney Greenstreet, Peter Lorre and the traditional Indian shopkeeper.

He constantly introduced me to his friends and solicitors as the new reader on the floor. He had a healthy and impish disregard for authority! I sensed that underneath he had a rebellious streak which I admired – he wanted to change the world and in important respects.

Nick contributed freely to the collegiate life of our floor, was of great assistance to our readers (including myself) and freely shared his time with other members to discuss and assist them with their legal problems as they did with his.

He was quick to help others and was generous to people in need.

As I said, Nick read widely in theology. He was, as you may know, a member of the congregation of this famous church of St James. He developed an extensive knowledge of the history of the Christian Church and of other religions. His father describes him as a man of God. I shared a number of conversations with him on these matters. He had what I would describe as a very simple faith. It was no doubt fashioned to some extent by his insistence on the need for intellectual rigour in his thinking.

Early last year he attended a seminar given in Sydney by a leading United States psychologist, Professor Martin Seligman. He came away from it with a very positive view he said about the need to have a belief in something beyond himself. It seemed to reignite his faith – that is his belief, as he explained it to me, in the existence of a God whose defining characteristic was love, and who was, because we all have the capacity to love, within us all. Love, he thought, was as essential to life as the air we breathe. In the centre of it all was the person of Christ.

Nick loved life and the good things that can go with it. He wanted people to love God and love one another. He loved people – his parents, his family and his many friends – above all, as he often told the members of our floor, he loved his boys.

True love like that never disappears. I believe I can hear him saying: 'Do not stand at my grave and cry; I am not there. I did not die'.

Daniel Edmund Horton QC (1932 – 2007)

By the Hon Justice Clifford Einstein



Daniel Edmund Horton QC was a very complex as well as a very private person. He was an extremely gifted person with very fine qualities. It was a signal honour to be led by him. It is a signal honour to speak of his professional achievements.

Finding at age 16 that he was unable to gain admission to Sydney University Law School, he spent a deal of the following year playing chess.

Before his call to the Bar he had been an associate to the Honourable Justice Maguire and an acting associate to the Honourable Justice McClemens, both of the Supreme Court. He was admitted to the Bar of New South Wales on 8 February 1957. His early promise as a highly capable junior was soon recognised and only two years after his call to the Bar he was appearing in the Privy Council: *Beatrice Alexandra Victoria Davies v Perpetual Trustee Company (Limited)*¹ as well as *Dun v Dun*². On 14 November 1973 he was appointed a queen's counsel.

He commenced his practice camping in the fifth floor Wentworth Chambers of Douglas McGregor, later the Honourable Justice McGregor of the Federal Court. In due course Dan became the leader of that floor occupying the former chambers of Sir Garfield Barwick. In later years he would become the leader of Blackstone Chambers on level 62 of the MLC Tower.

On the occasion of his retirement at the end of 2001 he received a letter from the Honourable TEF Hughes AO QC, at that time also a member of Blackstone Chambers, in which he observed that Dan had been a leader of the Bar in every possible sense.

Dan was a colossus in his chosen profession. He was universally recognised as a 'Barrister's barrister' of profound legal ability. His chosen field was the commercial/equity bar. However as was commonly the practice during the early years of his time at the Bar, he had the capacity to treat with any field of endeavour in which he might be briefed. He had the rare facility of being able to quickly home in upon and identify the central real issue in any set of complex proceedings. Recognition of that issue would then lead to the most exhaustive examination of every corner of the relevant principles of law and of every corner of the really material facts.

As Matthew Dicker of Blackstone Chambers observed in a notice sent to his floor on Monday of this week: 'To work with Dan was a lesson in the application of law. He unapologetically believed in investigating legal principles back to their historical roots and was a strong believer in the careful examination of 19th-century English cases as illustrations of general legal principle.'

His very special genius lay in his uncanny and unerring ability to be able to forecast as if by instinct, the correct path to be taken through the litigious maze in order to obtain a successful result. In the jargon of the present times, he had an inbuilt direction finder, which never failed him.

But more than this, his enquiring mind never rested. He mulled over every conceivable approach to the legal analysis, sometimes seemingly driving his juniors to distraction, until having discarded all insubstantial possibilities, he was certain that his ground was rock solid.

To his clients, his solicitors, and his juniors, Dan brought a justifiable high confidence born of experience. To his opponents, the mere knowledge that he had been briefed spelled out a matter of cataclysmic

significance. Many of those subjected to his ruthless cross-examination could not have known that he had committed to heart the following words uttered by Lord Macnaghten in *Reddaway v Banham*³ at 221:

[F]raud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if only it could afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the court.

There are many present today who will remember the significance which Dan placed on the judgment of Lord Hardwicke LC in *Earl of Chesterfield v Janssen*⁴ where the jurisdiction of the court to relieve against every species of fraud is affirmed and which even today is often cited.

I too well remember the number of occasions when the Earl of Chesterfield would be brought out to make the point that both the body of the common law as well as the law of equity remain dynamic, its genius involving its ability to adapt to the particular circumstances. *Brian v UDC*, truly one of the major successes of Dan's brilliant career, was a clear example of the High Court upholding this principle.

No prisoners would be taken in the cases in which he appeared. I provide one only example. Shoulder to shoulder with Roderick Pitt Meagher QC and a bar table glittering with talent, Dan defended Brambles in *Trade Practices Commission v TNT Management [Tradestock]*⁵, the first real test of the anti-competitive provisions of the Trade Practices Act. Alone of all the eminent counsel at that bar table Dan first identified the basis for a finding of contempt against the Trade Practices Commissioner and then successfully moved the court for that finding: *Brambles Holdings Ltd v Trade Practices Commission and Anor*⁶.

He appeared in every significant jurisdiction. Early in his career he was led by Sir Maurice Byers in *Pacific Acceptance Corporation Ltd v Forsyth*⁷. He was leading counsel in many of the landmark decisions of his time including *Hospital Products Ltd v United States Surgical Corporation*

and Others⁸, *United Dominions Corp Ltd v Brian Pty Ltd*⁹, and *Catt v Marac Australia Ltd*¹⁰ where he represented 60 medical specialists. His special interest involved the law concerning fiduciary obligations.

In his later years he was likely briefed in every major auditors negligence case in this country as well as in a number of takeover cases: these included *Tricontinental v KPMG*, *State Bank of Victoria v KPMG*, *State of South Australia and State Bank of South Australia v KPMG Peat Marwick and Touche Ross*, *National Mutual v Century Corporation*, *BGJ Holdings v Touche Ross*, *The ACI takeover* and *The BHP takeover*.

During his time at the Bar he also worked closely with Sir Kenneth Jacobs QC later on the High Court, Douglas Staff QC, Dick Conti QC now on the Federal Court, and William Gummow QC, now on the High Court to name but a few. He became a close personal friend of Robert Alexander QC [later Lord Alexander of Weeden]

sometime chairman of the English bar who was considered by many of his peers to be the best advocate of his generation and was later to become chairman of the NatWest Bank. This friendship followed his team's success before the Privy Council in *BP Australia v Nabalco*¹¹ against formidable opponents namely Forbes-Officer QC, John Lockhart QC later of the Federal Court and Murray Gleeson QC now chief justice of Australia.

His somewhat select group of favourite juniors included Dermott Ryan SC, John Karkar QC, Peter Wood, Fabian Gleeson SC, Howard Insall SC and Mathew Dicker. He treated his juniors with courtesy and respect.

He was known and respected for his integrity and adherence to the obligations owed by counsel to the court.

For much of his professional life he was in his field, the favoured senior counsel

briefed by Freehill Hollingdale and Page, a high honour indeed.

The likes of Daniel Edmund Horton will not often pass through the portals of counsel's chambers. But many will profit by the example of excellence which he set. It was a privilege to work with him and a privilege to count him as a friend.

¹ [1959] AC 439

² (1959) 100 CLR 361

³ [1896] AC 199

⁴ (1751) 2 Ves Sen 125

⁵ (1985) 6 FCR 1

⁶ (1980) 32 ALR 328

⁷ (1970) 92 WN (NSW) 29

⁸ (1984) 156 CLR 41

⁹ (1985) 157 CLR 1

¹⁰ (1986) 9 NSWLR 639

¹¹ (1977) 52 ALJR 412



A young Dan Horton in the Privy Council.

Russell Francis Wilkins (1948 – 2007)



Russell Wilkins, of Henry Parkes Chambers, died on Thursday, 8 February 2007. The following is an edited version of a eulogy delivered by the Hon Justice Michael Adams at St James Anglican Church.

My friend Russell Francis Wilkins was born just over 59 years ago at Neutral Bay. His father, also called Russell, was a businessman in a small way who died in 1989 at the age of 79. His mother, Una Jessie Wilkins, known for many years – certainly as long as I have known her – as Jessie, is here today. She is 88 years old. Jessie was a teacher and then a lecturer at what used to be called the Sydney Teacher's College. The family was by no measure a wealthy one. Russell has a younger brother Kim, who followed Russell into the law and practises as a solicitor in Wollongong.

I first met Russell at Neutral Bay Primary School, where we were pupils together, though separated by a year as he was a year younger. I did not really get to know him, however, until he came to North Sydney Technical High School, then a selective high school, where we both completed our secondary schooling.

...

Russell obtained the Leaving Certificate in 1964 and immediately commenced an arts-law degree, assisted as many of us were, by the Commonwealth scholarships, then fairly freely available. He went on to take a master's degree. The study of law suited, I think, the cast of his mind. He was an excellent debater and enjoyed language as a clarifier of ideas. He continued his interest in debating at university. Surprisingly, since he suffered badly from asthma all his life, he played tennis aggressively and well through his school days and on for much of his life, playing competition at district club level.

Russell undertook his articles at the firm of Turner Jones, where he was articled to Roy Turner, a very significant mover and shaker in the Labor Party in the state, moving to work for the legendary Jim Comans when he was admitted. It was at this time that he developed his interest in personal injury law, a field in which he worked for all his professional life. After his admission as a barrister in 1976 he found himself on the Fourth Floor Wentworth Chambers, a floor that was notorious for the refinement of its members and the possibly excessive politeness of their intercommunications, although it obtained this reputation, I think, after the departure to loftier environs of Lionel Murphy and Neville Wran.

...

Russell quickly established a substantial practice in personal injury law, particularly workers compensation, both with metropolitan and country solicitors. He enjoyed traveling to country NSW, frequently visiting Goulburn, Lismore, Broken Hill, Dubbo, Orange, Wollongong and Newcastle.

In his later career he moved to 43rd Floor MLC Chambers and more recently Henry Parkes Chambers and in each case had one of the more extensive practices on the floor. He continued in active practice until the last few months when the deterioration in his health forced him to stop.

It is fashionable in some parts of the legal profession to denigrate those who practise in this field – especially for plaintiffs – as somehow being less skilled or less

sophisticated and calling for less learning than practice in the refined atmosphere of the equity or the commercial division. And, of all personal injury work, that of the Workers Compensation Commission, where Russell spent most of his time, was most despised by the intellectual snobs whose interest in the law was largely absorbed by the arcane niceties of the Income Tax Act or the Companies Code and where the whispering didn't quite drown out the rustle of lots and lots of money. In the personal injuries cases, the plaintiffs were not down to their last \$10 million, they were all too frequently down to desperate reliance on friends and relations just to get through the day, in chronic pain and disability, scarcely cared for in an inadequate public hospital system and attempting to get compensation that might give them a modicum of care and restore the dignity of comparative independence from charity. And, of course, just as in the Federal Court, there was a full contingent of fraudsters and hucksters – the substantial difference being that they rarely wore suits and ties and their counsel rarely wore silk.

The fact is, as anyone who bothers to read the reported decisions both of the Compensation Court and on appeal to the Court of Appeal will readily see, the legal and factual issues thrown up in the jurisdiction are as complex and difficult as many in the other fields of litigation. In terms of the significance of the outcomes, the genuine plaintiffs (as most of them were) were frequently facing catastrophe, both personal and financial, for the rest of their lives.

It was no mere accident that led Russell Wilkins into this area of the law, at which he excelled. He had a real sympathy for his clients and a firm belief about their entitlement to compensation. Their ability to litigate depended on solicitors and counsel who agreed to charge no fees if they lost and only the specified fees if they won. The temptation, therefore, to settle – even for an inadequate sum – was great in cases where there was a real risk of a loss and a potential of days of hearing going unpaid. Russell had the reputation of never surrendering to this temptation.

Russell quickly established a substantial practice in personal injury law, particularly workers compensation, both with metropolitan and country solicitors ... It was no mere accident that led Russell Wilkins into this area of the law, at which he excelled. He had a real sympathy for his clients and a firm belief about their entitlement to compensation.

One solicitor who briefed him a lot told me that, aside from his intellectual gifts and legal knowledge, she briefed him for his courage. It was a matter of indifference to him that the judge was unsympathetic and his opponent was sniping and that the case looked as though it would go for days – after all, he was a survivor of Fourth Floor Wentworth Chambers floor meetings – and anyway he was never minded to give his client up. He would say to the respondent's counsel, 'That's not enough' and to his solicitor, 'Well, Kitten, let's go' and march into court to continue the battle.

...

Russell married Nea Goodman in April 1988. They were and remained very much in love. Shortly before his death Russell said to me that as he came close to the end he had come to love Nea even more than he ever had. Russell and Nea have two children, Rachel now 17 and Rebecca now 15. His love for his children was unbounded.

In 1991 while Nea was pregnant with Rebecca, Russell suffered a major stroke which at one stage appeared life threatening. It was probably Nea's insistence on immediate treatment when he came to hospital after it seemed that it was proposed to observe him in the ward for a while that, if it didn't save his life, enabled his extraordinary recovery. I remember visiting him with other friends

in hospital, where he spent some time. We read to him and watched his struggle with speaking and using a knife and fork. Nea was constantly by his side, nagging him back to health. During the entire period of his recovery, he exhibited what seemed to me great courage and the most amazing calm patience, an extraordinary toughness of which even those who had known him well were until then unaware.

It seemed a miracle that Russell was able to return to practice at the Bar. It is true that his knife-edge concentration had lost its razor sharpness and his memory was not quite so complete and instantly available as it had been. But these things were noticed only by those who knew him well. It is difficult to assess, but I would guess that he recovered to 95 per cent of his previous capacity. Yet that 95 per cent was the equal of most and better than many of the barristers with whom he competed daily in the courts. We noticed, however, that he tired more easily and never quite recovered his physical agility.

Russell was pretty well a life-long member of the Australian Labor Party, which he passionately supported and passionately criticised, especially when over recent years, the ALP government of NSW serially removed workers rights to decent compensation for injuries at work and then moved on to destroy the protection given by the common law to ordinary people

hurt and sometimes badly hurt by the wrongful conduct of others. He regarded economic rationalism as just so much cant that undermined the essential decencies of community life in favour of the rich and powerful. As a judge I do not comment, but Russell knew what injustice was when he saw it.

I do not know the nature and extent of Russell's Christian faith. He had too sceptical a cast of mind to accept easily, or perhaps at all, the orthodoxies of organised religion. Towards the end, he asked to see an Anglican priest and Father Kurti was good enough to minister to him on a number of occasions. He was not a hypocrite and I am sure that his heart, if not his mind, was open to receive the consolations that Christianity at its most pure is able to give. This much I do know: Russell was brave, loving, honest, generous and kind. If it is true that by their fruits shall we know the godly, he was a godly man.

In his unpretentious, quietly courageous, hard-working and skilful way and in his unflinching integrity, Russell was an adornment of the NSW Bar. We should be proud that he was one of us. Russell was my friend. If there is a heaven, I cannot imagine that he is not there. And if God is, amongst other things, a judge, I do not doubt that Russell is quite brave enough to make some submissions about some things down here that need attention.

Bullfry gets too close to the client

By Lee Aitken

'The client is God!' Bullfry rolled the offending phrase off his tongue with growing delight, incredulity and muttered thanks, pausing only to refresh himself from a crystalline tumbler. He rested his glass from time to time on the skull of the former jurist purchased from its wanton executrix; a minor tumble to the floor caused by Alice's drunken dusting, had given it a nasty parietal fissure, and markedly increased its slack-chopped appearance which added to it a benignity which its owner had never displayed judicially. 'The client is God' – in those four words lay confirmation of the continued, if benighted, existence of the independent Bar.

Bullfry had never regarded a client as God. Indeed, apart from a few concupiscent instructresses who qualified potentially as nymphs, or goddesses, no notion of the Deity had informed any part of Bullfry's practice. (This misplaced admiration had evoked a certain gene from the first Mrs Bullfry to which he had applied the sage advice of the Scotch bard: 'A man may drink, and not be drunk, a man may fight and not be slain, a man may kiss a bonny lass and still be welcome home again'). True it was that in his in his variegated career, various jurists may have considered themselves numinous when asking pointed questions from the Bench but as was so often the case, they proved ultimately to be mere idols with feet of clay. So what did this new revelation from a senior member of the cadet branch of the profession betoken? What it meant, stripped of its spiritual coda, was that the largest firms of solicitors now regarded themselves as completely in the thrall of those who instructed them. (Indeed, it was only with some difficulty that Bullfry had been able to reject, firmly but politely, an invitation to canapés and champagne put on by the litigation branch of one of the bigger operations which had as its ill-concealed aim reminding counsel precisely where the litigious power lay, and which piper was calling the tune).

Bullfry remembered the dictum of one of his masters when he first came to the NSW Bar: 'Jack, always bear this in mind – there are 10,000 solicitors in New South Wales and it takes more than one lifetime to lose the goodwill of all of them'. So it was that Bullfry had no hesitation in sending from his door clients, dishevelled and crying, aghast at the forthright and depressing advice which he had delivered. As Viscount Simon had advised long ago about dealing with solicitors, when starting into practice at the Bar, and advising those older than yourself, you must do so without pomposity or apology. Of course, there were always craven exceptions: stall-fed juniors who would do anything to maintain their standing with the largest firms in return for a large amount of debt-collecting work for registered security holders. One such had recently adjured Bullfry to go easy on a liquidator Bullfry was cross-examining on the basis that 'the firm has a lot of work which they could brief you to do!!' That suggestion revealed a sad misconception of the characters of them both.

For the largest firms things were slightly different, and it was hard not to sympathise with them while being fully alert to the constant conflict of business and ethical interest which they confronted. To begin, they had huge overhead, and enough ancillary staff to embarrass Nebuchadnezzar. (Recently, Bullfry had been in-house and had been greeted by a uniformed waiter who offered him a choice of every form of beverage known to man). Furthermore, very large operations had to maintain contacts with anchor clients at every level of the organisation. So it was that each had become sedulous in placing young and old associates on secondment in the company as in-house advisers with the express intention of maintaining those

relations and ensuring that the work continued to flow. In addition, in order for the partners to maintain a colossal draw, every manjack in the building had to be pulling on an oar from dawn until well after dusk. To make the place profitable, enormous leverage had to be imposed for the services of the most credulous and least skilled and tedious, time-consuming tasks undertaken to permit a full budget to be recovered.

The same commercial sentiments meant that there was an overwhelming pressure to do as much work as possible 'in-house' and to brief the Bar rarely, if at all, as the matter matured. Since the lawyers doing the work at the early stages would never have to explain to a savage court exactly why a particular forensic course had been adopted there was every incentive to take as much marrow from the bone as could be chewed before any barrister reached it. Bullfry had noticed an increasing tendency for his own advice to be sought only at the death, when for whatever reason, the firm feared that the matter was going awry, and it needed the cold comfort of a Bullfry conference either to dampen down client expectations of a victory, or give the whole case its quietus.

Unfortunately, the market for Australian legal services was fully mature. Each client had to be guarded reverently. As clients merged and cartelised, so the demand for legal services decreased. Moreover, as matters became commoditised, the client expected to exert constant downward pressure on legal costs in the same way as it might order widgets more cheaply from Ruritania. Thus it was that, per capita, Australia had the largest law firms in the world. The only way, so it seemed to Bullfry, that a firm could expand was by poaching one two or three star performers from another firm who would bring their existing clients with them. Within the firms themselves, constant internal fighting went on over who owned what, and who was entitled to the 'client credit' thus engendered. Youth no longer owed deference to age. With the supply of legal services saturated it was vital to continue to employ the best and brightest of graduates.

But the *cursus honorum* had changed greatly. Bullfry had very briefly in his salad days (a period of alcoholic frivolity) worked at such an organisation (before being escorted to the door by armed security). Then, the average time to reach partnership was four to five years. Now, it was more like nine or ten. In Bullfry's day, a man who shaved and checked his dress before leaving was virtually assured of ascension to heaven. Now, only one out of six or seven ambitious thrusters (or more likely trustees) in the same section was likely to be promoted. As a result, each firm had viperish in its bosom a large number of disappointed aspirants who would never have their honours thick upon them. Furthermore, there was no longer any question of resting quietly on the oars and reaping the benefits of years of careful work; to the contrary, each man (few women survived motherhood and the 'mommy track' despite the canting endeavours of the firms to convince their female cohort of junior solicitors otherwise) had to continue to labour in order to maintain the billables and avoid the knock on the door which presaged a cut in the points, and the thinly veiled invitation to take up the smallgoods store at Batemans Bay.

No wonder the client was 'God' to the law firms. The comment revealed the inherent conflict in anyone providing a fee for advice. The advice might be to settle, or discontinue the matter immediately, but to do so necessarily diminished the work available to be billed. The courts had largely encouraged this. Modern 'pleading' meant that



'The client is God.' In those four words lay the continued, if benighted existence of the independent bar.

when anything could be pleaded, anything would. The pusillanimity of most jurists meant that very few matters would be peremptorily struck out. (It always struck Bullfry as somewhat ironic that the very senior jurists who most inveighed against the 'extravagance' of discovery or the like failed completely to remedy the situation by using those powers of summary dismissal or judgment which had made courts of special pleading such worthwhile tribunals. The Common Law Procedure Act had much to answer for). The broad powers of amendment and their liberal use meant that the possibility of a demurrer cutting off a case before too much time had been wasted almost never occurred. Similarly, since there was no rule against a departure, multiple inconsistent cases could be put with the solicitor generally safe in the knowledge that all could be settled at the door of the court. So it was that there was the strongest incentive to run cases along on a Micawber basis (at least until well past full discovery). Equally, in its own defence, a firm running a largish case for a major client could argue that so stringent and bizarre had the law of professional negligence become that a big case demanded the expenditure of millions of dollars in its preparation to avoid any contention that some important aspect (or unimportant and remote possibility) for ultimate victory had been overlooked.

Fortunately, Bullfry had no leverage – indeed, it was all he could do to rise from his chaise lounge. He took no man's surplus work product; indeed, it was but seldom that he could bill for his own. He did not care what matter any of his confreres was conducting; he did not aspire to be one of those who enjoyed an etiolated Customs Act practice before some federal beak, delving for hours on end into the backside of a revenue statute, while the AGS man cowered in the corner; he did not aspire to run a bespoke commercial matter where eight or nine trolleys of irrelevant documents were deployed from the 'tender bundle', and each day brought a spiral bound volume from someone on level 78 which set out what the judge had had for lunch the day before.

The Bar is not a zero sum game (unlike a law firm). Provided that Bullfry was gainfully deployed anyone else's practice was a matter

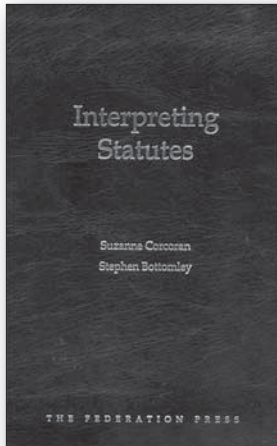
of indifference to him. A matter could as easily end up in the High Court from the District Court at Newcastle as it could from Court 21B. And Bullfry well knew that in each court filled with higher primates, and like any other troop of rebarbative Barbary apes, an unspoken fighting order existed so that every counsel of any experience knew immediately where he stood with his fellows and the tribunal. The overly frequent granting of silk had, in an inevitable application of Sir Thomas Gresham's law, risked driving out the brilliant counsel with the unsound but there were political reasons for that. It did not really matter what honorific was claimed by counsel – the Bar was still so small that anyone practising in a particular jurisdiction knew to a nicety over time the precise strengths and weaknesses of any opponent.

Alice announced the arrival of the next conference with her usual hesitancy. ('Has she already had her extra scoop?' wondered Bullfry?) The subject matter of the conference was a delicate one and the client, a rich widow from the East, was attending. The solicitors had gone wrong early on but had continued on a fateful forensic course and had run up costs on account beyond the dreams of avarice. (As was invariably the case, this made the matter almost impossible to settle). Then, too late, they had sought the advice of counsel having extracted as much potential profit cost as they decently could. With a trial looming (and failure virtually certain) she was being brought in at the last minute to obtain Bullfry's proverbial benison. He never let them down – it never for a moment crossed his mind, as it had a famous jurist of the past, to suggest, at the end of a difficult conference, commencing proceedings against those instructing him. With his usual eloquence and circumlocution he would (once again) pull their fat from the fire. He had often grappled in his darker moments with the hypocrisy this deception necessarily involved.

The door to his chambers opened and Bullfry was momentarily taken aback. He had not connected the name with his past but as the solicitor showed her in Bullfry's mind flooded back to a party at the Queen's Club in his youth, and its inevitable finale.

Interpreting Statutes

Suzanne Corcoran and Stephen Bottomley (Editors) | The Federation Press, 2005



No lawyer would gainsay Spigelman CJ's now oft-quoted words in his August 2001 extra-curial address that:

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of law has escaped statutory modification.

These days, every competent legal practitioner needs to have ready access to helpful texts on legislative interpretation, such as Pearce and Geddes' influential work, *Statutory Interpretation in Australia* (now in its 6th edition), and the equally significant work of Pearce and Argument, *Delegated Legislation in Australia* (3rd edition).

But those texts are of a fundamentally different character to the collection of essays which make up the book being reviewed. This collection does not purport to provide a black and white digest of legal principles and canons of construction or, indeed, merely focus on judicial interpretation of primary and secondary legislation. Rather, the value of this collection of essays lies in the fact that they seek to grapple with more fundamental questions arising from the task of interpretation. Those issues include the proper role of the judiciary in interpreting both statutory and constitutional instruments; the symbiotic relationship and interaction between legislation and the common law; the need for legislation to be understood not only by judges and

legal practitioners but also by those whose conduct and affairs are affected by it; and the practical need not to lose sight of the fact that, in most areas of human endeavour, the 'non-statutory picture' has to be taken into account. Thus recognition must be given to the role and function of non-judicial interpreters (such as administrative tribunals and regulators) in interpreting and enforcing not only primary legislation, but also delegated legislation, policy statements, practice notes, guidelines, codes and other unconventional law making instruments.

The book is the product of a project funded by The Australian National University. Many, but not all of the contributors, are associated with the ANU. The book will do no harm to that University's pre-eminent reputation in the field of public law.

The book is divided into two parts. Part One is devoted to 'Fundamental Themes'. In two essays, Professor Corcoran describes various competing legal theories of statutory interpretation in various international jurisdictions, including Australia. They include the literal approach, textualist theory, purposive interpretation and various dynamic theories.

Professor Leslie Zines contributes an essay on constitutional interpretation which is as succinct and illuminating as his many admirers have come to expect. His contribution is notable for its clarity, insight and erudition. The same could be said for the chapter on 'Statutes and the Common Law' written by one of Professor Zines' disciples and erstwhile colleagues, Justice Paul Finn.

Part Two of the collection largely focuses on discrete areas of statutory regulation. Those specific areas of law include human rights and discrimination law, native title, corporate law, employment law, criminal law and health. It should not be thought, however, that those specialist chapters will be appreciated only by specialists in the relevant fields. For example, I found Professor Bottomley's essay entitled 'A Framework for Understanding the Interpretation of Corporate Law in Australia' particularly stimulating and of much wider relevance. He makes the point that

any proper understanding of interpretive practices in the corporate law area needs to confront the growing complex web of statutory and non-statutory rules, but also the fact that the key interpreters of corporations law are not always judges, but also other regulatory or disciplinary bodies, such as the Takeovers Panel, the Companies Auditors and Liquidators Disciplinary Board, the Australian Securities and Investment Commission, the Australian Stock Exchange and standards-setting authorities such as the Australian Accounting Standards Board.

His analysis and discussion of these matters in a corporations law context is valuable not only for specialists in that field, but for practitioners in other fields which are similarly regulated and structured. For example, much of his analysis and commentary could apply equally to the area of compensation for motor vehicle injuries and death in New South Wales. The days are long past since that area was governed substantially by common law or, indeed, merely by judicial interpretation of statutes. Consideration now has to be given not only to those matters, but also to the meaning and operation of a vast body of sub-statutory and non-statutory instruments, including Regulations, Guidelines issued by the Motor Accidents Authority and other administrative publications emanating from bodies such as the Claims Assessment Resolution Service, not to mention the practical significance of the interpretation and enforcement of those instruments by persons other than judges, including claims assessors and medical assessors. That is not to say that administrative processes have entirely replaced judicial processes and the common law in the field. The New South Wales Court of Appeal's recent decision in *Nominal Defendant v. Gabriel* [2007] NSWCA 52 is a timely reminder of the ongoing interplay between interpreting statutes and the context of the common law, a theme which is explored at some length in several of the essays in this book.

Many of the remarks above concerning the relevance of Professor Bottomley's commentary to the New South Wales Motor Accidents Compensation Scheme could equally be applied to the subject

of environmental law, with its complex interweaving of common law, primary and secondary legislation (including multiple layers of environmental planning instruments), policy statements, development control plans and guidelines which have to be interpreted not only by courts, but also by councils and other regulators.

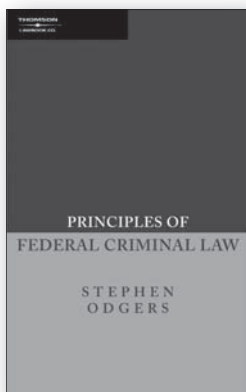
It would also be wrong to dismiss the work as one which is likely to appeal only to law academics and students. Legal practitioners who are called upon to give advice or argue issues which turn upon the interpretation of statutory or non-statutory publications of general application will also find it to be an informative and thought-provoking work. Or to put

that another way: even personal injuries advocates ought not to be embarrassed about displaying a copy of this book on their library shelves. Its possession will unquestionably assist in coming to grips with the new challenges and opportunities presented by recent legislative reforms in that area.

Reviewed by John Griffiths SC

Principles of Federal Criminal Law

Stephen Odgers SC | LawBook Co, 2007



Stephen Odgers SC's exposition of the principles of federal criminal law takes the form of an annotation to Chapter 2 of the Commonwealth Criminal Code.

Like the Evidence Acts, the Criminal Code started life as an attempt to enact consistent legislation at the federal and the state level. For those who have been involved in any prosecution under the Commonwealth Criminal Code it has come as no surprise that Chapter 2 of the Code remains a solely federal endeavour.

The focus of his analysis is Part 2.2 of the Criminal Code; and for good reason. Part 2.2 codifies 'the elements of the offence' and introduces the concepts of 'physical elements' (conduct, result of conduct, or circumstance) and 'fault elements' (intention, knowledge, recklessness or negligence) to each Commonwealth offence (unless the relevant offence legislation provides otherwise).

Odgers expressly disavows any engagement with the debate on the merits of the provisions of Chapter 2 of the Code, although he must have been sorely tempted. Instead he aims to 'explain and elucidate the principles established in Chapter 2'.

To do so, he lays out his annotation in a way which will be familiar to readers of his annotated *Uniform Evidence Law*: the text of the provision is set out in grey, with commentary from the 1992 report of the Model Criminal Code Officers' Committee. This is followed by his analysis of the provision supplemented by case law that has applied the provision or dealt with an equivalent concept under other criminal law statutes or the common law.

Odgers brings a wealth of knowledge and experience to the analysis of the criminal law principles in Chapter 2 (especially Part 2.2) and the book succeeds as an annotation of Chapter 2. The book is written from the perspective of a practitioner engaged in criminal law. Attempts by others to elucidate Chapter 2 reveal more about the intention of the legislature than the likely interpretation and application of the provisions in criminal proceedings and he has no hesitation in expressing disagreement with earlier suggested interpretations.

Ongoing judicial consideration of the Code will no doubt form the basis of further editions. It may be that Odgers' certainty as to the interpretation of some of the provisions and the successful application

of the legislature's intentions will be tested. For example, he seems certain that the offence of importing a 'border controlled drug', an offence now against s307.1 of the Criminal Code, has been successfully re-drafted so that the fault element of intention only applies to the fact of importation and not to the substance being imported. Judicial interpretation of s307.1's predecessor is one indication that the legislature's intention may not be borne out.

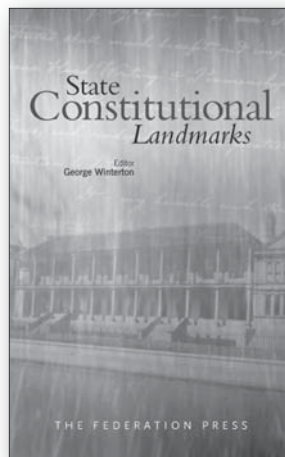
Odgers has also introduced a novel addition to his format: the provision being 'elucidated' is reproduced in small typeface in a box on the left-hand side of each pair of pages which deal with that provision. It may be that this format anticipates the likely length of this work by the third or fourth edition. But it may not be to everyone's taste and does not necessarily assist in the use of the current edition, which is not lengthy; and when used for provisions such as ss11.1 (attempt) and 11.2 (complicity and common purpose) the format creates the unsettling sensation of reading text in columns.

This however is a very minor criticism. I for one welcome the research and rigour of analysis which he brings to this complex and novel piece of Commonwealth legislation. The book will have a wide appeal as a ready reference, not only among criminal lawyers, but also for the increasing number of non-criminal lawyers who are required to advise corporate clients and their directors and officers.

Reviewed by Kate Morgan

State Constitutional Landmarks

Professor George Winterton (ed) | The Federation Press, 2006



There is nothing more dangerous than a book which contains detailed analyses which confute the reader's dearly held preconceptions. This is such a book. As the editor, Professor Winterton, explains in the Introduction (p 7) the book is one of two volumes¹ both of which are 'predicated on the belief that constitutional issues are of interest to, and comprehensible by, the intelligent layperson if explained in their political and social context'. There is much here to inform and entrance both the general and the specialist reader. More importantly, each of the contributors has the ability to be able to place the potentially 'dry' legal issue in its social and historical context. As soon as the surrounding facts of any of the great controversies are explored, the topic tends to come alive, even for those whose interest in exquisite constitutional questions is attenuated. Equally important, the book revisits crucial state constitutional questions which are still of high relevance even as centripetal forces increase in the polity.

Mr Williams's detailed foray into prosopography on the rise and fall of Justice Boothby (an ill-equipped and pig-headed jurist p 50) in South Australia is a tale fascinating for the insights into the early history of the administration of justice in the colony, the way in which (as today) personality and politics play a large part in judicial office, and its discussion of the origins of the *Colonial Laws Validity Act 1865*.

Professor Booker looks at the important doctrine of the plenary power of the colonial legislatures, with an analysis of the cases leading up to *Powell v Apollo Candle*², a decision beloved of all first year law students. Following a type of inquiry first popularised by Professor AWB Simpson, there is a discussion of the important background facts which give a 'colour' to the issues in the case which a bare reading of the judgment never conveys. There is a copious analysis of the history of 'delegation' in other parts of the British Empire (see for example p 62 footnote 51 looking at the earlier Indian position.)

In his chapter on *Thomas McCawley v The King* (p 69 et seq) Dr Aroney places the vital question of the extent of the legislative sovereignty of parliament in its historical and political context. Once again, there is plenty of prosopographical detail – McCawley had worked his way up from humble beginnings and his involvement with the labour movement is discussed in detail. Once again, local questions of politics and personality played a large part in the source of the dispute and the sectarian influences on the criticisms of McCawley's appointment are a reminder of how much Australian public life has changed for the better (p 76).

Professor Goldsworthy puts *Trethowan's case* in its political and social context. Sir John Peden was the supposed 'inventor' of the entrenching strategy and the concept was 'for a time regarded as so important that the [law faculty] administrative officer used to take visitors to the spot in the library where Sir John was said to have had it'!! Would that the modern-day law school contained such exemplars!! Once again, in short compass, the political intrigues and manoeuvres are discussed in an accessible and interesting style.

For 'rusted on' Labor supporters, Dr Twomey's discussion of the dismissal of the Lang government by Sir Philip Game makes disturbing reading. A true believer tends to think of the demise of the Lang and Whitlam governments as following the same pattern but nothing could be further from the truth. As with previous writings, Dr Twomey has informed the

entire discussion by the most detailed references to the underlying Dominions Office documents. Sir Philip Game comes out of the whole episode with an enhanced reputation (at least for this reviewer). Some things never change, however: Dr Twomey notes with her customary understatement that 'the most bitter letters [complaining about Mr Lang], ... seemed to come from women on Sydney's north shore' who wrote in strong terms of the governor (p 138). One suggested that he was 'Sir Spineless Game' who was 'more of a jelly fish than a man'! In the end, after machinations about the method of payment of state public servants, Lang seems to have left the governor with little choice. As Dr Twomey notes: 'It was therefore curious that Lang preferred dismissal over withdrawal of the circular [in relation to payment of government salaries]. The governor was also surprised by this response, and formed the view that Lang wanted to be dismissed from government' (p 153). It appears in the end that the crucial factor in the dismissal of Mr Lang was his failure to provide any form of legal comfort whatsoever to the governor that his contemplated actions were not illegal (p 157). Dr Twomey provides a second analysis in her discussion of *Clayton v Heffron*. Once again, there is copious reference to secondary sources to put the relevant questions in their social context. The history of the 'House of fossils rescued by rats' (p 168) reads like a political thriller. Finally, Dr Twomey returns to her 'special topic' in a masterful analysis of the making of the *Australia Acts 1986* (Chapter 10). As always, there is a wide-ranging analysis of all the available contemporary documents.

Dr Waugh looks at a more prosaic topic, 'Deadlocks in State Parliaments' (Chapter 7) but one which retains contemporary relevance. Professor Johnston examines the problems of the Western Australian gerrymander in *Tonkin v Brand*. The author notes the change in emphasis over the last 50 years in terms of judicial review, and the increasing importance of Chapter III of the federal Constitution and the 'arising under' jurisdiction (p 234)

Gareth Griffith looks at the fascinating saga of Armstrong and Budd and the former's unique place as the only member to be expelled by a legislative body for his extramural misconduct. The relevant hearing lasted 55 days and a fascinated public 'heard one sensational revelation after another from the witness box' (p 244). How quickly a *cause celebre* fades from recollection! He (with Mr Clune) returns in Chapter 12 to consider the Franca Arena controversy on parliamentary privilege.

The last four chapters deal with more recent controversies; Dr Carney looks at *Egan v Willis*³ and the protection of state papers – an issue which is likely to become of increasing relevance and importance. The decision of the High Court is subjected to astringent review (pages 313 – 325). Professor Wheeler puts the BLF struggle in its historical context and notes its fundamental importance for constitutional scholars, confronting as it

does the boundary between legislative and judicial power (p 379). This provides a context for Professor Lee's discussion of the *Kable* decision, 'a guard-dog that barked but once?'⁴ As Professor Lee notes in thorough analysis, *Kable* generated great expectations which later development has perhaps disappointed although it provides 'protection against extreme laws' (p 414). The basic principle which underlies it is hard to ascertain (see discussion at p 411). Finally, in *McGinty v Western Australia* Dr Peter Gerangelos, who is an expert on the topic, looks at the question of electoral equality in the Westminster tradition and the 'implied rights venture' in the High Court.

The book is beautifully produced with a detailed index. For those who wish to dip into questions of state constitutional law it provides a fascinating and accessible vehicle. It is in the nature of things that (at least for this reviewer) the happenings of long ago are of greater interest than

matters occurring within a professional lifetime. Nevertheless, it is also likely that analyses of more recent controversies will provide the basis for judicial discussion in the future.

Reviewed by Lee Aitken

¹ The earlier companion volume is Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge UP, 2003).

² (1885) 10 App Cas 282.

³ (1998) 195 CLR 424.

⁴ Per Kirby J in *Baker v. R* (2004) 210 ALR 1 at 17[54] quoted at page 403.

Verbatim

Handley JA, on being sworn out as a judge of appeal:

Courts are not the only places where language has layers of meaning. A reference for an incompetent employee who was leaving to pursue fresh challenges stated: 'I cannot recommend him too highly or say enough good things about him. I have no other employee with whom I can adequately compare him. The amount he knows will surprise you. You will be fortunate if you can get him to work for you.' There is also a code for school reports which I picked up over the years. If you read that your son is easy going it means he's bone idle. If you read that he's helpful it means he's a creep. If he's reliable, that means he dobs in his mates. If he's forging his way ahead, he's cheating. And if all his work is of a high standard, you know that you and your wife are ambitious, middle class parents.

Slattery QC on the occasion of Hammerschlag J's swearing in ceremony:

Shortly after commencing at Freehills you prepared a draft affidavit for the late Peter Hely QC, as he then was. Hely looked it over, handed it back and commented that it appeared to him you had drafted it in Boer.

Hammerschlag SC (as he then was) cross-examining Mr John Landerer to suggest that, in preparing FAI's response to HIH's 1998 takeover offer, he had not separated his role as chairman from his firm's role as solicitor for the company:

Q: Mr Landerer, I want to suggest to you that as a consequence of your position as chairman and solicitor, your roles in either of those capacities were, from time to time, often blurred?

A: I wouldn't accept that suggestion, sir.

Q: In relation to the Part B, you say, do you, that your non-equity partner in your firm, Mr Mark Houston, looked after that?

A: That's correct.

Q: And you say that you saw no difficulty with that?

A: That's correct, Mr Hammerschlag.

Q: You didn't say to him, 'Houston, we have a problem?'

A: No, I didn't and I don't see what's so funny about that.

Q: 'Neither do I'.

NSW Bar v Queensland Bar

By Lachlan Gyles

On the morning of 25 March 2007, twenty two members of the New South Wales Bar gathered at the magnificent playing fields of Brisbane Boys Grammar School for the annual matches against the Queensland Bar.

These matches were to have special significance because the guest of honour for the weekend was the Hon Justice Callinan, the former Queensland Bar captain, who is to retire from the High Court Bench later this year. It was fitting therefore that the matches should have been played at his Honour's *alma mater*, and where he was captain of the First XI in 1954 and again in 1955, winning premierships on both occasions.

The teams were entertained the previous evening at the home of current Queensland Bar captain, and the guest of honour's former pupil, Roger Traves. Roger had also been the premiership winning captain of the First XI at Brisbane Boys Grammar in 1978.

A number of past players came along to the function and re-lived some of the triumphs and disasters (both on and off the field) over the 35-odd years that the game has been played.

The New South Wales side looked reasonable on paper, but was looking to achieve something that had not been able to be achieved by any NSW Bar team since 1993, a win north of the border.

The Second XI game took place on the adjoining oval and was won by Queensland. Mention should be made of Chin and Stuart Bell who flew up on the morning of the game; Reynolds SC and King SC who made the effort to play despite having to leave early; and Hastings

QC who captained the team. Other players were Allen, Marshall SC, McSpedden, Duncan, Neil SC, and Lithgow from the Victorian Bar.

The willingness of all those people to come up and ensure that we could field a second team was much appreciated by our hosts.

Best performers for New South Wales were Chin (33) and Allen (16) with the bat and King SC with ball.

In the main game, the visitors won the toss and batted on a hard and flat wicket. Bilinsky and Dalglish opened, but the former was dismissed with the first ball of the match, hitting a full toss straight to Crawford at short cover.

Dalglish (11) and Carroll then steadied the ship and took the score to 1/60 off 18 overs, before Docker, also from the Paddington Club, joined Carroll. They had proceeded to just over 100 off 25 overs when Callinan J was thrown the ball by the Queensland skipper in what turned out to be an inspired bowling change.



The New South Wales Bar team: Carroll, Bilinsky, Docker, Foord, Macfarlane, Gyles (c), Dalglish, Eastman, Naughtin, Stowe, Scruby.

The years were then rolled back as the former Queensland Colts leggie ripped the heart out of the NSW middle order, dismissing Carroll (78), Foord (17), Docker (27) and Stowe (14). It was only when his former associate, Scruby, came to the wicket that the rot was stopped. Scruby said that he had learned to pick his Honour's wrong'un when he used to bowl to him in the corridors at the High Court between hearings.

Carroll, who had looked a certainty for a century, for his part when asked what had happened when he had been stumped said that it was a bit like what had happened when his Honour had gone onto the High Court: he thought the ball would go to the right but it went to the left.

In the end the visitors finished with 7/179 from their allotted 40 overs, with Gyles 16no. Callinan J had taken 4-39 off eight overs and in doing so had given Queensland a fighting chance.

Queensland did not get the start which they needed. Drysdale was run out in the third over, and McFarlane and Eastman bowled a fine opening spell restricting the hosts to 25 from their first ten overs.

Docker then came on with Naughtin and took the crucial wicket of Traves for 32, and with a fantastic run out by Carroll with a direct hit from side on, Queensland had the wobbles.

Stowe then pulled off a miraculous leg side stumping off Naughtin to dismiss Crawford, who had just about single-handedly won the previous match up there, and repeated the dose a few overs later off Bilinsky. All agreed that the first was the best piece of wicket keeping ever seen in the history of the fixture.

After some resistance from Anderson and Williams, Bilinsky then mopped up the tail taking 4-21, and when Roney was caught by Carroll off the bowling of Gyles

in rain and fading light, Queensland were all out for 129 and the Callinan trophy had been retained by NSW.

It was perhaps fitting that the undefeated batsman was the aforementioned Callinan J, who left the crease proud in the knowledge that he had resisted everything that had been thrown at him by the visitors.

While the historic victory for the visitors was celebrated well into the evening, the game will be longest remembered for the performance of Callinan J who at the age of sixty nine (and over fifty years after leaving the school) turned the Brisbane Boys Grammar playing fields for that day into his own 'Field of Dreams'.

We all look forward to the next match in Sydney in 2008.



Justice Callinan: a picture essay

To mark the impending retirement of Justice Callinan from the High Court, *Bar News* presents a photo tribute together with a suitable Verbatim in his honour.

Bodruddaza v MIMA [2006] HCATrans 685 (14 December 2006)

Gleeson CJ: There was a rather colourful example in Western Australia not long ago of a decision-maker who had given erroneous information about her age and who sat on making decision after decision in circumstances where she had exceeded the time for statutory retirement.

Kirby J: The thought has occurred to me.

Gleeson CJ: I am keeping an eye on Justice Callinan myself.

Kirby J: You had better keep an eye on me as well.



Roll back the years. L to R: Shepherdson J, Callinan J, Gyles J, Callaway QC and Crooke QC





This is my last 'Coombs on Cuisine'. Your editor has encouraged me to self-indulge in some reminiscing and a few thanks.

The first column appeared in Autumn 1989 and was called 'Circuit Food', a name it kept until Andrew Bell SC renamed it and graced it with a Poulos sketch of yours truly.

My thanks must go to Ruth McColl (as she then was, now McColl JA) then secretary to Bar Council and editor of *Bar News*, for her early support as well as to Bell SC for his.

My thanks also to the parties of the various parts. In truth there have only ever been two parties of the second part; my ex, Jan (nee Ashburner), and my lovely Annette. There have been a number of the third part

and even the odd party of the fourth part, which proves what we all know; that food column writers are all greedy.

To all parties of all parts (excepting the first) my thanks for enhancing not only meals written about, but many others.

To business. The brightest new spot is Fix St James. The gimmick which I love is that all courses come in three sizes – piccolo; medio and grande – which permits (a) light lunches and (b) sampling.

The food is superb. I particularly liked the whitebait fritter, larger than usual, very crisp and brown (piccolo); the tartare beef, moist and tangy with Tabasco, finely chopped shallots and a raw quail egg for garnish (piccolo); the black mussels in a tomato garlic and white wine sauce with a sting of chilli (delicious) (medio) and the figs in prosciutto (piccolo). Others loved and I tasted calamari with tomato, chilli, garlic and prosciutto, nice and crisp. The pork belly and the rabbit and porcini risotto were rated highly by those who had them, as were the seared scallops. A good range of wines by the glass complemented everything. It is not cheap but perfectly positioned for the Bar.

Out of town I really enjoyed Bella Largo at Narrabeen. Lyn, my secretary of 14 years, came down from her retirement in Buderim to help out with some paper work. On my daughter's recommendation we lunched there. Lyn had fish and chips (fat finger sized) crisp and crunchy and was very happy. I had crab ravioli, just two big ones in a lobster bisque with bok choy and finely chopped tomato, onion and fresh caper dressing. A light but lovely meal diminished by poor service at lunch time. Good value though, with all main courses \$20, except for the seafood platter at \$24.90.

My last thanks go to my readers who have kept my pen moving by the warmth of their response.

John Coombs QC

Fix St James
111 Elizabeth Street, Sydney
Ph: (02) 92322767

All major cards accepted

Bella Largo
Beach Road, Narrabeen
Ph: (02) 99705599
All major cards accepted

Verbatim

In the course of an appeal concerning questions of foreseeability, the following exchange occurred:

Ipp JA: Mr Taylor, that's pure *Shirt*.

Taylor SC: It's got an 'r' in it your Honour.

Ipp JA: It must be my accent.

Gleeson CJ's opening remark in an address to the Australasian College of Surgeons

When judges and surgeons meet for professional purposes, the outcome is likely to be painful for one side or the other.

Betfair Pty Limited & Anor v State of Western Australia [2007] HCATrans 165 (26 April 2007)

Gummow J: I will not make any formal order as to listing or duration of the appeal, but I have given those informal indications. Is there anything else, gentlemen? Yes, 11 June which appears in proposed order 3 should become the 12th. The 11th is the Queen's Birthday Holiday.

Mr Meadows: Not in Western Australia, your Honour.

Gummow J: It is at headquarters

Libke v The Queen [2007] HCATrans 84

Mr Devereaux: ... If I may move straight to the cross-examination ground. The appellant, Mr Libke, was giving evidence in his defence at his trial in the District Court in Brisbane on some serious charges of sexual offences. He was subjected, in our submission, to questions that were likely to be confusing, that contained statements against him, that he was not given a proper opportunity to answer and that pitted the prosecutor against him in a personal way. He was interrupted when answering and his answers were criticised. Some questions contained statements that were...

Gleeson CJ: It sounds like an argument in this court.

Mr Devereaux: Yes, except I am expected to be able to deal with that.

Kirby J: Good answer.

Mr Devereaux: We will see how that goes.

Gleeson CJ: We will reserve our expectation.

