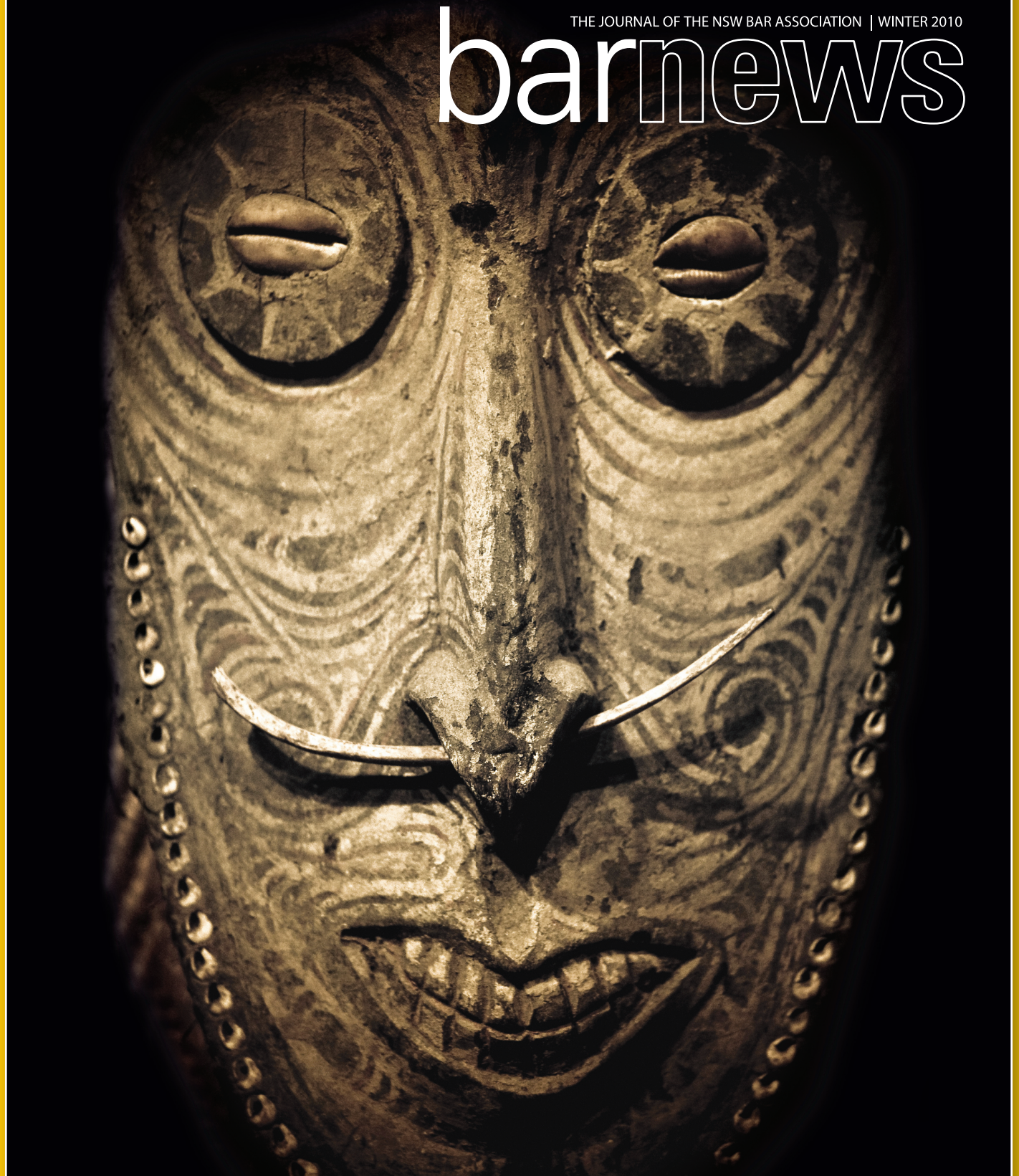
THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2010

barnews



2010 SIR MAURICE BYERS ADDRESS

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barnews

ISSN 0817-0002

Views expressed by contributors to *Bar News* are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor,
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Cover: A tribal mask from Papua New Guinea. Photo: iStockphoto

I really do think that members of the Bar can make a contribution to public life; they understand that in the debates that occur in the political process, facts are important, principles are important; that there needs to be focus on what is relevant rather than what is extraneous or misleading. The virtues of disinterested debate and objective consideration of the issues I think flow from an experience of practising law, and can contribute to the level of our political discourse in Australia.

The late Hon Jeff Shaw QC

This distillation of the potential for members of the bar to contribute to public life was typical of the elegant mind of the late attorney general, and deserves to be recorded as a mark of respect to someone who made a significant contribution to state politics that won respect from both sides of parliament, and the community more generally. He was also a fine barrister and one of the leading industrial advocates of his generation. Jeff Shaw's life and contribution to the community is recorded in this issue of *Bar News*. He was honoured with a state funeral at the Sydney Town Hall, as well as a minute's silence at the annual Bench and Bar Dinner. A number of his legislative initiatives bear testament to the tangible difference he was able to make for the good in his public career.

In the period since the last edition, there has been a spate of judicial appointments, including three to the Sydney Registry of the Federal Court and two to the Supreme Court. More are expected. The Federal Court also has a new chief justice in Patrick Keane who has a national reputation as an outstanding jurist. Chief Justice Keane has agreed to be interviewed in the next issue of *Bar News*. One topic on which his views will be sought concerns the continuing desirability of the Federal Court having no permanent full court. There is a perception by many that the court has become so large that not to have such an appellate court has the potential to lead to a certain unevenness in judicial pronouncements. On the other hand, to sit both on appeal and at first instance, no doubt delivers a variety of challenges and experience that is attractive to current judges.

The corollary of the recent spate of appointments is the creation of an expanded pool of retired senior judges who are available to, and increasingly engaged in, local and international commercial arbitrations. There can be no mistaking the ever-increasing significance of this shift towards 'privatised' commercial dispute resolution by highly skilled and enormously experienced former commercial and appellate judges. In this context, the Recent Developments section of this issue contains a number of important notes in relation to commercial arbitration.

The topic of judicial retirement more generally is addressed by Arthur Moses SC in an Opinion piece in which he advocates an increase in the age for the retirement of federal judges. A related question which arises is the extent to which federal judges would take advantage of any such increase. The likely answer is that it will depend upon the individual but there would seem to be a powerful case for an increase in federal retirement age. Tony Cuneen's piece on the *Judges Retirement Act 1917* provides an interesting historical counterpoint.

This is by far the longest edition of *Bar News* ever published. One of the reasons for its length is the fact that an increasing number of members have taken the time to contribute articles, notes and opinion pieces of high quality on varied subject matters. These contributions are much appreciated, as is the work of the Bar Association's publications manager, Chris Winslow, who has principal responsibility for the physical production of *Bar News* which is done to a standard to rival any professional journal any where in the world.

Bar News, as a publication, not only reflects the intellectual energy and curiosity of the bar in respect of topics of current and historical interest, but also serves as an important journal of record. The extended noting of superior court appointments operates both as a matter of historical record and is also designed to 'introduce' new judges to those members of the profession who may not have encountered the recently appointed *judex* in practice. The publication of obituaries (of which there is a depressingly large number in this issue) pays respect to much missed colleagues and also records the many and varied life experiences and personalities of our profession.

In recent issues, there has been a heavy focus on matters of legal history and, in particular, the history of the profession and of some of its notable members. Such articles, many penned by the assiduous David Ash of Frederick Jordan Chambers, are not only of intrinsic interest but also contribute to the

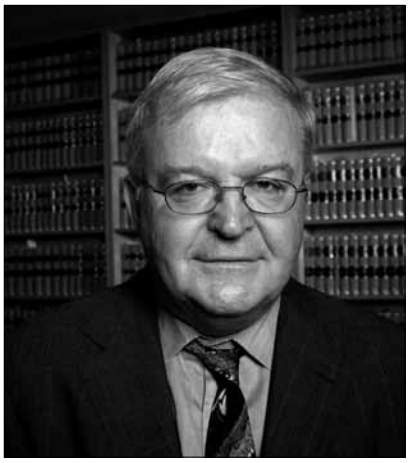
institutional continuity (and education) of the profession. There has also been a heavy emphasis on matters of practice.

In this particular issue, Ash continues his march through the careers of members of the New South Wales Bar who have been appointed to the High Court with an extended essay on the long life of Sir George Rich in which he focuses on his relationships with other members of the court and, in particular, Sir Owen Dixon. Ash also revives his fascination/obsession with the clerihew, reviewing the recently published *Lives of the Governors of New South Wales* in this idiosyncratic form of verse.

Other articles of particular note include David Bennett QC's Sir Maurice Byers Address, which took a fresh approach to this annual lecture, focussing upon analytical questions rather than historical or purely constitutional themes. There is also Michael Kirby's riposte to Justice Antonin Scalia's view of the use of foreign authority in judicial decision making, a topic also recently critically considered by Justice John Basten in the Bar Association's Law and Values series on the topic of Law and International Thought.

Graham Ellis SC, who has returned to Papua New Guinea as a judge, gives a fascinating and gripping account of his experiences in that jurisdiction. For sheer interest, Geoffrey Watson SC's essay 'A really rotten judge' on the life of United States Supreme Court judge James Clark McReynolds, is bound to attract attention. There is, of course, a great deal more in this issue, including an exclusive preview of the ABC's forthcoming series *Rake*, which follows the life and travails of Cleaver Greene - philanderer, serial adulterer, addicted gambler and member of the New South Wales Bar! For Bullfry afficionados, Professor Aitken recounts Bullfry's experience as a member of the junior bar, many years ago and without the benefit of the Bar Practice Course. There are lessons to be learnt everywhere.

Andrew Bell SC
Editor



In the last six months probably the most important matter for the bar has been the ongoing reform proposals for the legal profession proposed by the taskforce established by the Council of Australian Governments (COAG). This is now culminated in a draft Bill, which as presently drawn has the potential to significantly undermine the independence of the profession.

The Bill is too complex to deal with in the space of this column but its fundamental proposals are that the general regulation of the profession will fall under the control of a board, the majority of which will comprise government appointees. That board will have general control over admission, the issue of practising certificates and their cancellation and variation and the making of rules governing the conduct of the profession. Although some of its functions can be delegated (in some cases delegation is mandatory) overall control of these issues remains with the board.

Parallel to the board, the Act envisages the appointment of a person described as a national ombudsman who will be responsible for disciplinary matters. Once again the person in this role has power to delegate, which in some cases is mandatory. However, he or she is entitled to deal personally with matters which are regarded as setting a precedent or which are considered otherwise to be of importance. Further, the ombudsman is presently subject to the direction of the Council of Attorneys General.

Both these issues have the potential to significantly undermine the independence of the profession. A number of chief justices (including the chief justice of New South Wales) have spoken out against them and they are opposed by both the Law Council and the Australian Bar Association. The Bill is presently subject to a consultation period and the government has generally speaking indicated flexibility in its approach. Both Philip Selth and I are involved in the negotiations and we will do our outmost to ensure the independence of the profession is maintained.

In the last six months probably the most important matter for the bar has been the ongoing reform proposals for the legal profession proposed by the taskforce established by the Council of Australian Governments

The next matter I would like to mention is the new silk protocol. It does not have the provisions that Jeremy Kirk recommended at the Bench & Bar Dinner, rather it adopts in substantial measure the recommendations made by Roger Gyles QC in his report. In particular, the Selection Committee will now include a non-practising barrister. This year it will be Keith Mason AO QC, well-known to all of you and who, in the council's view, was an outstanding candidate for this role. I am grateful to Keith for taking on this onerous task.

The protocol will not, of course, satisfy all of you. One thing it does do is impose a fairly significant burden on applicants in completing the application form and for that matter on the committee in considering it. However, this was thought to be desirable to ensure that the committee makes its decisions on particular candidates with regard to the views of persons who have actually seen them in action and can provide an informed analysis of their ability to take silk. The council will again review the protocol at the conclusion of this year's round of applicants to see what, if any, further improvements can or should be made.

The Bench & Bar Dinner was an outstanding success this year. That was due in no small measure to the outstanding speeches of Justice Virginia Bell, Angela Bowne SC and Jeremy Kirk. I already feel sorry for next year's potential speakers who will have to try to come up to the same standard. Thanks also to those members of the Bar Association staff, particularly Katie Hall, who worked so hard to make it a memorable evening.

Earlier on this year I attended a number of all-day CPD seminars, both in Sydney and in regional areas. It gave

The Hon Justice Virginia Bell and Jeremy Kirk at the Bench and Bar Dinner 2010

me a good opportunity to hear of the problems confronting many members of the profession in relation to areas such as payment for legal aid work, the competitive advantage solicitors have by being able to describe themselves as barristers and solicitors, and a number of other matters peculiar to the regional areas which I visited. The Bar Council, as best it can, is seeking to deal with those issues, some of which such as the barrister/solicitor problem are enshrined in statute and will continue to do so.

As I indicated in my column for the previous edition, I want to hear of any particular problems which you have or suggestions in the way the Bar Council can better assist its members. As I then indicated, I have an open door policy and would be happy to talk to any of you about any matters you wish to raise.

It remains for me to thank the editorial committee of *Bar News* for bringing out such an entertaining and informative publication of which my column, I am afraid, is a somewhat drab footnote.

Tom Bathurst QC

President

Dear Sir

Your piece on 'Australian Miscellany at Law' (Summer 09/10, p74) impels me to write to you.

I am particularly interested in the photograph accompanying your prose, which makes no reference to the photograph nor to the subject of same.

Allow me to assist. The picture has been in the possession of *Bar News* for something approaching a quarter of a century.

One morning in the early nineteen eighties I was seated at the bar table in the courthouse at Goulburn. As the most senior member of the bar present I was preparing to make a speech of welcome to Maxwell J on the occasion of the opening of the annual sittings of the Supreme Court. My train of thought was interrupted by the then editor of *Bar News* who informed me that she had come into possession of a photograph of me taken in Phillip Street many years previously. This surprised me as I had had no previous knowledge of the photograph nor could I imagine the circumstances in which the unknown cameraperson had taken it.

Some months later when the picture appeared in *Bar News* I was a trifle miffed to see that the accompanying text described me simply as 'this young barrister'.

Upon seeing the fresh publication, which arrived in yesterday's mail, I was surprised to see that your own enquiring mind appears not to have discovered my identity. After a little reflection it struck me that there might well be good reason for your failure to identify me to your readers.

First, it might have been a deliberate attempt to insult me, a forensic artifice not unknown to the New South Wales Bar. I regret to say that I sometimes resorted to such knavery myself.

Second, it might have been the result of poor subediting in your otherwise excellent publication.

Then the third possibility struck me. Perhaps you and your predecessor were seeking to protect me from the sort of torment that befell Frank McAlary following his claims that he was the subject of the legendary photograph taken on 15 August 1945.

If that is the case, i.e., if you are protecting me from some upstart pretender, I am suitably grateful.

I am mindful that McAlary's cause was advanced by many notable witnesses, not least Chester Porter QC and that eventually Frank triumphed when the Mint immortalised him on the reverse side of the $1 coin.

If my own claim to fame be disputed it rests upon lesser testimony.

John O'Meally who originally drew the photograph to my attention in the eighties, had little to say about my role in the scene as he appeared to be distracted by the undoubted representation of his late father's name on the wall of Oxford Chambers.

Barry Mahoney was the only person to write to me on the subject. He wrote primarily to make a too-clever enquiry as to whether I had secured the acquittal of Mr Bill Posters.

If I am faced with a contest from some once handsome pretender I would nevertheless appreciate your correction of the grave wrong that has now been twice done to me.

Whether or not you are able to risk your editorial integrity on such flimsy evidence, I could be bought off with an A4 copy of this important historical document. Mrs Maguire is quite insistent that it should take its place amongst the other antiquarian memorabilia on the walls of the study that we share. She asserts confidently that the children would love it.

Brian Maguire QC

Dear Sir

The editorial (Summer 2009-2010) on bar governance deprecates the long lead time involved in holding executive office in the Bar Association under current arrangements. The convention that the presidents serve two year terms is questioned.

I agree that the lead time to becoming president now is too long – particularly if the progression is from ordinary member of the council to treasurer to junior vice-president to senior vice-president to president. This deters good candidates from standing.

However the real culprit may be the length of the stately chain of progression, rather than the two year term of the president.

There are advantages in that term – the president can outlast some and develop useful relationships with others that could not be done in a one year term. A contested election for president is not to be expected, absent some pressing controversy of the day. However, there is no reason why there should not be elections (within the council) for other offices when well-qualified barristers are elected to the council. Indeed, there is no reason why a good candidate cannot be 'shoehorned' into a position. There should be no sense of entitlement in those on the ladder. The abolition of the position of junior or second vice president should also be on the agenda.

Roger Gyles AO QC

Dear Sir

In the course of the last year, a colleague of mine passed away. Actually, he was more than a colleague. Much more. We had shared chambers for over a dozen years (my entire time at the bar except for my reading year as it happens). In that time we had appeared for co-accused in a few long running trials and even came to reside in adjoining suburbs. So more than just a colleague, he became a friend, a mentor and a confidant.

He'd had a few setbacks of different types but things appeared to be going smoothly, until an illness he thought he had beaten came back. He remained positive that he'd beat it again. In the end, he didn't. That end came fairly quickly, but with enough time for many of us who knew and loved him to say goodbye.

I write this anonymously because it's not intended as a eulogy to him – better than I have already delivered those. My purpose in writing is to acknowledge the compassion and generosity of the bar, through the medium of the Barristers' Benevolent Association.

At a time of difficulty and grief the association provided assistance to meet immediate needs and to ensure a proper service of memorial and thanksgiving for our friend. Inherent in that assistance is the collegiate nature of our profession. It's heartening to know that in the darkest of times there is a means by which we can provide assistance and support to the family of our fellow barristers.

The report of the Benevolent Association contains the following information:

> The association can respond to calls for assistance without formality and without delays. There are no formal applications, forms, waiting periods, means tests or other predetermined administrative requirements. There have been times when assistance has been provided on the same day as information about a problem became known.

I can attest to the truth of that statement. One phone call, no formality. Just genuine compassion and immediate assistance in whatever form required.

I would commend the report of the Benevolent Association to you – there's a link on the Bar Association web site. It sets out the many forms in which assistance can be provided. It also lists donors to the fund. On behalf of my friend I thank each of those donors for their generosity. Perhaps by demonstrating one use of those funds, this short note might encourage others to make a donation.

[Anonymous]

Bar Practice Course 01/10

Back row, left to right: Matthew Graham, Scott Nash, Brett Hatfield, Fleur Ramsay, Carlo Fini, John Hyde Page, Bill Loukas, Chris Burgess, Benjamin Koch, Alan Shearer, Mark Machonachie, Tim Saunders, David Hughes, Charles Alexander, Greg O'Mahoney

Second from back row: James King, Rita Lahoud, Anita Power, Rhys O'Brien, Ralphed Notley, Robert White, Ross Glover, Victoria Brigden, Margaret Pringle, Michael Gleeson, Lachlan Robison, William Summers, Daniel Mihalic, Sean Bogan, James Hutton

Second from front row: Michael Klooster, Nicolas Moir, Dilan Mahendra, Imtiaz Ahmed, Bora Kaplan, Emmanuel Kerkyasharian, Deone Provera, Colin Purdy, Geoff Denman, Phill Butterfield, Mark Davies, Isabel Reed, Anthony Kaufmann, Robert Ranken, Richard Lee

Front row, left to right: Peggy Dwyer, Philippa Clingan, Sheridan Goodwin, Elizabeth Weisske, Michael Heraghty, Michelle McMahon, Lee-May Saw, Gabriella Rubagotti, Liza Friedwald, Therese Catanzariti, Tracey Iskra, Lyndelle Brown, Martha Barnett, Evan Walker, Joanne Little

A review of the Senior Counsel Protocol

By the Hon Roger Gyles AO QC

I have reviewed the New South Wales Bar Association Protocol for the Appointment of Senior Counsel and the related administrative arrangements at the request of the Bar Association. Having done so, I recommend as follows:

- That a distinguished person, who is not a practising barrister, be added to the Selection Committee with a non-deliberative role.
- That the form of application for appointment as senior counsel should be reviewed and framed to refer to the actual performance and practice of the applicant in a manner capable of being verified and assessed. This recommendation should be implemented forthwith.
- That the process of consultation and assessment be altered so as to be more closely tailored to the particular application than now.
- That the form of paragraph 7 of the protocol be reconsidered.

I have also drawn attention to some issues requiring further consideration.

Background

The present system was introduced after the then New South Wales Government ended the system of appointment of queens counsel by the Executive Council on the recommendation of the attorney general after appointments were made in 1992. The New South Wales Bar Association then developed a system for the selection and appointment of barristers to be designated as senior counsel by the president of the association. The principles governing that process are set out in the Senior Counsel Protocol which was last revised on 2 July 2008. That protocol is available on the website of the New South Wales Bar Association.

The silks ceremony in the High Court of Australia, 1 February 2010. Photo: courtesy of ID Photographics.

The change in system is not as great in practice as might appear. For many years, it had been the practice of successive attorneys general to seek the recommendation of the president of the New South Wales Bar Association as to those to be appointed as queens counsel. The president consulted widely before making the recommendation. It was rare for the attorney general to depart from the list recommended by the president. It has been a very long time since any attorney general has had sufficient personal and current knowledge of the bar to make the selection.

However, the relatively smaller number of applicants, coupled with the smaller bar and somewhat less specialisation, meant that the president in those days was likely to have a closer knowledge of the capacity of the applicants than is the case now, and was able to target consultations more closely to the particular applicants than has been the case in recent years. The increasing size of the bar, the proliferation of courts and tribunals, increasing interstate and international work and greater specialisation have complicated the identification of appropriate candidates.

The process is also complicated by the increase in the sheer number of applicants. Last year, 120 barristers applied. That reflects, in part, the significant lessening of the risks to the practice of a successful applicant for silk, and thus to his or her ability to make a living, than hitherto. In earlier times, queens counsel could not appear without a junior (the two counsel rule) and the junior was to charge two-thirds of the fee of the senior (the two-thirds rule). Taking silk meant a major change in the style of practice and the effective level of fees charged. The two-thirds rule broke down first. The two counsel rule was removed later, although it continued to have force through custom and practice. It

...senior counsel can continue to do a junior's work charging junior's fees if he or she fails to attract work as leading counsel.

is, of course, to be expected that many cases – or advices – will require two or more counsel and the appointment of silk should still indicate those capable of being leading counsel in such cases. The practice that senior counsel would not draft pleadings and affidavits and would rarely become involved in interlocutory applications has waned. The net result is that senior counsel can continue to do a junior's work charging junior's fees if he or she fails to attract work as leading counsel. Thus, there is little financial risk involved in making an application. The increasing ratio of publicly funded positions, particularly in criminal law, has the same effect.

As governments around Australia followed the New South Wales example, other states and territories developed their own response – all have retained a system of appointment of senior counsel, administered somewhat differently.

There has been public criticism of the system from time to time – usually by or on behalf of unsuccessful applicants. The protocol has been revised from time to time. The Honourable Trevor Morling QC undertook a review of the protocol and reported in March 1999. The public criticism of the system, both here and in Victoria (in relation to the somewhat different system applying there), has become greater over recent years. There has been media interest in the issue.

Present system

It is worth setting out some key aspects of the protocol. The purpose of the appointment is set out in paragraph 2 of the protocol:

> The designation of Senior Counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.

Paragraph 4 provides that:

> Appointment as Senior Counsel should be restricted to practising advocates, with acknowledgment of the importance of the work performed by way of giving advice as well as appearances in courts and other tribunals.

The public criticism of the system, both here and in Victoria (in relation to the somewhat different system applying there), has become greater over recent years. There has been media interest in the issue.

The essential criteria for appointment are identified (in paragraph 6) as learning, skill, integrity and honesty, independence, disinterestedness, diligence and experience.

Paragraph 7 is somewhat controversial, providing:

> Senior counsel will have demonstrated leadership in:
>
> - developing a diverse community of the bar; or
> - making a significant contribution to Australian society as a barrister.

The protocol provides for a Selection Committee (paragraph 9) which in turn chooses a Consultation Group (paragraph 11). The Selection Committee can summarily reject an application (paragraph 16) but must seek comments on all remaining applicants from the Consultation Group (paragraph 17) and from the Judicial Consultation Group (paragraph 18). The Selection Committee may consult with other persons (paragraph 19) and consult again with any of the persons from whom comments have been received (paragraph 20). The committee then makes final selection (paragraph 21). The chief justice of New South Wales has a veto (paragraphs 22 and 23).

A copy of the Cover Sheet for Senior Counsel Application 2009 which is to be attached to an application together with a Guide to Practical Aspects of the Appointment of Silk in New South Wales promulgated by the president in July 2009 are available on the New South Wales Bar Association website, and can be regarded as incorporated by reference in this report. These documents flesh out the relatively general provisions of the protocol.

In 2008 127 barristers applied and 645 judges and other members of the profession were consulted as part of the consultation group and the judicial consultation group. Fourteen applications were successful.

In 2009 there were 120 applicants, 648 persons consulted and 18 applications were successful.

There has been a rise in the ratio of senior counsel to junior counsel in recent years – from 11.3 per cent in 1990 to 15.2 per cent now.

Review procedure

At the time of engagement I was provided with documents relevant to the current procedure, the Morling

review, protocols from interstate and the United Kingdom, and a number of communications from members of the bar over the last couple of years which were critical of the process, together with some responses on the part of the association.

On 9 December 2009 the president notified members of the bar that this review was to take place and called for expressions of views by the first week of February 2010. It was later made clear that submissions could be sent directly to me. Time for submissions was extended, and I received some as late as early April. Overall, 50 submissions were received from members of the bar, including a submission from a former chairman of the Victorian Bar, some of which incorporated the views of others or represented the views of a section of the bar. As might be expected, most of those submissions offered criticisms of the present system with varying degrees of severity. Some were from disappointed former applicants, but many were not. Most of the submissions, including those from disappointed applicants, were well thought out, well presented and constructive in suggesting improvements or alternatives. I also received a number of solicited and unsolicited comments in the course of discussions with members of the judiciary and the profession, including solicitors. Further material was received from interstate and the United Kingdom.

The president of the association briefed me as to the detail of the handling of the applications in 2009. I spoke with a number of those who had been members of the Selection Committee recently. I consulted senior judges in all of the courts – state and federal – exercising jurisdiction in the state. I also consulted the president of the Law Society of New South Wales. I have taken into account my own experience over the years as a barrister and judge in observing the outcome of the process, as an office bearer of the New South Wales Bar Association and as a regular consultee thereafter.

Most members of the profession have not responded. Even though that may partly spring from apathy (and in some cases a concern not to be identified as a trouble maker), it must be taken to reflect a reasonable degree of satisfaction with the present system. I will not endeavour to summarise all of the issues canvassed and views expressed. They were many and varied, and some were directly in conflict with others. I shall identify the issues which I regard as significant and discuss them in the light of the material gathered without attempting to summarise or deal with all that has been said in relation to them.

Most of the submissions, including those from disappointed applicants, were well thought out, well presented and constructive in suggesting improvements or alternatives.

Should the appointment be abandoned?

A small number of persons were in favour of abandoning the appointment of senior counsel. A small number favoured reversion to the system of appointment of queens counsel or at least the use of the title queens counsel (citing the recent New Zealand experience). One respondent proposed replacing the present system with a form of specialist accreditation. Cogent arguments were advanced in favour of each proposition. However, my review is about the method of appointment of senior counsel rather than whether there should be such appointments. Whilst such questions will, no doubt, remain live, I do not sense a significant groundswell in favour of radical change at the moment, particularly as the system continues interstate and overseas – and has relatively recently been introduced in Singapore.

Are the criteria right?

The statement of the purpose of the appointment of senior counsel and the essential criteria stated in the protocol are basic to the system. There has been some criticism of the detail of this part of the protocol. That is inevitable. If the protocol were being re-written, there would no doubt be a range of legitimate views about the drafting. In my opinion, a strong enough case for change has not been made out in general. This part of the protocol differs to some extent from the matching provisions in the protocols of other states and territories.

It would be better to have a uniform approach, particularly because of the arrangements for mutual recognition between states and territories and the move to a national profession. That goal should be pursued. I would not suggest any change to the New South Wales protocol in the meantime on that account.

The basic principle enunciated in the protocol is peer group identification of those with individual merit and integrity for the benefit of the public in choosing

counsel – principally solicitors and their clients. That justification for the system has not been widely questioned.

A suggested alternative is to appoint all who apply after a lengthy minimum of years in practice who demonstrate a viable practice and integrity. That would be a radical departure from a long tradition in New South Wales, and is likely to confuse potential clients. It should only be considered if the present system breaks down.

Two issues of principle are raised about the essential criteria. The first is that there is no proper, perhaps any, recognition of barristers who practise in the field of mediation. The second is that there is a tension between the criteria in paragraph 7 and the balance of the criteria and, in particular, the statement of the purpose of appointment. I will return to discuss those two difficult subjects later.

General method of appointment

The president of the association makes the appointment on the advice of the Selection Committee. An alternative which is current in some states is appointment by the chief justice of the state. The chief justice has never appointed or recommended silk in New South Wales, by contrast with some other states. It might be thought that appointment by the chief justice would quell controversy, particularly about partiality and bias. This has not proved to be the case, as events in Victoria over recent years have demonstrated. The chief justice would not have sufficient personal experience of the applicants to make the choice, but would have to depend upon a process of consultation. It would be surprising if the chief justice of New South Wales would be willing to undertake a task not hitherto undertaken in circumstances likely to involve the Court in controversy. This is a New South Wales Bar Association scheme – albeit taking over the historical role of the attorney general – and, as such, it is appropriate that the appointment be by the president of that Association. I do not detect any pressure for a change in the appointing authority. As things stand at the moment, I see no basis for the kind of bureaucratic structure erected in the United Kingdom, nor for widening the potential appointees beyond practising barristers as occurs there.

The selection system

The principal complaints about the present system are that it is biased in favour of commercial practices and certain floors of barristers with a preponderance of members with commercial practices, and a corresponding bias against common law and criminal practice, particularly those who practise at trial in the District Court, and against members of regional Bars and women. The system is said to work in favour of members of the Bar Council and those politically active in Bar affairs and to have elements of a popularity contest based on reputation, rather than selection on merit. The system is said to lack transparency with no meaningful feedback to unsuccessful applicants. There is claimed to be a bias in favour of those having a floor connection with members of the Selection Committee.

However, the general opinion amongst those I consulted, confirmed by many of the submissions, even those critical of the present system, is that, by and large, those appointed senior counsel are 'within the range' of those that ought be appointed and have the necessary qualities. There are problems in the criminal area to which I shall return and there was

one recent appointment in a specialist area which is regarded as an aberration. The criticism, rather, is that candidates more worthy or at least as worthy as those selected are not chosen.

It is difficult to assess the claims of bias on any objective basis. I refer later to claimed bias in favour of those connected with the selectors. The reality is that different areas of practice have different demands for the services of leading counsel and different qualities are required for appointment. The most obvious example is the difference in years of experience prior to appointment between commercial silk and common law silk. Commercial silk have been appointed with fewer years of experience than common law silk for as long as I can remember. That is because court-craft gained from years of experience at trial is considered by briefing solicitors to be relatively more important for a common law silk than for a commercial silk.

I was not presented with any evidence that applications by women have been less successful than might have been expected on a systematic basis, indeed the evidence is to the contrary. The proportion of women applicants who succeed is far higher than that of men, in recent years. However, overall, the proportion of women silk to juniors is significantly less than that for men. That is not surprising in view of demographics – the age and experience profile of women would be younger than men and the rates should steadily improve as time goes on and the proportion of women in the eligible group becomes higher. The problem is exacerbated by the tendency to appoint women silk to the bench as soon as possible. I return to this topic later.

Photo: ID Photographics

There have been relatively few appointments from regional Bars. That has always been so and reflects the kind of work available at those Bars and the more limited practices that develop. This leads to more limited exposure of those practitioners to the judiciary and profession at large. The decline in substantial common law cases heard in regional centres over recent years has probably increased the difficulties.

A common criticism of the present system is that it measures reputation rather than performance. A related criticism is that the process of consultation is superficial and comparative rather than focussed upon the practice of the individual applicant. I shall deal with these issues as the discussion proceeds.

Selection Committee

The main issues concerning the Selection Committee are whether members of the Bar Council should be members of the committee, and whether the committee should include (or be comprised of) persons who are not practising barristers. I do not think it is practical to do anything about the complaint that the selectors chosen have not been sufficiently representative and are too narrowly based upon the commercial chambers located in Phillip Street. If a selection of members of the committee is to be made, it should be made by the president of the bar who bears responsibility for the appointments. It is neither practical nor desirable to endeavour to prescribe categories which should be represented on the panel. Even if it were practical, there would have to be an expanded number of selectors. This would increase the chance of compromise and horse trading inevitable in any committee system. This should be avoided as it would inevitably lead to appointments being made that are not appropriate. The risk of that happening which exists under the present committee system would be magnified if there were a quasi representative selection panel. Having said that, a prudent president would take into account the diversity of practice at the bar in choosing members of the Selection Committee.

No doubt a selection panel could be envisaged which is composed entirely of, or had a majority of, members who were not practising barristers, but who could have knowledge and experience of a relevant kind. That group could then consult with those able to assist in relation to the candidates. That model was no doubt worthy of consideration when the system was established, and may still be. However, in my opinion, the criticisms of the present system are not sufficient to warrant a wholesale

change from peer assessment to that model.

No committee of an appropriate size will have sufficient knowledge of candidates to act on its own experience. Consultation, and the assessment of the results of the consultation, must be a critical feature of the system. However, the current knowledge and experience of the practising members of the Selection Committee is an important part of the process. That very knowledge and experience may involve the possibility of actual or unconscious bias playing a part. Some statistical evidence was presented said to bear that out, which has not been refuted as such on the part of the association. Having spoken to some Selection Committee members, I have no doubt about the diligence and sense of responsibility with which the task is approached. In my view, the combination of experience, knowledge and responsibility inherent in peer group selection clearly outweighs the risk of bias. Provided that the committee is sensibly chosen and that there is a reasonable turnover of membership each year, the possible effect of bias should be minor. It is suggested that selectors should not participate in relation to members of their own chambers. I do not agree that there should be such a rule. The essence of peer review is knowledge of candidates – the closer the better. The choice of chambers connection is arbitrary. A selector may have closer relationships with other applicants than with floor members. Indeed, by no means all floor relationships are unduly friendly. Such a mandatory requirement is impractical in a peer review system. However, I can imagine circumstances where it would be appropriate for a selector to refrain from contribution in relation to a particular candidate. On the other hand, confidence in the system would be enhanced by having a distinguished person other than a practising barrister as a non-deliberative member of the committee, and I so recommend. That person should be charged with observing the process to monitor integrity.

The present consultation process was widely criticised. The obtaining of yes, no or not yet responses from so many consultees about so many applicants on the one form does have the appearance of superficiality, particularly where a number of criteria need to be satisfied.

I was surprised by the number of respondents who were against any Bar Council member being a member of the Selection Committee. However, that was far from a majority view, even amongst the relatively small proportion of barristers who did respond. I do not think that a sufficient case has been made for that change.

Consultation and assessment

The present consultation process was widely criticised. The obtaining of yes, no or not yet responses from so many consultees about so many applicants on the one form does have the appearance of superficiality, particularly where a number of criteria need to be satisfied. The consultees are only given a list of names with the address of chambers and broad statement of areas of practice for each applicant. The applicant is able to provide more relevant information, but that does not form part of the wide consultation process. That concern is somewhat alleviated by the present requirement that a respondent should not answer except on the basis of experience of an applicant within the last 3 years, except in special circumstances. There is also much misunderstanding as to the use that is made of the results of consultation. Analysis of the results does provide much useful information in a time and cost-effective way. The selectors can, and do, take account of the identity and position of those who have contributed in relation to a particular applicant and can, and do, personally discuss an applicant with a consultee if the occasion arises. The analysis of the results of the survey is a starting point rather than an end point. The committee can, and does, make its own enquiries. The process is by no means as mechanical as is thought by many. Nonetheless, responses to the questionnaire are likely to be impressionistic and influenced by reputation; not that the repute and standing of an applicant is irrelevant. By and large, lack of 'ticks' or the presence of negatives are a significant factor in the decision-making. The lack of reasons makes meaningful feedback difficult.

A sense of perspective needs to be retained. A thorough individual examination of 127 candidates is a major exercise. Current experience is that consultations result in the identification of a small number of candidates – usually less than 10 – who receive close to universal support. There is a large group who clearly do not

command sufficient support. This leaves a group of varying size, but perhaps 20 or 30, about whom there are mixed messages. Whatever system is chosen, there needs to be a judgment call as to those who do and do not survive closer scrutiny. Whatever system is chosen, a number of those who are rejected will be aggrieved when they compare themselves with those who succeed.

One solution would be to limit appointment to those receiving close to universal approval in a relevant field of practice. That would enhance the standing of the office and, over time, would probably reduce the number of applications. That approach would no doubt be attacked as elitist and protectionist. Neither argument holds sway with me. Any merit-based appointment can be described as elitist. The number of senior counsel seems to have proportionally increased over recent years, and there is an increasing proportion of senior counsel who do not practise as leaders of the bar as envisaged by the protocol. I have not heard any suggestion that there is a dearth of available senior counsel, particularly as appropriate counsel can be obtained from interstate in the event of a particular shortage developing. However, some candidates of real merit might be overlooked in a more restrictive approach. Whilst there may be a case for setting the bar for selection higher than it has been over recent years, the difficult task of assessment of those in the grey area would still need to be done, even if the grey area might be smaller in size.

The present consultation procedure is probably the most efficient way of conducting a 'yes', 'no' or 'not yet' system. It is a useful filtering process but in my opinion is no longer suitable as a major component of decision-making.

I agree with the predominant view of respondents that assessment of an application should be more closely aligned to the actual practice and performance of the applicant. The applicant should demonstrate the case for appointment based upon his or her actual practice and performance and that case should be scrutinised by the selectors. I note that both the United Kingdom and Queensland bars have moved in that direction with the applications requiring a good deal of detail. I do not favour moving as far down that track as the United Kingdom. The required detail there is extensive and complex. Indeed, a business of coaching candidates has developed. This may be explained by the size, diversity and geographical spread of the United Kingdom Bar. I recommend that this change be instituted this year, whether or not other recommendations are accepted. Even if the present system is retained, the Selection Committee would be much better informed about the applicants than they are at present.

A number of respondents have made suggestions as to the required information and the methods of assessing it, and some have urged that there be an interview with the candidate. Before descending to that kind of detail, it is necessary to consider the ramifications of the general approach. It can be taken that the consultation group for a particular applicant would be closely tailored and may involve opponents, barristers and solicitors with whom the applicant has worked, and judges or tribunal members before whom the applicant has appeared.

A threshold question is whether the bar has the resources to institute such a system. It would be more resource-demanding than the present system. It would require more staff administration than at present if the task of the Selection Committee is to be kept within reasonable bounds. Dealing with 120-odd applications would be daunting indeed. However, the number of applicants would probably drop when the need to have a fully justified application with chapter and verse as to the extent of the applicant's practice to be given and investigated is appreciated. It is also both feasible and appropriate that a substantial fee be charged to all applicants in order to fund the necessary resources. If that has the effect of deterring some fringe applicants, so be it.

In that system the focus would be more closely upon the qualities of the candidate as such rather than the current system which, to an extent, can be seen as a kind of contest between candidates. As there is no support for a quota of senior counsel, it does not matter whether in the result, few or many are chosen in a particular year. It would also enable more useful feedback to unsuccessful candidates.

It is also both feasible and appropriate that a substantial fee be charged to all applicants in order to fund the necessary resources. If that has the effect of deterring some fringe applicants, so be it.

The present system of consultation could be used as a filter for identifying those candidates about whom detailed consideration is appropriate this year as an interim measure while the consultation and assessment process is developed and the place of the present survey assessed. Since the system has been set up, and the results are capable of helpful analysis, its use should not necessarily immediately be discarded. If that is not done, there should be an initial cull of those whose applications simply do not measure up to the required standard on any reasonable view prior to more intensive consideration of applications.

I thus recommend that approval in principle be given to requiring that an application for appointment as senior counsel be framed to refer to the actual performance and practice of the applicant in a manner capable of being verified and assessed. I recommend that the process of consultation and assessment be altered so as to be more closely tailored to the particular application than now. If that recommendation is accepted, there is a good deal of detailed work to be done. One issue will be the tension between genuine consultation on the one hand and transparency to the candidates on the other. Many respondents may be reluctant to give frank opinions if they are to be disclosed to applicants. A number of the respondents have made detailed suggestions worthy of consideration which can be extracted, if appropriate. Two particular suggestions are worthy of mention.

The first is that there should be no annual lodging of applications by a fixed date with one announcement of results for the year. Applications could be made at any time and dealt with individually or in smaller groups. That would emphasise the individual assessment of applications and would alter the competitive nature of the present process. That would be likely to reduce the sense of grievance felt by those rejected and reduce the occasion for external interest in the league table of results presently announced. That is the approach in the United Kingdom. Consideration of its introduction should only take place if the recommended principles were adopted and the necessary processes established.

I confess to being troubled by the notion that social opinions or social activism should be regarded as necessary for the appointment as senior counsel.

The second, and more radical, proposal is that assessment of an application be made over a period – one suggestion was two years – during which the practice and performance of the applicant could be monitored. This should be kept in mind as the system develops.

Some contentious issues

Protocol paragraph 7

Some have pointed to the tension between the criteria in paragraph 7, which has little, if anything, to do with performance as a barrister, and the other criteria, which are merit-based, and argue that paragraph 7 ought be removed. Some say that the criteria leads to self-promotion, particularly in relation to election to the Bar Council, with a view to being advantaged in the appointment of senior counsel. It is said to be uncertain in meaning and an example of misplaced political correctness. On the other hand, others argue that the criteria are appropriate but that only lip service has been paid to them.

The content of the two limbs of paragraph 7 is somewhat nebulous. On any view, it is difficult to justify paragraph 7 as a mandatory requirement ranking equally with the qualities set out in paragraph 6. It has certainly not been applied as such in practice. I confess to being troubled by the notion that social opinions or social activism should be regarded as necessary for the appointment as senior counsel. I can understand that leadership in social areas might be regarded as a plus, but it is hardly an essential criterion. I recommend that the form of paragraph 7 of the protocol be reconsidered.

Some of the submissions on this point complained that no real progress has been made in advancing those who are relatively disadvantaged, particularly women and others who have not been able to carry on full-time practice without interruption. Paragraph 7, as framed, has little apparent connection with that issue. Be that as it may, equal opportunity and anti-discrimination is a difficult topic in the field of merit selection – by no means limited to the appointment of senior counsel. It may be accepted that a disadvantaged person of exceptional ability might not develop the largest of junior practices or the widest reputation, but nonetheless be quite capable of handling a substantial case as leading counsel. In addition to women, this could be said of those who have worked overseas

or interstate, those who have been locked in a long case or are members of regional Bars, and so may not have the recognition they deserve among the consultees. I hope that a fully justified application by such a person, properly and fairly scrutinised and assessed, would recognise that capability. In that way, I would expect that such meritorious cases would have a greater chance of success if the approach I have recommended were instituted than at present. However, I do not think that it is appropriate that a candidate who has not demonstrated the necessary capability, whether because of some disadvantage or not, should be given silk in the hope that the necessary capability will develop. Appointment along those lines is likely to bring the system into disrepute.

I said earlier that I detect no bias against women in the process for the selection of senior counsel – rather the contrary. That is not to say that there is no disadvantage to women (and other sections of society) in relation to practice at the bar generally. That issue is beyond the scope of the review.

Mediation

The protocol is framed on the assumption that representing a client as an advocate before courts and tribunals is the core function of senior counsel. That has been the general understanding over time and is likely to accord with the perception of judges, solicitors and the public.

As such, the present criteria do not sit easily with an application by a barrister who specialises in mediation. It is argued in some comprehensive submissions that as mediation is a recognised field of practice at the bar, excellence in that field should be capable of recognition as much as excellence in other legitimate fields of practice at the bar.

I have some knowledge about mediation as practised in New South Wales but I am not confident that I have a sufficient grasp of what is entailed in a barrister's practice specialising in mediation to express an opinion on the issue. The barristers whom I have come across in mediation are involved because they do, or will, represent the client in actual or prospective litigation or arbitration over the dispute being mediated, not because they are experts in mediation. Barristers, of course, act as mediators – as do members of other professions and occupations. I suspect that a barrister would be chosen rather than another professional because of presumed knowledge of the law rather than other qualities. No doubt some people are better mediators than others. However, that skill does not (or may not) reflect the eminence of the person in his or her substantive field.

Mediation has burgeoned in recent years and mores are no doubt developing. The question as to whether skill or eminence as a mediation practitioner should be recognised by the appointment as senior counsel is a policy question which ought to be the subject of separate consideration.

Criminal Practice

There is considerable disquiet about the appointment of silk in the criminal arena. Some judges are unhappy with the standards of advocacy of some appointed as senior counsel; some members of the private profession perceive a bias in favour of the public profession; some members of the public profession are unhappy with the choice of candidates as appointment follows from the bureaucratic allocation of work – particularly between trial and appeal; and those practising at trial complain of a lack of recognition. These problems in part result from changes in criminal practice at the bar in recent times. Solving them is beyond the scope of this review, but they need to be addressed with input from those in that field.

Ego and ethics

By Duncan Graham

> Our choice of occupation is held to define our identity to the extent that the most insistent question we ask a new acquaintance is not where they come from or who their parents were but what they *do*, the assumption being that the route to a meaningful existence must invariably pass through the gate of remunerative employment.[1]

Work contributes to our sense of identity. The strength of our ego is largely dependent on outcomes at work. Problems can occur when we identify too closely with our work. The waiting rooms of psychiatrists and psychologists are full of people struggling for a meaningful, fulfilling life outside of work. It is unhealthy, and professionally unsafe, to have our feelings of self-worth and, ultimately, our happiness too dependent upon outcomes at work.

None of this is new. My concern is that these problems are much more acute for barristers. The problems are aggravated by the adversarial system in which we operate, and the changes to work as a barrister over the last decade, making it more like a business and less like a profession. The result is a tendency towards self-interest and a slide in ethical behaviour. The adversarial system is unsustainable in such an environment.

Some barristers derive meaning in their lives, not from the role they play in the administration of justice, but from their form and position in an imaginary league table. In the meritocratic, modern world, status is important. It may be determined by one's confidence, imagination and ability to convince others of one's due.[2] It is therefore hardly surprising that self-worth is proportional to how high you are in the league table within the profession.

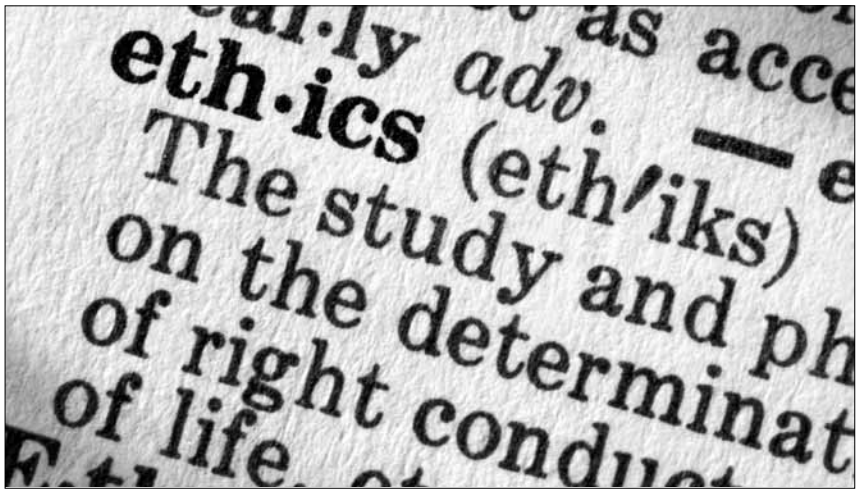


Photo: iStockphoto

In a recent seminar to barristers, the legal services commissioner, Steve Mark, observed that legal ethics had a great deal to do with how one regarded oneself and the values and principles the individual held important.[3] In a meritocracy, you tend to value yourself if you are at the top of the table rather than languishing winless at the bottom. There must be a risk your ethics will be governed to a degree by what you think you have to do to get to and stay at the top. A conflict may develop between your ethics and your desire to win. Unethical behaviour is the result of a value system dependent on personal success, the opinions of others, and an identity too closely tied to outcomes at work.

We are, however, told we are part of a special profession. Barristers occupy a unique position in society in the proper administration of justice. This role is enshrined in barristers' rules of conduct. Some may regard this view as obsolete. Barristers now operate in a competitive market place. Different principles must dictate practice as a barrister.

In 2007, Michael McHugh AC QC warned of the waning influence of professional ideals: [4]

> Outside the Bar, many hold the perception that the Bar is now as much a business as a profession. It should surprise nobody then a large section of the community regard barristers in the same way as they regard business persons. However, I do not think that the perception of the Bar as a profession will ever disappear, fade though it might. At worst, the Bar will continue to promulgate it, thought in practice is may be no more than a nostalgic ideal. It will be used to invoke the notion of barristers as persons dedicated to serving the public, rather than their own, interest.

It is perfectly understandable for barristers to consider their own interests. Many have very powerful incentives to do so, such as mortgage repayments, family responsibilities, school fees, etc. But this is not the sort of self-interest with which I am concerned. I am referring to the definition of self through work, where identity and work are indivisible. Problems occur when ego is everything. Barristers not only become concerned with winning and the relentless quest for money, but will search for ways to become the centre of public attention, like film, singing and sporting stars.[5]

What types of problems eventuate when professional thought is dominated by

interest in self or by the idea that work is the only means of identifying self?

First, there is a risk of losing independence. One of the most important aspects of practice is a barrister's independence. Some find this difficult to maintain. The temptation to give clients and solicitors opinions that they want to hear in the hope of return work or a lengthy hearing (with associated fees) may be hard to ignore. When the whole of your identity is dependent on outcomes at work, it becomes almost impossible to ignore.

Second, objectivity may be lost. If you identify too closely with your work, then you lose insight into the consequences of your conduct. You may lose judgement. For example, a barrister may take on a brief in an area of the law with which he or she has no experience or expertise. A barrister would be appalled if a brain tumour was removed by a colorectal surgeon who wanted a bit of a change in the surgery he performed. Why is it reasonable for a personal injury lawyer to accept a brief in a building contract dispute and charge his or her standard rates for the experience? They may get by with bravado and the equivalent of a good bedside manner. Meretricious conduct is surprisingly difficult for clients and the public to detect.

Third, barristers who see work as being all about them, rather than as something with obligations to courts and clients, tend to run cases that could be settled. They tend to develop entrenched positions and lose the ability to analyse a case from the other side's perspective.

Fourth, there is a risk of self-aggrandisement. Running cases may give the barrister greater exposure to the judiciary or to the media. A barrister may enjoy seeing himself or herself striding in slow motion along the tarmac, or see excerpts of his or her (undoubtedly) withering cross-examination on the nightly news. But a client, cowering behind a scrum of television cameras and microphones, may not find the experience as enjoyable. There is no place for the shameless self-promotion that comes with courting the media. Public interest in court cases is nothing new. It will continue. Court cases are not, however, opportunities to grandstand and to self-promote.

There must be a risk your ethics will be governed to a degree by what you think you have to do to get to and stay at the top.

Fifth, in a competitive, commercial market place and an adversarial system, the health problems of identifying too closely with one's work or having one's ego dependent upon success at work, are made much more acute. It leads to a generally unhappy work environment and significant mental health issues. Rudeness, aggression and abuse to colleagues may occur if winning and self is everything. Depression is common among barristers. We all know it can be a stressful, lonely and demanding job. If your sense of happiness is overly dependent upon success in this job, or your belief as to how the public perceives you is your overwhelming concern, then events may conspire to cause your self-esteem to crumble and for depression to set in.

Having identified these problems, it is not easy to suggest solutions.

One could argue for a return to the anti-competitive practices of prior centuries, but that is unlikely to occur. Barristers' rules only go so far. The teaching of ethics could be given greater attention. An avenue of reporting concerns about colleagues would be helpful. This is not a matter of "dobbing in" a colleague for poor conduct. Rather, there is a need for a process of educating barristers when they lose perspective or their colleagues become concerned about their welfare. There should be a blanket prohibition on contact with the media. This will rein in the self-promoters.

Ultimately, I do not think these problems will disappear unless the adversarial system is abandoned. In contemporary meritocratic society, it is inevitable that barristers will value themselves entirely upon success in court, the number of briefs occupying their chambers, the size of their negotiated settlements, etc. Some barristers, when informed of an upcoming opponent, may remark, 'He won't cause much of a problem. I thrashed him in a case last year.' As if a trial is a football match and success is wholly determined by the brilliance of the barrister. Litigation should not be approached as a game.[6] And yet, the adversarial system encourages us to do just that. Especially when so much of what we see of ourselves rides on the outcome.

Endnotes

1. Alain de Botton *The Pleasures and Sorrows of Work* (2009) Hamish Hamilton, p106.
2. Ibid., p121.
3. Ethics Hypothetical, 24 March 2010.
4. Michael McHugh AC QC , 'The Rise (and Fall?) of the Barrister Class', 20 August 2007.
5. Ibid.
6. *Sydney South West Area Health Service v MD* [2009] NSWCA 343 at [55] per Allsop P.

Increase the retirement age for federal judges

By Arthur Moses SC[1]

United States Supreme Court Justice John Paul Stevens will retire in June 2010, at the end of the court term. His retirement is a timely reminder that the compulsory retirement age of Australian federal judges should be raised from 70 to 75.

Justice Stevens, who turned 90 on 20 April 2010, is a widely respected, hard working judge, whose wisdom and institutional memory will be missed. His retirement will make Justice Ruth Bader Ginsburg, at the age of 77, the oldest member of that court.[2] Before Justice Stevens, the oldest judge in the US Supreme Court's history was Oliver Wendell Holmes Jr, who also retired at the age of 90. His most influential judgments were written *after* he turned 70.

In Australia, the compulsory retirement age for federal judges was enshrined in s 72 of the Constitution following a referendum in 1977.[3] Before then, the Constitution included a similar provision to that found in Article III of the US Constitution, which gave judges life tenure. In October 1976 the Senate Standing Committee on Constitutional and Legal Affairs recommended an end to life tenure. This was based on a number of considerations, such as the need to maintain a vigorous and dynamic court and to avoid the unfortunate necessity of having to remove a judge who was unfit for office due to declining health. It is widely understood that the committee took into account that Justice Edward McTiernan, who retired in September 1976 after more than 45 years on the High Court, had become slow in completing his judgments at the age of 84.

The 1977 referendum was approved by more than 80 per cent of voters. Consequently, the retirement age for all federal judges, including justices of the High Court, was fixed at 70 by the *Constitution Alteration (Retirement of Judges) Act 1977* (Cth).

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The compulsory retirement age has meant that the High Court and the Federal Court have prematurely lost outstanding jurists who may have contributed more to the development of the law. Such judges are not easily replaced. The most significant example is Sir Anthony Mason, arguably the most influential and visionary chief justice in the history of the High Court to date. Sir Anthony, who was appointed to the High Court prior to the 1977 Referendum, lost his life tenure when he was appointed to the office of chief justice. But at the age of 85 he continues to sit on the Hong Kong Court of Final Appeal. Recent examples of the premature departure of High Court chief justices include Gerard Brennan and Murray Gleeson, both of whom were contributing to a vigorous High Court at the time of their retirement.

After 33 years, the time has come to lift the compulsory retirement age for federal judges from 70 to 75.[4] Coincidentally, there should be state and territory amendments to lift their judicial retirement age from 72 to 75. There does not appear to be any rationale for the existing separate retirement age for federal and state judges. Of course, there is no clear rationale for the age of 75 to be selected as the new retirement age for all judges. There are many examples of energetic and hard working judges in their late 60s who have a greater capacity for work than some other judges in their early 50s. However, the age of 75 is justifiable, given the current trends in the average life expectancy and the general state of health amongst older Australians.

The compulsory retirement age has meant that the High Court and the Federal Court have prematurely lost outstanding jurists who may have contributed more to the development of the law.

A more controversial proposal should also be examined at the same time –

lifting from 60 to 65 the age at which judges qualify for a judicial pension after 10 years' service. Constitutional impediments and fairness would dictate that such a proposal could only apply to judges appointed after the commencement of any new judicial pension scheme. This change would have two benefits. First, it may encourage judges to remain in office longer rather than retiring at the age of 60, then embarking on another career.

Secondly, it would represent a significant cost saving for taxpayers. The cost of both a judicial pension and the replacement judge's salary would be deferred five years. This change would ensure the long term sustainability of the judicial pension scheme and bring judicial pensions more closely in line with the Rudd Government's move to raise the qualifying age for the pension to 67.

Federal Attorney-General Robert McClelland, and the longest serving state attorney-general, Victoria's Rob Hulls, have both demonstrated a capacity to make difficult decisions which have a long term impact on the legal system. These proposals are worthy of consideration and the federal and Victorian attorneys-general could provide the necessary leadership at the Standing Committee of Attorneys-General to have them properly examined.

Endnotes

1. An earlier version of this article first appeared in *The Australian Financial Review* on 9 April 2010.
2. Justice Scalia is 74 years old and Justice Kennedy will turn 74 later this year.
3. The retirement age was inserted into s 72 of the Constitution which only permits the retiring age to be increased by referendum but oddly permits the retirement age to be set at a lower age by the Commonwealth Parliament.
4. The amendment to s 72 of the Commonwealth Constitution should provide that the retirement age can be increased by the Commonwealth Parliament rather than having to be the subject of a referendum.

Verbatim

On Canadians

'... there can be no denying that Canadian jurisprudence has embraced with enthusiasm the notion of fiduciary duty. I am told that Sir Anthony Mason has said that in Canada there are three types of persons: those who have been held to be fiduciaries; those who are about to become fiduciaries; and judges.'

From Chief Justice Keane's 2009 WA Lee Lecture 'The Conscience of Equity'

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John Alexander's Clubs Pty Limited & Anor v White City Tennis Club [2010] HCATrans 8 (10 February 2010)

Gummow J: I am trying to ascertain what Sir Garfield Barwick said to Mr Handley on occasion. It is good to know the last station on the railway line before you get on the train.

Mr Ireland: They have planes flying to Canberra now.

Gummow J: You say this has gone off the rails?

Mr Ireland: Yes, we do. .... Can I go back on my train?

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From Ipp JA's swearing out speech

Civilian lawyers prefer a unified theory of law and, I confess, so do I. I have always believed that if Albert Einstein thought that a single unified theory could explain the entire universe simple, comprehensible legal principles of overarching application should not be beyond our wit. I recognise, however, that this is contrary to the current orthodoxy which eschews top-down reasoning, focusses on historical purity and holds that judicial decision-making should only move with baby steps away from the umbrella of authoritative canonical cases. This approach has produced an excess of subtlety and complexity and nowadays there are few aspects of legal principle that can be understood by ordinary people – an odd phenomenon in a country that prides itself on being a democracy governed by the rule of law. It should not be forgotten that simplicity, commonsense and adaptation to change are not alien concepts, they are part of the traditional pragmatism of the common law. Where necessary, our law has not been afraid to take great leaps forward leaving established principle far behind: Donoghue v Stevenson, Hedley Byrne, High Trees and Anisminic are but a few examples of this. Maitland's aphorism remains pointedly relevant: 'Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow.'

Lessons from America

Citizens United v Federal Election Commission

'[W]ith all due deference to separation of powers': President Obama criticises the Supreme Court of the United States for reversing 'a century of law' on campaign financing. Six justices (bottom right) look on. Photo: Getty Images.

On 21 January 2010, the Supreme Court of the United States decided *Citizens United v Federal Election Commission,* one of the most important cases in recent years considering the First Amendment guarantee of freedom of speech. The Supreme Court declared invalid a provision of the federal campaign finance legislation (commonly referred to as the McCain-Feingold Act) prohibiting corporations from using funds for speech that is an 'electioneering communication' or that advocates the election or defeat of a political candidate. Although the decision did not disturb bans on direct contributions to candidates, it is likely to have a significant impact on the conduct of elections in the United States by allowing political spending by corporations during campaigns on public broadcasts including television advertisements.

Remarkably, just a few days after the decision was delivered, President Obama criticised it in his annual State of the Union address to an audience that included six justices, three of whom were in the majority in the 5-4 decision (Justice Kennedy, who wrote the opinion, Chief Justice Roberts and Justice Alito). The president said 'with all due deference to separation of powers' that the court had 'reversed a century of law' and that the decision would 'open the floodgates for special interests, including foreign companies, to spend without limit in our elections'.

That statement yielded the jarring spectacle of the six justices sitting stony faced while surrounded by members of Congress providing the president with a standing ovation. It was too much for Justice Alito – he was widely perceived to have uttered the words 'not true, not true' while shaking his head at the president's remarks. Chief Justice Roberts waited until after the speech to register his displeasure. In March, while answering a question from a law student at the University of Alabama, the chief justice reportedly said in relation to his attendance at the State of the Union Address, 'I'm not sure why we're there', and that he found troubling the 'image of having the members of one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the court – according to the requirements of protocol – has to sit there expressionless'. Supreme Court watchers will be interested to see whether any of the justices attend the State of the Union Address next year.

It was too much for Justice Alito – he was widely perceived to have uttered the words 'not true, not true' while shaking his head at the president's remarks.

What brought about this controversy? Ironically, the decision itself concerned a documentary released by Citizens United, a nonprofit corporation, in January 2008 called '*Hillary: The Movie*' that was critical of then Senator Clinton who at the time was in the early stages of her epic battle with then Senator Obama for the Democratic Party's presidential nomination. ('She is steeped in controversy, steeped in sleaze' said the narrator of the documentary.) Citizens United produced advertisements for the movie to run on television and was concerned about

civil and criminal penalties for violating the McCain-Feingold Act. It sought declaratory and injunctive relief.

Standing in their way was the 1990 decision of the Supreme Court in *Austin v Michigan Chamber of Commerce,* which held that political speech may be banned based on the speaker's corporate identity. In the Federal District Court, Citizens United abandoned a challenge to the constitutional validity of the legislation and relied on a narrower argument that *Hillary* was not 'electioneering communication' for the purposes of the Act. That argument failed because it was found that the film had no purpose other than to discredit Senator Clinton.

The Supreme Court heard oral argument on 24 March 2009. In an unusual development, on 29 June 2009 the Supreme Court issued an order directing the parties to reargue the case after providing submissions on whether the Supreme Court should overrule *Austin*.

Justice Kennedy delivered the main opinion for the majority holding that the restrictions on corporate expenditures in the McCain-Feingold Act were invalid and could not be applied to *Hillary*. *Austin* was overruled. The majority opinion emphasised the essential role that speech plays in holding officials accountable to the people. Justice Kennedy wrote that the 'right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it'. The First Amendment, in providing that Congress 'shall make no law … abridging the freedom of speech', was premised on mistrust of governmental power and there was no basis for the government to impose restrictions on 'certain disfavoured speakers'. The government may not 'deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration'.

Justice Scalia, in a separate concurring opinion, based his decision on 'the original meaning of the First Amendment'. His Honour held that because the First Amendment's text is written in terms of 'speech' not speakers there was no foothold for excluding any category of speaker from its protection, including corporations.

Justice Stevens's dissenting opinion at 90 pages was the longest in his 35 years as a justice. He was joined by justices Breyer, Ginsburg and Sotomayor. In one of several acerbic asides Justice Stevens suggested that under the majority's view of the First Amendment it might be a 'problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech'. His Honour rejected the notion implicit in the majority opinion that the identity of a speaker has no relevance to the government's ability to regulate political speech and said that 'such an assumption would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders'. (Justice Stevens, who is 90 years old, is a veteran of the Second World War and served at Pearl Harbor between 1942 and 1945 where he analysed Japanese communications. He was apparently warned by his clerks, to no effect, that the reference to 'Tokyo Rose' might be lost on contemporary readers.)

Justice Scalia, in a separate concurring opinion, based his decision on 'the original meaning of the First Amendment'.

A significant aspect of the decision is its discussion of judicial restraint and the role of *stare decisis* in constitutional cases. Chief Justice Roberts wrote a separate opinion (which was joined by Justice Alito) addressing those issues. The chief justice said there is 'a difference between judicial restraint and judicial abdication'. For the chief justice the policy of *stare decisis* was the 'preferred course' but was not an 'inexorable command' especially in constitutional cases. It was rather a 'principle of policy' that required the court to balance 'the importance of having constitutional questions decided against the importance of having them decided right'. For his Honour, *stare decisis* is not an end in itself but a means 'to serve a constitutional ideal – the rule of law'. For Justice Stevens a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. His Honour's view was that no such justification existed.

On 9 April 2010, Justice Stevens informed the president of his intention to retire at the end of the current term. After receiving the news the president vowed to replace him with someone who 'knows that in a democracy powerful interests must not be allowed to drown out the voices of ordinary citizens', an indication that the president's attitude to the *Citizens United* decision has not softened with time. We can confidently expect to hear more about the decision at the confirmation hearings for the new justice that will take place over the coming months.

By Justin Hewitt

Developments in arbitration

Class action arbitration: *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*

Introduction

On 27 April 2010, in a 5-3 decision, the Supreme Court of the United States emphatically rejected the availability of class action arbitration where the governing arbitration clause is silent on the availability of class action arbitration. The court based its decision on the fundamental tenet that arbitration derives its authority from the consent of the parties. It vacated an arbitral award by a panel of leaders in the international dispute resolution bar that had interpreted such a contract to permit class arbitration, concluding that the arbitral tribunal had 'exceeded its powers' because it had based its decision on its own policy choice rather than identifying and applying a rule derived from governing law.

The decision is likely to limit the number of class action arbitrations significantly in the United States. It may also herald a more expansive review of arbitral awards in the United States where arbitrators appear to base their decision on policy grounds rather than applicable law.

Background

In 2003, a US Department of Justice criminal investigation concluded that Stolt-Nielsen, a commercial shipping company, and other participants in the world market for parcel tanker shipping, had engaged in an illegal price-fixing scheme. AnimalFeeds, one of Stolt-Nielsen's customers, commenced an arbitration in New York pursuant to the arbitration clause in a highly standardised and specialised shipping contract first drafted in 1950. AnimalFeeds demanded a class arbitration, on behalf of itself and similarly situated shipping customers, despite the lack of an explicit provision in the arbitration clause either permitting or prohibiting class arbitration.

The parties submitted a supplemental agreement to the arbitral panel stipulating that the original arbitration clause was 'silent' on the question of class arbitration, and asking the panel to decide whether or not the clause authorised class arbitrations pursuant to rules developed by the American Arbitration Association. The panel issued a partial award stating that the arbitration clause permitted class arbitrations, citing a consensus of arbitral decisions interpreting 'a wide variety of clauses in a wide variety of settings,' but not citing any state or maritime law in support of that conclusion. Stolt-Nielsen challenged the award in the Southern District for New York, which vacated on the grounds that the panel had 'manifestly disregarded the law' because had it conducted a proper choice-of-law analysis the panel would have applied the rule of federal maritime law requiring contracts to be interpreted in light of custom and usage. The Second Circuit Court of Appeals reversed, finding that the strict requirements of 'manifest disregard' had not been satisfied because New York law had not established a rule against class action arbitration, and upheld the partial award. A majority (Alito J, joined by Roberts CJ, Scalia, Kennedy and Thomas JJ) of the US Supreme Court upheld an appeal and vacated the partial award.[1]

Judicial review of arbitral awards

Under the US Federal Arbitration Act ('the FAA'),[2] a court may set aside (or, in the language of the statute, 'vacate') an award in the following circumstances enumerated in section 10:

1. where it was procured by corruption, fraud or undue means;
2. where there was evident partiality or corruption in the arbitrators, or any of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehaviour by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

The statute does not expressly provide for any judicial review of an arbitral award on the basis of a mistake or error of law, and US courts had held an award may not be set aside on such grounds[3] and have otherwise construed these grounds as very limited.[4] In this respect the arbitral appellate framework in the United States, whilst it has not expressly incorporated the Model Law into domestic law, is similar to the appellate framework for international arbitral awards under the *International Arbitration Act 1974* (Cth)('the IAA'). Section 16 of the IAA adopts the Model Law. Article 34 of the Model Law enumerates the 'only' grounds for setting aside an award. Those grounds of review mirror those for refusal of enforcement under the New York Convention, and basically require a violation of due process or a breach of public policy. Like the FAA, it does not contemplate any right of appeal for errors of law.

Before 2008, the US courts of appeal were split as to whether an arbitral award could be vacated on the grounds that the arbitration panel had 'manifestly disregarded' the law, i.e., that the panel had knowingly and deliberately flouted a clear rule of law. In *Hall Street Associates, LLC v. Mattel, Inc,*[5] the Supreme Court held that a court may not vacate an arbitral award on grounds other than those provided in section 10 of the FAA, and those grounds of judicial review of an arbitral award can not be expanded by the agreement of the parties.[6]

Dicta in the Hall Street opinion suggested, however, that 'manifest disregard' might be interpreted as a 'shorthand' for certain section 10(a) grounds, and the Second Circuit Court of Appeals has recently upheld the 'manifest disregard' standard, post-Hall Street, under just such an interpretation.[7]

In Stolt-Nielsen the majority vacated the arbitral panel's award based on Section 10(a)(4) of the FAA, finding that the arbitrators had 'exceeded their powers' by deciding the class arbitration question based on their own policy judgment, and not on applicable law. According to the court, once the parties had stipulated that the arbitration clause was 'silent' on class arbitration, the panel's obligation was to determine the appropriate 'default rule' under the FAA or applicable maritime or New York state law; instead permitting class arbitration where not prohibited by agreement was better policy. The court said that the fact that the panel had not explicitly mentioned policy in its award was not determinative. Moreover, although the panel cited to an 'arbitral consensus' of other panels allowing class arbitrations in a 'wide variety' of circumstances, the court found that the panel had not attempted to determine the actual rule under maritime or New York law. This reliance on policy, without regard to governing law, 'exceeded its powers.' The minority disagreed with this conclusion contending it to be 'hardly fair' given policy was not mentioned in the arbitral award. Rather, the panel had based its decision on those made by other panels pursuant to Rule 3 of the American Arbitration Association's rules on class arbitrations, which it observed were 'consistent with New York law as articulated by the [New York] Court of Appeals…and federal maritime law.'

… compared with the United States Australia's class-action litigation system is still relatively inchoate.

The majority did not decide whether 'manifest disregard' of law had survived its decision in Hall Street, as an independent ground for review or as a 'judicial gloss' on the enumerated grounds for vacatur set forth in section 10. Rather, it merely noted that if such a standard applied, the above standard would apply for the same reasons and justify vacatur. Notwithstanding, the court's decision does seem to contemplate expanded review of arbitral awards.

Clear contractual authorisation required for class arbitration

After finding that the Stolt-Nielsen arbitral panel had exceeded its powers by looking to policy rather than applicable law on the question of class arbitration, the majority decided that question itself, and held that the FAA barred class arbitrations where the arbitration clause was 'silent.'

The court emphasised that the FAA's touchstone was the consent of the parties, and no arbitral panel could compel parties to submit to an arbitration to which they had not previously agreed. Class action arbitration also fundamentally changed the nature of arbitration which further militated against inferring a term in favour of class action arbitration. In the words of the majority:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their dispute to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lowers costs, greater efficiency and speed, the ability to choose expert adjudicators to resolve specialized disputes…But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.[8]

Accordingly, the majority concluded that consistently with the consensual basis of arbitration the question is whether the parties agreed to authorise class arbitration. They eschewed, however, as the minority noted, a conclusion that such authorisation had to be explicit. Presumably if the required authorisation is not express it would have to be capable of being inferred clearly and unambiguously from the other terms of the agreement.

Conclusion

Class-action arbitration has not yet become a feature of Australian dispute resolution. This no doubt reflects, amongst other things, the fact that compared with the United States Australia's class-action litigation system is still relatively inchoate. However, it has been developing quite rapidly in recent years following the proliferation of representative proceedings supported by litigation funders, the High Court's decision in Fostif[9] and other structural changes that have facilitated representative proceedings. In this respect the US Supreme Court's decision in Stolt-Nielsen is reminder of the fundamental basis of arbitration and the limitations

and difficulties in expanding that form of dispute resolution beyond bilateral disputes. Furthermore, leaving to one side any supervening constitutional considerations,[10] insofar as the decision in Stolt-Nielsen is suggestive of expanded review of arbitral awards on the basis of manifest disregard of law, it is out of step with the trend in Australia and other jurisdictions in favour of arbitral finality and minimal court interference with arbitral awards, as embodied in the Model Law.[11]

By Jonathan Redwood

1. The dissent (Ginsburg, joined by Stevens and Breyer JJ) concluded that the question was not ripe for judicial review under Article III of the Constitution because it was too preliminary and premature. The majority disagreed.
2. The statute was first enacted in 1925 but has been amended many times since. It covers international and interstate commercial arbitrations. State arbitration law generally governs intra-state arbitrations.
3. For example, *Baxter International Inc v Abbot Labs*, 315 F. 3d 829 (2003).
4. See *First Options of Chicago, Inc. v Kaplan*, 514 US 938. 942 (1995) holding that section 10(a) authorises vacatur 'only in very unusual circumstances'.
5. 552 U.S. 576 (2008).
6. The position may be contrasted with arbitral regimes in other jurisdictions (e.g., Hong Kong and the United Kingdom) that explicitly provide a statutory basis for the parties to 'opt-in' to provisions allowing review of awards for error of law. There is no such opt-in mechanism for review of errors of law under the IAA.
7. See *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2nd Cir. 2010); Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94-95 (2nd Cir. 2008) (interpreting manifest disregard as a 'judicial gloss' on the § 10(a) grounds).
8. At 21.
9. (2006) 229 CLR 386.
10. Such a limitation on precluding judicial review of an arbitral award for error of law might be derived from Ch III of the Commonwealth Constitution. See, for example, *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531 at 578-581, although there would be powerful reasons for treating arbitration by private agreement of the parties differently to the supervisory review of inferior courts and administrative tribunals. It has also been held that an arbitrator does not exercise judicial power: *QH Tours Ltd and Sazalo Pty Ltd v Ship Design & Management (Aust) Pty Ltd and Gibbons* (1991) 105 ALR 371 at [25]-[30] and *Hi-Fert Pty Limited & Cargill Fertilizers Inc v Kiukiang Maritime Carries Inc & Western Bulk Carriers (Australia) Ltd* (1998) 159 ALR 142 at [12].
11. See, for example, *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] SGCA 28 at [59]-[62] and *Thoroughvision Pty Ltd v Sky Channel Pty Ltd & Anor* [2010] VSC 139 at [15]-[17].

Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd [2009] NSWCA 354

In *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354, the NSW Court of Appeal held that, following a mediation, a solicitor owed an obligation of confidence to an opposing party. The obiter remarks of Campbell JA leave no doubt that this decision applies equally to the bar.

In 2005, Veolia Environmental Services (Australia) Pty Limited (Veolia) commenced proceedings against the respondent (WSN) alleging breaches of Part V of the *Trade Practices Act 1974* (Cth). During 2008, the proceedings settled at mediation (at [5]-[7] & [9]).

Shortly thereafter the applicant (Worth) retained Veolia's solicitors (the solicitors) to proceed against WSN for substantially the same breaches of the TPA (at [14]-[15]).

WSN filed a Notice of Motion seeking to restrain the solicitors from acting for Worth, contending that they owed WSN an obligation of confidence arising from the mediation [16]. The mediation agreement had been signed by the parties and there was no additional confidentiality agreement signed by the attendees. Accordingly WSN did not bring a contract claim against the Solicitors [26]. The relevant confidentiality clause provided that '[a] person who acquires confidential information, whether oral or documentary, in the course of the Mediation will not disclose or use that information…' [7].

The Court of Appeal concluded that, if the accepted requirements for confidentiality[1] were satisfied, then the solicitors owed WSN an obligation of confidence [26].

WSN contended that at least the following material met those requirements [17]:

- WSN's position paper and opening statement
- Discussions on the strengths and weaknesses of the case
- Any offers and the response to any offers
- WSN's attitude towards the issues discussed at the mediation, including its negotiating position
- Any other information 'disclosed, discussed or otherwise communicated' by WSN at the mediation

The court appears to have accepted that some or all of that material was confidential. In reaching that conclusion the court was informed by 'the terms of the mediation agreement and the circumstances of the mediation' [28]. Unfortunately without further elaboration it is difficult to discern from the court's reasoning why it reached that conclusion in relation to particular classes of information. The application proceeded on the basis that there was no evidence that the solicitors had misused any confidential information [33]. Nonetheless the

court concluded that such misuse would be almost inevitable if the solicitors took part in any settlement negotiations [44], and that that was sufficient to establish a 'real and sensible possibility of misuse' of the confidential information. The broader implications of this decision for the bar include:

1. Barristers who are routinely briefed to appear against the same client may want to:

   a. insulate themselves from any involvement in the mediation process; or

   b. disclose the fact that they have (and anticipate continuing to have) other matters against the same client at the start of any mediation; and

   c. suggest amendments to any confidentiality clause in a mediation agreement.

2. While the court commented that the mediation agreement would not have precluded the solicitors from continuing to act for Veolia in the same litigation, [30] nonetheless, barristers briefed to appear for a client at mediation may want to:

   a. familiarise themselves with the confidentiality requirements of the mediation agreement; and

   b. consider whether they think that any amendments to the confidentiality clause are necessary so that, in the event that the mediation is unsuccessful, they can continue to fully advise the clients in the proceedings.

By Anne Horvath

Endnotes

1. The four requirements were set out by Gummow J in *Smith Kline & French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 87

NSW Supreme Court Equity Division – Commercial Arbitration List

A new list has commenced in the Equity Division for proceedings concerning international or domestic commercial arbitration, over which the Commercial List judge presides. A practice note was issued on 15 December 2009, and commenced on 1 February 2010. It sets out the case management procedures for the Commercial Arbitration List (see Practice Note No. SC Eq 9 – Commercial Arbitration List).

A matter in the list must be commenced in the general form of summons prescribed under the *Uniform Civil Procedure Rules 2005* (NSW). The practice notice stipulates that the plaintiff must file, with the summons:

- a 'Commercial Arbitration List Statement', which is similar in form to the general form of Commercial List Statement and identifies the nature of the dispute, the issues likely to arise, and the plaintiff's contentions;
- a copy of the arbitral award (if the proceedings concern the award);
- a copy of any agreement under which the arbitration has taken place (or is to take place); and
- an affidavit setting out in summary form the facts which give rise to the dispute, and to which any further documents in support of the relief claimed are to be attached.

A defendant is required to file and serve a 'Commercial Arbitration List Response', in similar form to the usual form of Commercial List Response. With the response, a defendant is required to file:

- any additional arbitral award or agreement which is asserted to be relevant; and
- an affidavit setting out which of the facts in the plaintiff's affidavit are disputed, and any additional facts which are asserted to be material to the dispute, as well as attaching any further documents relied on to resist the relief sought.

Parts of Practice Note SC Eq 3 (Commercial List and Technology and Construction List) apply to the pleadings and entry into the new list, as well as to any other evidence that a party may intend to rely on.

The new practice note indicates an expectation that applications in the list will be given a hearing date on the first return date of the summons, and that practitioners are expected to agree to a timetable, and adopt the Usual Order for Hearing (or an agreed modified order for hearing) on that date. No orders will be made for discovery in any application in the Commercial Arbitration List, unless special reasons are established. Motions are to be listed at 9.15am on Fridays.

In practical terms then, it would appear likely that the Commercial Arbitration List will be administered in a similar fashion to the general Commercial List, albeit that there may be only one directions hearing before the matter is allocated a hearing date.

By Kylie Day

Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57

In this case, the Court of Appeal considered a number of issues that are of general importance to the practice of commercial arbitration, the proper conduct of applications for leave to appeal under s 38 of the *Commercial Arbitration Act 1984* (NSW) ('the Act'), and the circumstances in which that leave may be granted. It is probably the most significant decision on matters of general principle relevant to s 38 of the Act, since *Promenade Investments Pty Ltd v State of New South Wales* (1992) 26 NSWLR 203 and *Natoli v Walker* (1994) 217 ALR 201. The principal judgment is that of Allsop P, with whom Spigelman CJ and Macfarlan JA agreed.

The background to the appeal was as follows. The respondents were excess of loss reinsurers of Gordian's professional indemnity and directors' and officers' ('D&O') insurance portfolio for the 1999 year. A dispute arose between Gordian and the respondents as to whether the reinsurance contracts responded to certain claims made on Gordian under a D&O run-off policy issued to FAI Insurance Ltd and its former directors and officers. The dispute was referred to arbitration before a panel of experienced insurance arbitrators. The arbitral tribunal found that, taking the effect of s 18B of the *Insurance Act 1902* (NSW) into account, the reinsurance contracts did apply to claims made under the FAI policy within three years of its inception.

The reinsurers sought leave to appeal from the award, under s 38 of the Act. Over Gordian's opposition, the primary judge heard the application for leave to appeal and the appeal concurrently. The nub of the reinsurers' complaint about the award concerned the arbitrators' interpretation and application of s 18B. The primary judge held that the arbitrators had misunderstood s 18B to a degree that satisfied the relevant statutory grounds of manifest error of law on the face of the

award, and strong evidence of error of law, the determination of which may add, or may be likely to add, substantially to the certainty of commercial law (s 38(5)(b)(i) and (ii) of the Act). Accordingly, the primary judge granted leave to appeal from the arbitral award, allowed the appeal, set aside the award, and dismissed the claim of the applicant in the arbitration (i.e., Gordian). However, the Court of Appeal allowed the appeal from the primary judge's decision, set that decision aside, and refused the application for leave to appeal from the arbitral award, with costs. The decision of the Court of Appeal is an important one on the issues outlined above, for the following reasons.

First, it establishes that ordinarily an application for leave to appeal from an arbitral award should precede an appeal, and the two should only be heard concurrently in exceptional cases (see [102]-[113]). The Court of Appeal held that this follows from the context and legislative history of the Act. Here, it was an error of principle for the primary judge to hear the application for leave concurrently with the argument on the appeal. However, the Court of Appeal rejected the submission that the matter went to jurisdiction. That is, the Court of Appeal rejected the proposition that, on the proper construction of s 38, there was no jurisdiction for the primary judge to hear an appeal under s 38(2) in the absence of a pre-existing grant of leave or the consent of the parties (see [102]-[103], [109]).

Secondly, the decision confirms what is required by a 'manifest error of law' for the purpose of leave to appeal under s 38(5)(b)(i) of the Act (see [116], [240]-[242]). Such an error must be more than arguable; it must be evident or obvious. There 'must be powerful reasons leaving little or no doubt on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law' (at [116]). The respondents conceded in the course of the appeal that the primary judge erred in concluding that the arbitrator's construction of s 18B was manifestly wrong.

Thirdly, the decision confirms that the ground of 'strong evidence of an error of law' (under s 38(5)(b)(ii) of the Act) requires proof of a strong prima facie case that the arbitrators were wrong on a question of law (see [119]-[129]). Only if that is satisfied does one move on to the additional consideration of whether the determination of the question of law may (or may be likely to) add substantially to the certainty of commercial law (see [127]). Where determination of the relevant question involves 'primarily fact and context specific analysis and evaluation', it will not add substantially to the certainty of commercial law (see [194]). The Court of Appeal cautioned against any tendency 'to downgrade the statutory requirement of 'strong evidence' … because of the 'interesting' or important legal question involved'. It pragmatically acknowledged that '[t]he remit of arbitrators includes the making of errors; that is an inevitable part of any process of dispute resolution', noting that '[h]ow and what errors are to be corrected depends on the statute in question' (at [127]). Here, the Court of Appeal held that the primary judge erred in concluding that there was strong evidence of an error of law, where the arbitrators had adopted a broad construction of s 18B that was supportable by the words of the legislation (at [161]-[172]).

Fourthly, the decision illustrates the stringency of these requirements for leave to appeal, as applied to the issues in the case. For example, the Court of Appeal held (at [179]-[182]) that there was arguably error in the arbitrators' approach to causation of loss. However the error was not as to a question of law, nor was it either manifest or strongly arguable (at [182]-[183]). Furthermore, the court held that determination of the question would not add or be likely to add substantially to the certainty of commercial law (at [185]). In addition, the Court of Appeal rejected the submission that the reasons of the arbitrators were inadequate on the point (at [186]). Clearly, much more is required than an error, per se, before the court may exercise its discretion to grant leave to appeal from an arbitral award.

Fifthly, the Court of Appeal considered the nature of the requirement that an arbitrator provide reasons, rejecting the proposition that arbitrators have the same legal obligation to provide reasons as judges (see [196]-[224]). The Court of Appeal found no support for such a proposition in either international authorities on the UNCITRAL Model Law (Art 31(2)) or in the legislative history of the Act. The Court of Appeal held that the decision of the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255; 18 VR 346 was clearly wrong on this issue, and should not be followed.

Lastly, and although this aspect of the decision was strictly obiter (see [244]-[245], [266]-[282]), the Court of Appeal indicated that where questions of law arise out of an award and are agitated by the respondent as well as the applicant/appellant, all of the questions should be the subject of applications for leave to appeal under the Act (and not simply raised as 'points of contention' by the respondent, in its List Response).

By Kylie Day

Trans-Tasman litigation

On 18 March 2010, the Commonwealth Parliament passed the *Trans-Tasman Proceedings Act 2010* (Cth), and the *Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010* (Cth), both of which received royal assent on 13 April 2010. The legislation aims to make trans-Tasman litigation simpler, cheaper and more efficient. In particular, the legislation implements the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed on 24 July 2008. The text of the agreement can be found in the Australian Treaty Series at [2008] ATNIF 12. The new legislation also incorporates other existing legislation regulating trans-Tasman legal proceedings, so as to provide a single point of reference for the law governing the conduct of such proceedings. Reciprocal legislation is currently before the New Zealand Parliament.

The new legislation will affect various aspects of trans-Tasman legal practice. In particular, it will:

- allow initiating process issued in civil proceedings in Australian courts to be served in New Zealand without leave (Part 2 of the Act);
- replace the 'clearly inappropriate forum' test for *forum non conveniens* with a 'more appropriate forum' test, as a common statutory test to be applied between Australia and New Zealand in determining when proceedings should be stayed on the ground that a court in the other country should hear the dispute. A number of factors must be taken into account by the court in the exercise of its discretion to grant a stay, and those are set out in the legislation (s 19). However, those matters are not exclusive or exhaustive (although the legislation does specify that the court must not take into account the fact that the proceeding was commenced in Australia). Specific additional provisions govern the situation if there is an exclusive agreement between the parties as to the choice of forum (s 20) (Part 3 of the Act);
- prohibit anti-suit injunctions as between Australian and New Zealand proceedings on the ground that the relevant court is not the appropriate forum (s 22, Part 3 of the Act);
- allow prescribed Australian courts to grant interim relief in support of New Zealand proceedings (Part 4 of the Act);
- build on the existing co-operative evidence regime to allow subpoenas to be issued in criminal proceedings, and for subpoenas to be issued with leave (Part 5 of the Act);
- facilitate the greater use of technology to enable parties and lawyers to appear remotely in civil proceedings in the other country (Part 6 of the Act);
- broaden the range of judgments of New Zealand courts that can be enforced in Australia, to include non-money judgments, civil pecuniary penalties and certain fines (Part 7 of the Act); and
- provide special rules for the conduct of trans-Tasman market proceedings, formerly in Part IIIA of the *Federal Court of Australia Act 1976* (Cth) (see Part 8 of the Act). Those are proceedings brought under provisions of the *Trade Practices Act 1974* (Cth), which prohibit a corporation with a substantial degree of market power from taking advantage of that power to eliminate or damage competition in any market.

Although the Australian Acts have been passed, the co-operative scheme will not commence until both Australia and New Zealand have completed all domestic arrangements necessary to fully implement the reforms. The Commonwealth Attorney-General's Department is currently monitoring the progress of the New Zealand Bill through Parliament, and will move into the next phase of the project after the passage of that legislation.

By Kylie Day

Verbatim

McGrath and Honey as the joint liquidators of HIH Insurance Ltd (in liq) (ACN 008 636 575) v Perpetual Trustee Co Ltd (2008) 66 ACSR 210

Per Graham J

[1] This case is concerned with 'redemption' and 'conversion'. However, neither word is to be understood in its biblical or religious sense. Rather, the case requires a meaning to be given to these words as used in an 'HIH NZ converting notes 1998 trust deed' made 26 October 1998 (the trust deed), which provided for the creation and issue of 'notes' by the directors of the second defendant/first cross-defendant, HIH Holdings (NZ) Ltd (in liq) ARBN 084 759 866 (NZ).

Limits on liability

Wallaby Grip Ltd v QBE Insurance (Australia) Limited; *Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9

In *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9, the High Court unanimously held that an insurer which asserts a limit to its liability under a contract of insurance bears the evidentiary onus of proving such limit.

The facts in the case were as follows. Mr Stewart contracted mesothelioma and later died from its effects as a result of his exposure to asbestos products used in the course of his employment with Pilkingon Bros (Australia) Limited (Pilkington). Wallaby Grip Limited was the supplier of the asbestos products. At the time of Mr Stewart's employment with Pilkington, Pilkington was required under s 18(1) of the *Workers' Compensation Act 1926* (NSW) (the Act) to maintain, inter alia, a policy of indemnity insurance for an amount of at least forty thousand dollars in respect of its liability arising independently of the Act for any injury to any worker.

It was not in dispute that, at the relevant time, Pilkington had had a contract of indemnity insurance which complied with the Act. At first instance, Kearns J of the Dust Diseases Tribunal of NSW held that Pilkington and Wallaby Grip had been negligent and that the plaintiff's claim came within the terms of the insurance contract. Those findings were not challenged on appeal.

As Pilkington had been deregistered, the case was brought directly against the insurer, QBE Insurance (Australia) Limited ('QBE'), as permitted by section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). QBE did not admit that the indemnity extended beyond the statutory minimum of forty thousand dollars. QBE adduced no evidence as to the limit of indemnity and was unable to produce to court the documents which specified the terms and conditions of the policy. Thus, the question arose as to whether the insurer's liability under the policy was limited or at large.

In determining that question, the trial judge was asked to rule on the issue of which party bore the onus of proving the limit, if any, of indemnity. Kearns J held that QBE bore the evidentiary onus because it asserted a limit to its liability.[1] The NSW Court of Appeal allowed an appeal against that decision and held that the amount of cover was an essential term of the contract of insurance which the party asserting the agreement and its terms (i.e. Mrs Stewart as the legal representative of her deceased husband) was required to prove.[2]

The High Court overturned the Court of Appeal's decision and held that QBE bore the onus of proving the alleged restriction on the scope of its liability. The court observed that '[i]ndemnity insurance involves payment for the loss actually suffered by the insured'.[3] As such, a contract of indemnity insurance is, prima facie, of unlimited cover. Whilst the insured must prove the extent or amount of the loss claimed,[4] an insurer which asserts a limit to its obligation to indemnify bears the onus of proving such limitation.[5] In its judgment, the court cited The 'Torenia' in which Hobhouse J stated that the 'legal burden of proof arises from the principle: [h]e who alleges must prove' and that the 'incidence of the legal burden of proof can therefore be tested by answering the question: [w]hat does each party need to allege',[6] by reference to the insurance contract.[7] It was insufficient for QBE merely to decline to admit that Pilkington was entitled to an indemnity greater that the statutory minimum – it had to prove what limit, if any, conditioned its obligation to indemnify Pilkington. QBE had failed to discharge its onus and was therefore liable for the full amount of the appellant's loss.[8]

The decision is of particular significance for 'long tail' insurance claims involving, for example, gradual onset diseases or latent defects, as the production of the policy documentation in those cases can be problematic given that claims are often brought decades after the relevant period of insurance.

By Jenny Chambers

Endnotes

1. *Stewart v QBE Insurance (Australia) Ltd* (2008) 15 ANZ Insurance Cases ¶61-758 at 76,551.
2. *QBE Insurance (Australia) Ltd Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,461 per Ipp JA, at 77,469 per Gyles AJA; Brereton J dissenting.
3. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [30] citing *British Traders' Insurance Co Ltd v Monson* [(1964) 111 CLR 86 at 92–93.
4. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [31].
5. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [35].
6. *The 'Torenia'* [1983] 2 Lloyd's Rep 210 at 215.
7. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [36].
8. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [36], [38].

Act of state

Habib v Commonwealth of Australia [2010] FCAFC 12

In *Habib* the full court of the Federal Court considered the applicability and scope of the act of state doctrine in Australian civil law. The Commonwealth's reliance on the doctrine in opposition to the justiciability of Mr Habib's claims gave rise to questions concerning the operation of the doctrine on the exercise of federal jurisdiction and its application to cases involving serious breaches of human rights.

The claim

Mr Habib's allegations against military and intelligence agents of Australia, the United States, Pakistan and Egypt are reasonably well known. In essence, Mr Habib alleges that following the events of 11 September 2001 and immediately prior to the outbreak of the war in Afghanistan, he was captured and detained in Pakistan and rendered, first to Egypt, then to Afghanistan (at the time under United States control) and finally to Guantánamo Bay. While in the custody of government officials of each of those countries, Mr Habib says that he was subjected to torture.

Mr Habib also alleges that officials of various Australian departments were implicated in his mistreatment and sought his continued detention. His claim in the Federal Court[1] seeks damages for the torts of misfeasance in public office and the intentional infliction of harm, arising from Commonwealth officers having aided, abetted and counselled officers of the foreign governments to inflict torture on him.

Mr Habib alleges that the conduct of the foreign agents constituted acts of torture contrary to various Australian criminal statutes[2] giving effect to Australia's obligations under international conventions against torture and the treatment of prisoners of war (the Torture and Geneva Conventions[3]). Each of the foreign states are parties to the conventions. Mr Habib says that, by aiding, abetting or counselling these offences, the Commonwealth officers committed the same offences as accessories, and acted in excess of power and so as to cause him harm.

The Commonwealth's objection

The Commonwealth contended that the claim was not justiciable in the Federal Court because it was precluded by the act of state doctrine, which prevents the court from examining the legality of acts performed in the exercise of foreign sovereign authority, based on principles of separation of judicial and executive power and international comity.[4] Because Mr Habib's claims involved determination of whether foreign officials committed acts of torture in the exercise of their public functions, the doctrine was engaged.

Mr Habib briefs the media. Photo: Newspix

Mr Habib contended that, while the act of state doctrine is part of Australian law, it is not engaged where the claim concerns the acts of a foreign state in grave violation of human rights and international law.[5]

Public policy exception

Jagot J (with whom Black CJ agreed) held that the act of state doctrine did not operate to exclude examination by the court of clearly established principles of public international law (at [116]). Her Honour considered the United States and United Kingdom authorities,[6] and concluded that none supported the

... any sensitivities that may arise from Australia's relationship with the United States should be weighed against the fact that the claim involved an Australian court determining the conduct of its own officials in contravention of rules of international law and human rights embodied in the Torture and Geneva Conventions ... and of such a degree of international acceptance that they may be considered non-derogable peremptory norms.

proposition that the doctrine should apply regardless of the nature of the foreign state acts to be adjudicated. In fact, United Kingdom law accepted the existence of a public policy exception to the doctrine.

The question for the court could be described as whether the doctrine should be excluded in circumstances that would (if the claim was justiciable) permit the court to exclude an applicable foreign law on the grounds that it offended public policy. In that context, the court considered cases where the implications for international comity were somewhat simpler than in the present case.[7]

In *Oppenheimer* and *Kuwait Airways*, the expropriations were committed by states with which the nation of the forum court was at war at the relevant time, and where the actions of the foreign states were roundly condemned by the international community. The Commonwealth submitted that the present case was different, involving as it did the conduct of Australia's allies.

Jagot J rejected this contention for a number of reasons. First, the analogous doctrine of sovereign immunity (which would have been available had the foreign agents been parties to the proceedings) did not require the application of the doctrine to a claim against officers of the Commonwealth in this country (at [113]).

Second, any sensitivities that may arise from Australia's relationship with the United States should be weighed against the fact that the claim involved an Australian court determining the conduct of its own officials in contravention of rules of international law and human rights embodied in the Torture and Geneva Conventions (to which the foreign states had acceded) and of such a degree of international acceptance that they may be considered non-derogable peremptory norms (at [108], [115]).

Third, there was no justification for distinguishing the alleged conduct in this case (which is strongly disputed by the Commonwealth) from those in other cases in which the conduct of the foreign state was notorious. The conduct at issue represented (if proved) a clear violation of international law and Australian criminal laws, and there was no question of a lack of judicially acceptable standards by which the issues could be determined.[8]

The Act of State Doctrine and federal jurisdiction

The court also considered whether the Commonwealth's invocation of the act of state doctrine in this case was inconsistent with Chapter III of the Constitution. The Commonwealth asserted that, not only were the claims non-justiciable under the common law, but they gave rise to no 'matter' within the jurisdiction of the court pursuant to ss 39B and 44(3) of the *Judiciary Act 1903* (Cth) and s 77(i) of the Constitution.

Perram J considered that this consideration overrode any need to examine the exceptions to the doctrine. The obligation of a court exercising federal jurisdiction to ensure that officers of the Commonwealth act within their lawful authority (as embodied in ss 75(iii) and 75(v)) excluded any principle of the common law that purported to limit such an inquiry.

Mr Habib's claim involved allegations that officers of the Commonwealth had acted in contravention of Australian criminal law and therefore in excess of their lawful powers as conferred by s 61 of the Constitution. Those claims were necessarily justiciable by a federal court notwithstanding that the proceedings concerned a civil law claim. There was no basis for an assertion that, by acceding to the Torture and Geneva Conventions and enacting consequent criminal legislation, the Commonwealth did not impliedly exclude the act of state doctrine in respect of civil actions (at [36], see also [129] per Jagot J).

Jagot J agreed and added that, by enacting criminal legislation implementing the Geneva and Torture Conventions, applicable regardless of where the impugned conduct occurred and by whom, parliament can be taken to have intended that issues of this nature should be judicially determined (at [123]). There was no basis for preventing judicial examination of the conduct of Australian officials alleged to have been involved in serious breaches of internationally protected human rights and Australian criminal law, and against an Australian citizen (at [131]).

Conclusions

Habib was in some respects an easy case. While the case involves determination of the legitimacy of acts of United States officials, a country with which, for better or worse, Australia enjoys a close relationship, the involvement of Australian officials gave rise to a constitutional question about which there can be little debate. Questions of when a forum court may comfortably refuse to apply the doctrine were thus deftly avoided.

Mr Habib's claim also concerned breaches of human rights so offensive that they are elevated to peremptory norms of public international law. It may not be as easy to ascertain the limits of the public policy exception in cases where the state acts may be reprehensible in Australia, but acceptable by legal and cultural standards in other countries. Issues of international

comity may acquire greater significance in these cases.

Lastly, the court's conclusions in *Habib* rendered it unnecessary to consider the basis and scope of the doctrine. In his reasons, Perram J devoted lengthy consideration to whether the doctrine is properly characterised as a choice of law rule concerned with the validity of state acts, or a rule of deference or abstention according to which the forum treats cases lacking any judicial or manageable standards by which to determine the issues as non-justiciable. His Honour considered the latter characterisation to preclude the existence of a public policy exception (at [43]).

It may be appropriate that the doctrine be confined on this basis: when it is recognised that the act of state doctrine effectively operates only in cases where the foreign state is not a party (because of sovereign immunity), it may be an ideal approach to reserve the application of the doctrine to cases in which the forum court is unable to determine the matter according to manageable judicial standards.[9] The narrower basis of the doctrine would remove the necessity in most cases to consider the messy question of public policy.

By Catherine Gleeson

Endnotes

1. Originally commenced in the High Court of Australia but remitted to the Federal Court pursuant to section 422 (2A) of the *Judiciary Act 1903* (Cth).
2. The *Crimes (Torture) Act 1988* (Cth) ss 3(1), 6(1), the *Geneva Conventions Act 1957* (Cth) ss 7(2)(c), the *Criminal Code Act 1995* (Cth) ss 268.26(1) and 268.74(1).
3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977.
4. *R v Bow Street Stipendiary Magistrate; Ex Parte Pinoche Ugarte* [2000] 1 AC 61 at 106; see also *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 495, 506-7 and 511; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Limited* (1988) 165 CLR 30 at 40-41; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354.
5. An argument was also raised that the acts of the US agents did not come within the territorial scope of the doctrine because they took place outside of the territory of that country. In the event it was not necessary to determine this issue.
6. *Banco Nacional de Cuba v Sabbatino* [1964] USSC 48; 376 US 398 (1964); *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International* [1990] USSC 11; 493 US 400 (1989) *Doe I v Unocal Corp* [2002] USCA9 708; 395 F. 3d 932 (9th Cir. 2002); *Sarei v Rio Tinto PLC* 456 F.3d 1069 (9th Cir. 2006), *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270.
7. *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249; *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883.
8. At [110] cf *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 938.
9. That is, when the matter involves true political issues between states not suitable for judicial determination.

Verbatim

Aktas v Westpac Banking Corporation Limited [2009] HCATrans 326 (11 December 2009)

Hayne J: The point therefore comes, Mr Sackar, is there anything that would make this an inappropriate vehicle to determine the question if the question is alive and otherwise of general importance?

Mr Sackar: Well, no, I could not candidly say there would be anything in that way except to say the bleeding obvious, namely, that the Court of Appeal, in our view, was right. They are our submissions.

French CJ: Thank you, Mr Sackar. There will be a grant of special leave in this matter.

Where are the court books?

Counsel: I am instructed your Honour that the court books were in fact filed in the registry on level 5 marked to the attention of your Honour's associate. We have not been able to ascertain what has happened to the court books but will continue to make enquiries.

Justice Hammerschlag: When I am told that something was filed in the Registry, evidence of its absence on the court file is proof positive that it was filed.'

Sentencing

Wakefield v R [2010] NSWCCA 12; *Bourke v R* [2010] NSWCCA 22

These two recent decisions of the New South Wales Court of Criminal Appeal provide useful guidance on the operational effect of the sentencing principle laid down by the High Court in *The Queen v De Simoni* (1981) 147 CLR 383 that an offender must only be sentenced for the offence he or she has been charged with and convicted of.

In *Wakefield* [2010] NSWCCA 12 the appellant was sentenced on nine counts of fraud by an officer of a company (Nestle), with a further eighteen counts being taken into account on a Form 1. The scheme involved the appellant misusing his position to redirect to himself company funds allocated to gifts, discounts, rebates and prizes to retailers of the company's products. The earliest offence occurred on 1 December 2000 and the latest on 19 March 2004. However, the sentencing judge stated in his remarks on sentence that the offences occurred between 4 September 2000 and 28 May 2004.

It was argued, on behalf of the appellant, that in stating in his remarks that the offences occurred between 4 September 2000 and 28 May 2004 the sentencing judge 'by stating a period that must have incorporated offences not brought against the applicant … fell into error by taking into account erroneous material in aggravation of the applicant's offending'. In rejecting this argument, Grove J, with whom Simpson and R A Hulme JJ agreed, held that the remarks made it sufficiently clear that the *De Simoni* principle had been complied with. Grove J stated (at [14]):

> The dates mentioned by his Honour had obvious relevance to the applicant's holding the position which enabled him to perpetrate the frauds. There was no indication that the applicant was being punished for uncharged offences either during the five months calculated by counsel or any other time. To the contrary his Honour was careful to avoid so doing. Inter alia he said:
>
> > The offences occurred at least between the period of 4 September 2000 and 28 May 2004, which is a lengthy period. Although the offender is not to be sentenced for matters other than those which he has been charged with, it is of note that on the agreed facts it appears that the offender has otherwise benefited in the past from funds transferred improperly from the company by others who were later concerned in these matters. But, as I say, Mr Wakefield is only to be sentenced in relation to those matters that are brought against him. Of course the only matters bought (sic) against him are those where he was the person responsible for improperly authorising the actual payment.'

The issue in *Bourke* was more complex. In that case the appellant pleaded guilty to an offence of 'malicious wounding', that is, wounding a person with intent to inflict grievous bodily harm, contrary to s 33(1)(a) of the *Crimes Act 1900*. The offence occurred when the applicant approached the victim armed with a pole and an axe. The applicant swung the axe at the victim, who fell to the ground. The applicant then struck the victim three times with the axe and the pole causing lacerations and fractures to the victim.

… the Court of Criminal Appeal held that the sentencing judge was both entitled to and obliged to take into account the full extent of the injuries, and this did not contravene the De Simoni *principle.*

These injuries were clearly capable of comprising grievous bodily harm. However, it was argued that because the applicant was charged with 'malicious wounding' injuries which amounted to grievous bodily harm had to be disregarded when considering the objective severity of the offence. To do otherwise would result in the applicant being sentenced for a more serious offence or for circumstances of aggravation which had not been pleaded.

In rejecting this argument the Court of Criminal Appeal held that the sentencing judge was both entitled to and obliged to take into account the full extent of the injuries, and this did not contravene the *De Simoni* principle. McClellan CJ at CL, with whom Price and R A Hulme JJ agreed, set out the reasons for this as follows (at [54]):

> It must be remembered that the intent to which the applicant pleaded guilty was the intention to do grievous bodily harm. It is apparent that his Honour had that in mind, but also recognised that the injuries inflicted on the victim included both wounds, and, if considered alone, injuries in the nature of grievous bodily harm. To my mind in the circumstances of this case his Honour was both entitled and, if he was to determine the appropriate sentence, obliged to have regard to the full extent of those injuries. The consequence is not that the applicant has been sentenced for a more serious offence than that for which he was charged or for an aggravated form of the present offence. Furthermore because the infliction of wounds or grievous bodily harm is an element of the offence, the sentencing judge was careful to identify the fact that he was not taking the injuries into account as an additional aggravating factor under s 21A(2)(g) of the *Crime Sentencing Procedure Act* 1999 (NSW).

In separate judgments both McClellan CJ at CL and R A Hulme J distinguished the present facts from those in *McCullough v R*

[2009] NSWCCA 94 because that case involved the sentencing judge erroneously taking into account an injury that was entirely separate and distinct from the wound that was the subject of the charge.

McClellan CJ at CL succinctly described the principle in *De Simoni*, as developed in recent New South Wales Court of Criminal Appeal decisions, as follows (at [50]):

> an offender must not be sentenced for an offence with which he or she has not been charged and convicted. If by reason of the facts of a particular case an offender could have been found guilty of an offence carrying a greater maximum penalty than that for which they have been charged, the facts which would constitute a finding of the more serious offence cannot be relied upon when sentencing the offender. If those facts would have made the offender liable for the penalty for the aggravated form of an offence they must be put to one side when sentencing for the offence for which that person has been convicted.

By Chris O'Donnell

Double jeopardy: *R v JW* [2010] NSWCCA 49 and *R v Carroll, Carroll v R* [2010] NSWCCA

Two recent decisions by the New South Wales Court of Criminal Appeal have clarified the interpretation of a recent amendment abolishing the concept of double jeopardy previously applicable to a Crown appeal against sentence.

The matter was seen as so important that both *R v JW* [2010] NSWCCA 49 and *R v Carroll, Carroll v R* [2010] NSWCCA were heard by a bench of five judges with the chief justice presiding.

JW dealt with the effect of the amendment in detail. In 2009, Section 68A(1) was added to the *Crimes (Appeal and Review) Act 2001* in these terms:

> An appeal court must not:
>
> dismiss a prosecution appeal against sentence, or
>
> impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,
>
> because of any element of double jeopardy involved in the respondent being sentenced again.'

After considering the case law on the 'double jeopardy' concept and the submissions in the appeal, the court in brief summary was of the view [par 141] that the expression 'double jeopardy' in section 68A refers to the circumstance that an offender is, subject to the finding of error on the part of the sentencing judge, liable to be sentenced twice. The section also removes from the court's consideration the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject. Further, the section prevents the court, on the basis of such distress and anxiety, exercising its discretion not to intervene or reducing the sentence it otherwise believes to be appropriate.

JW also found that section 68 prevents the court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case.

Both cases will repay careful reading to see the many considerations that still remain relevant in the resentencing process. Carroll in particular is instructive in showing the effect its appellate history had on the ultimate sentence imposed.

Keith Chapple SC

Verbatim

Lehman Brothers Holdings Inc v City of Swan & Ors [2009] HCATrans 323 (11 December 2009)

Gummow J: Mr Hutley, you may be right about all of this.

Mr Hutley: I hear that. I know what is coming next, your Honour.

Gummow J: Is there not a question of some public importance?

Mr Hutley: Your Honour, what we say is this. There was an interesting question before the Full Court. We say that the Full Court has exposed in conventional fashion in great detail the reasoning and argument. We say that once that is exposed, that the argument available leads to such perverse results, or potentially perverse results, that it is not one where there would be sufficient prospects that your Honours, or a majority of your Honours, would come to the conclusion that the appeal would be successful. I can put it no higher than that, your Honour.

French CJ: You are allowing for the possibility of outriders.

Mr Hutley: Your Honour, I would not presume unanimity.

Beyond power: state supreme courts, the Constitution and privative provisions

The High Court's decision in *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; (2010) 84 ALJR 154 (Kirk) transcends its factual core as one relating solely to industrial safety. It is worthy of close examination not only because it considers the proper approach to the construction of the primary offence provisions for employers under the Occupational Health and Safety Act 1983 (NSW) (the OHS Act)[1], but also because it, first, examines the purpose, meaning and content of jurisdictional error and, secondly, considers the entrenched constitutional purpose of the Supreme Court of New South Wales and the equally entrenched constitutional minimum of judicial review of state tribunals and decision-makers.

Facts

Kirk Group Holdings Pty Ltd (Kirk Group) owned a farm near Picton in New South Wales. Mr Kirk was a director of Kirk Group but was not actively involved in the running of the farm. Kirk Group employed Mr Palmer in the position of farm manager. Mr Palmer managed and operated the farm on a day to day basis.

In June 1998, Kirk Group had purchased an all terrain vehicle (the vehicle) on Mr Palmer's recommendation. On 28 March 2001, Mr Palmer was fatally injured whilst driving the vehicle to deliver three lengths of steel to fencing contractors who were working on another part of farm. In order to deliver the steel, Mr Palmer drove the vehicle along a road that led to the area where the fencing contractors were working. However, immediately prior to the incident, Mr Palmer left the road and proceeded to drive the vehicle down the side of a steep hill. There was no road or track on the slope of that hill. The vehicle overturned down the slope of the hill and this led to Mr Palmer's fatal injuries.

The OHS Act and the charges

At the time of the incident, s 15(1) of the OHS Act provided that 'Every employer shall ensure the health, safety and welfare at work of all the employer's employees.' Section 16(1) of the OHS Act provided that 'Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.'

Section 47(1) of the OHS Act provided that proceedings for offences under the Act were to be dealt with summarily and could be brought before the Industrial Court of New South Wales (the Industrial Court). Section 53 of the OHS Act provided for a defence to proceedings for offences against the Act if the defendant could prove that, amongst other things, it was not 'reasonably practicable' for the defendant to comply with the offence provision. In addition, s 50(1) of the OHS Act provided that, if a corporation contravened the Act, then each director of that corporation and each person concerned in its management, would be deemed to have contravened the same provision unless certain defences could be satisfied by the person.

Both Kirk Group and Mr Kirk were charged with offences under ss 15(1) and 16(1) of the OHS Act. The charges did no more than repeat the statutory text contained in ss 15(1) and 16(1) of the OHS Act. The particulars of the charges alleged that Kirk Group had failed to take certain steps in relation to the operation of the vehicle and thereby exposed Mr Palmer and other workers to the risk of injury. Neither the charges nor the particulars identified what Kirk Group or Mr Kirk should have done to eliminate the risk of harm. Rather, the particulars simply asserted a number of general failures on the part of Kirk Group.

Procedural history

After a full trial before the Industrial Court, both Kirk Group and Mr Kirk were convicted of offences under ss 15(1) and 16(1) of the OHS Act.[2] Somewhat surprisingly, the prosecutor called Mr Kirk as a witness in the prosecution case, without objection by the defendants. In convicting both defendants, the trial judge applied well-settled authorities established by the Industrial Court which held that the duty imposed upon an employer, to ensure the health, safety and welfare of employees at work, was absolute. The trial judge found that Kirk Group had failed to eliminate the risk of the vehicle being used 'off-road' and was not satisfied that the defendants had made out a defence on the basis that it could not be said that it was not reasonably practicable to have taken precautions against the risk of harm. Kirk Group was fined a total amount of $110,000 and Mr Kirk was fined a total amount of $11,000.[3]

Both defendants instituted appeals against conviction and sentence in the Court of Criminal Appeal and also brought proceedings in the Court of Appeal of that court seeking orders in the nature of certiorari and prohibition. The Court of Appeal held that it should not intervene until the full court had decided the issue of jurisdiction or refused leave to appeal from the decision in question.[4] In arriving at this conclusion, the Court of Appeal relied upon s 179 of the Industrial Relations Act 1996 (NSW) (the IR Act) which provides that, subject to an appeal to the full bench of the Industrial Court, a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal' and extends to proceedings for any relief or remedy,

whether by order in the nature of prohibition, certiorari or mandamus, injunctions, declaration or otherwise.

Kirk Group and Mr Kirk then applied to the full court of the Industrial Court granting leave to institute an appeal out of time. This application was rejected except on limited grounds on the basis that the delay in prosecuting the appeal was brought about by a conscious choice made by Mr Kirk and Kirk Group to pursue the question of jurisdictional error in the Court of Appeal as they considered their prospects of success in that court were better than in the Industrial Court.[5] Leave was also refused because the full court reasoned that the proposed appeal sought to challenge a body of jurisprudence which had been well settled in the Industrial Court over 20 years.[6] The full court heard a limited appeal from conviction and dismissed it.[7]

Mr Kirk and Kirk Group applied to the Court of Appeal for orders in the nature of certiorari quashing the decisions of the Industrial Court at first instance and orders in the nature of certiorari quashing the two decisions of the full court. An order was also sought pursuant to s 474D of the Crimes Act 1900 (NSW) for an inquiry into the convictions. The defendants contended that the Industrial Court had failed properly to interpret ss 15, 16 and 53 of the OHS Act so as to make compliance impossible and rendering ineffective the statutory defences. The Court of Appeal held that any such errors were based on findings of fact and did not amount to jurisdictional error.[8] The appeals and applications were dismissed.

The High Court's decision

In a unanimous decision, the High Court found that the Industrial Court had engaged in jurisdictional error and quashed the decisions of the Industrial Court convicting Kirk Group and Mr Kirk. In essence, no error was found in the reasoning of the New South Wales Court of Appeal. The substantive grounds which Mr Kirk and the Kirk Group succeeded on in the High Court, were grounds that were neither argued before the New South Wales Court of Appeal or the Industrial Court. The primary reasons are set out in the decision of the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). In a separate judgment, Heydon J agreed with the plurality's orders with the one exception being that his Honour also made orders that Kirk Group and Mr Kirk be awarded the costs of the hearings before the Industrial Court and the Court of Appeal. There were three essential limbs to the plurality's reasons for quashing the orders made by the Industrial Court.

First, the plurality found that the Industrial Court had misconstrued ss 15, 16 and 53 of the OHS Act.[9] The plurality held that charges under ss 15 and 16 must identify the act or omission said to constitute a contravention of those provisions and that in many instances this required specification of the safety measure which should have been taken by the alleged offenders (as opposed to simply asserting the steps they had not taken).[10] In the present case, the charges did little more than copy the words of ss 15 and 16 and did not identify what measures that Kirk Group could have taken but did not take.[11] The plurality explained that specification of these matters was critical because the offence provisions in ss 15 and 16 had to be read conformably with the defence in s 53 of the OHS Act.[12] Contrary to well-settled authority in the Industrial Court, the plurality held that 'The duties referred to in ss 15(1) and 16(1) cannot remain absolute when a defence under s 53 is invoked…[t]he OH&S Act delimits the obligations of employers by the terms of the defences provided in s 53.'[13]

The plurality held that the acts or omissions the subject of the charges had to be identified if Mr Kirk and Kirk Group were to be able to rely upon a defence under s 53 of the OHS Act and that in the instant case they were not in a position to satisfy the defence because they had not been told what measures they were required to take and therefore were not in a position to prove that the taking of those measures was not reasonably practicable.[14]

In addition, the plurality found that the Industrial Court had erred by permitting Mr Kirk to be called as a witness in the prosecution case (despite Mr Kirk's counsel not objecting).[15] Section 163(2) of the IR Act provided that the rules of evidence applied to the Industrial Court. Relevantly, s 17(2) of the Evidence Act 1995 (NSW) provides that a defendant is not competent to give evidence as a witness for the prosecution. The plurality held that by permitting Mr Kirk to be called in the prosecution case, the Industrial Court had conducted the trial of Mr Kirk and Kirk Group in breach of the limits on its power to try charges of a criminal offence.[16]

Secondly, the plurality held that the errors engaged in by the Industrial Court were jurisdictional errors. In so concluding, the plurality examined the purpose and meaning of jurisdictional error and observed that it was neither necessary, nor possible, to attempt to 'mark the metes and bounds of jurisdictional error'.[17] Whilst relying upon *Craig v South Australia*[18], the plurality cautioned that the reasoning in Craig is not to be seen as providing a rigid taxonomy of jurisdictional error.[19] In the instant case, the plurality found that the Industrial Court had misconstrued the OHS Act and in so doing had engaged in a jurisdictional error of a kind identified in Craig in that it had misapprehended the limits of its functions and powers.[20] The Industrial Court had no power to convict and sentence Mr Kirk and Kirk Group because no particular act or omission,

or set of acts or omissions, had been identified at any point in the proceedings so as to constitute an offence against the OHS Act.

Thirdly, the plurality reasoned that the privative provision contained in s 179 of the IR Act could not immunise the Industrial Court from the exercise of the Supreme Court's supervisory jurisdiction.[21] In arriving at this conclusion, the plurality held that the operation of a privative provision is affected by constitutional considerations.[22] In this regard, Chapter III of the Australian Constitution requires that there be a body fitting the description 'the Supreme Court of a State'. The plurality held that a defining characteristic of state supreme courts as and from the time of federation was and is their exercise of supervisory jurisdiction as the mechanism for the determination and the enforcement of the limits on the exercise of state executive and judicial power.[23] To deprive the Supreme Court of its supervisory jurisdiction would:

> …be to create islands of power immune from supervision and restraint…it would remove from the relevant State Supreme Court one of its defining characteristics.[24]

The plurality observed that their conclusions should not be taken to mean that there can be no legislation affecting the availability of judicial review in state supreme courts or that no privative provision is valid.[25] However, the plurality concluded that privative provisions such as s 179 of the IR Act, must be read in a manner that takes account of the necessary limits on legislative power brought about by Chapter III of the Australian Constitution.[26] The plurality held that s 179 of the IR Act did not preclude the grant of certiorari for jurisdictional error and accordingly quashed the decisions of the Industrial Court convicting Kirk Group and Mr Kirk.[27]

Conclusion

Aside from its relevance to the proper construction of the OHS Act and providing another timely reminder that it is difficult to exhaustively state the content of jurisdictional error, the decision in Kirk stands as a further example of the development and reach of what is an increasingly growing body of Chapter III jurisprudence. If it was ever in doubt, there is now no room for quarrel about the prominent role of state supreme courts as an entrenched part of the Australian judicial system. What follows from that axiomatic proposition is that any incursion or limitation upon the exercise of judicial power by state supreme courts necessarily affects the integrity of the Australian Constitution itself. The practical dimension of this constitutional truth is borne out by the decision in Kirk in that it has been authoritatively held that privative provisions in state legislation cannot oust the exercise of judicial review by state supreme courts. So much has been recognised in an extra-curial speech delivered by Spigelman CJ where his Honour observed that 'The effect of *Kirk* is that there is, by force of s 73 [of the Australian Constitution], an 'entrenched minimum provision of judicial review' applicable to State decision-makers…'[28]

A further development arising from the reasoning in *Kirk* is that the principles stated in *R v Hickman; Ex parte Fox and Clinton*[29] may be of limited or no relevance to the validity of privative provisions found in state legislation. The decision in *Kirk* now stands for the proposition that a privative provision in state legislation must be construed so as not to oust the entrenched constitutional role of the Supreme Court to exercise supervisory jurisdiction over inferior courts and tribunals.

By Arthur Moses SC and Yaseen Shariff

Endnotes

1. The OHS Act has since been repealed and replaced by the *Occupational Health and Safety Act 2000* (NSW).
2. *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* [2004] NSWIRComm 207; (2004) 135 IR 166.
3. *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* [2005] NSWIRComm 1; (2005) 137 IR 462.
4. *Kirk Group Holdings Pty Ltd v WorkCover Authority* (NSW) [2006] NSWCA 172; (2006) 66 NSWLR 151.
5. *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* [2006] NSWIRComm 355; (2006) 158 IR 281 at 293 [40].
6. *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* [2006] NSWIRComm 355; (2006) 158 IR 281 at 295 [48].
7. *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2007) 164 IR 146.
8. *Kirk v Industrial Relations Commission (NSW)* [2008] NSWCA 156; (2008) 173 IR 465 at 474 [38]-[39].
9. [2010] HCA 1; (2010) 84 ALJR 154 at [74].
10. Ibid., at [14].
11. Ibid., at [25]-[27].
12. Ibid., at [27].
13. Ibid., at [18].
14. Ibid., at [27]-[28].
15. Ibid., at [50]-[53].
16. Ibid., at [76].
17. Ibid., at [71].
18. [1995] HCA 58; (1995) 184 CLR 163 at 177-180.
19. [2010] HCA 1; (2010) 84 ALJR 154 at [73].
20. Ibid., at [74]-[75].
21. Ibid., at [93].
22. Ibid., at [95].
23. Ibid., at [96]-[98].
24. Ibid., at [99].
25. Ibid., at [100].
26. Ibid., at [101].
27. Ibid., at [105] and [108].
28. Spigelman CJ, 'The Centrality of Jurisdictional Error', Keynote Address to the AGS Administrative Law Symposium Commonwealth and New South Wales, 25 March 2010.
29. [1945] HCA 53; (1945) 70 CLR 598.

Causation

Tabet v Gett [2010] HCA 12

Tabet v Gett[1] is concerned with causation and damage in medical negligence claims. In such cases, the issue of whether a negligent act or omission has caused the damage suffered by the plaintiff can be especially difficult. Having determined what should have occurred, the court must undertake a hypothetical inquiry as to what the participants would have done had there been no negligence and what, in the counter factual, the consequences would have been. The latter question may need to be determined on conflicting expert opinions in highly specialised areas of medical science.

What, then, is the position of a plaintiff who has established negligence on the part of a medical practitioner and has persuaded the court that there was a prospect, or a possibility, that, if the negligence had not occurred, she would have had a medical outcome better than the one she in fact had? Has she suffered any actionable loss if she cannot establish that, on the balance of probabilities, the loss for which she seeks compensation was caused by the negligence of the practitioner? In particular, can she overcome that difficulty by claiming damages, not for the injury itself, but for the loss of the chance to avoid that injury?

In *Tabet v Gett*, the High Court has answered these questions in the negative. It has confirmed that the common law of Australia does not recognise, as actionable damage, the loss of a chance of a better outcome, in cases where medical negligence has been found. The possibility of characterising loss in such cases as the loss of a chance would, in the opinion of the court, countenance a departure from the standard of proof that currently applies to causation and damages in negligence. It has decisively rejected any such departure.

Background

Reema Tabet was six years old when she was admitted to hospital on 11 January 1991, suffering from headaches and nausea. At about 11am on 13 January, nursing staff, alerted by Reema's father, observed that the she was staring and unresponsive. Dr Gett, who was a visiting medical officer at the hospital, ordered a lumbar puncture. On the following day, at 11.45 am, Reema suffered a seizure and, this time, a CT scan was ordered. The scan revealed the presence of a brain tumour. Two days later, Reema underwent surgery. However, she was left with irreversible brain damage.

The trial judge[2] found that Dr Gett departed from proper standards in failing to order a CT Scan on 13 January[3] and that, if one had been ordered, the tumour would have been discovered then, rather than the following day. Further, some of the brain damage from which Reema suffered (25 per cent of her total injury) was found to have been attributable to the decline in her condition on 14 January. The plaintiff claimed damages in respect of that injury. However, critically, his Honour was not persuaded that the evidence established, on the balance of probabilities, that the discovery of the brain tumour on 13 January would have resulted in any treatment that would have avoided the brain damage that Reema suffered on 14 January. On the application of the usual principles, this would have meant that the plaintiff's cause of action in negligence failed. However, the plaintiff advanced an alternative claim. She contended that the loss that she had suffered because her tumour had not been detected on 13 January, was the loss of the chance of avoiding the damage that she had suffered when her condition deteriorated on 14 January. That chance of a better medical outcome, even if it was less than 50 per cent, was, it was argued, something of value and the loss of it as a result of the conduct of Dr Gett gave her a claim against him in negligence. The plaintiff derived support for this submission from decisions of the NSW and Victorian Court of Appeal.[4]

The trial judge awarded the plaintiff damages based on this alternative claim, having determined that the plaintiff had lost a 40 per cent chance of a better medical outcome (that is, of avoiding the brain damage suffered on 14 January). The NSW Court of Appeal[5] upheld Dr Gett's appeal on the basis that the alternative claim on which the plaintiff had succeeded at trial amounted to a significant departure from the principles applicable to proof of causation of damage in negligence, (in so doing, the court overturned the intermediate appellate authority on this point).[6] It was, the court said, for the High Court, and only the High Court, to reformulate the law of tort in this way.

The argument in the High Court

Kiefel J delivered the leading judgment.[7] Her Honour reaffirmed the common law test of causation and the applicable standard of proof, noting that, once causation is proved to the general standard, the common law treats what is shown to have occurred as certain (the 'all or nothing' rule).[8]

Her Honour considered the evidence led at the trial relevant to the events of 13 and 14 January and agreed with the finding of the trial judge that, applying established principles, the failure of Dr Gett to order the CT scan on 13 January was not, on the balance of probabilities, the cause of the appellant's deterioration on 14 January. Indeed the evidence did not, in her Honour's opinion, enable the plaintiff to satisfy the 'but for' test as the minimum negative criterion for causation.[9] The issue, then, was whether damages could be awarded on the alternative basis of a loss of a chance of a better outcome, as found by the trial judge.

In urging that damages could be awarded on that basis, the appellant relied on the availability of the loss of a commercial opportunity as damages in contract and for breach of section 52 of the *Trade Practices Act*. However, Kiefel J considered that cases involving lost commercial opportunities provided no relevant analogy. There was, in her Honour's opinion, a distinction between a commercial opportunity and the possibility of avoiding or lessening physical harm. In the former, her Honour said, what has been lost may readily be seen to be of 'value itself', whereas:

> the loss of a chance of a better medical outcome cannot be regarded in this way. As the assessment of damages in this case shows, the only value given to it is derived from the final physical damage.[10]

The appellant also sought to draw an analogy with the approach of the courts in assessing damages.[11] It is well established that, in assessing damages, the court may adjust its award to reflect the degree of probability of a loss eventuating. Why should not the same proportional approach be applied to causation?

However, both Kiefel J and Gummow ACJ noted that there was a fundamental distinction between the loss or damage necessary to found an action in negligence, and damages, which are awarded as compensation for that injury. [12] In the latter case, the permissibility of a proportional adjustment to reflect hypothetical occurrences follows from the requirement that the court must do the best it can in estimating damages.[13] The same approach could not be applied to the proof of loss or damage and causation.

Conclusion

It is now clear that, in the area of medical negligence, the characterisation of a plaintiff's loss as the loss of a chance cannot assist in overcoming difficulties in establishing, on the balance of probabilities, that the physical loss or damage suffered was caused by the negligent conduct.[14] As Kiefel J stated:

> The requirement of causation is not overcome by redefining the mere possibility that such damage as did occur might not eventuate as a chance and then saying that it is lost when the damage actually occurs. [15]

Such redefinition, in the opinion of Kiefel J, recognises that the general standard of proof cannot be met. The court has decisively rejected any lowering of that standard which, in the opinion of Gummow ACJ, strikes the appropriate balance between the competing interests of the parties.[16]

The decision will have implications for the manner in which medical negligence claims are framed in the future and may restrict the availability of claims in cases where there is doubt as to whether the appropriate treatment would have improved the patient's medical outcome.

The decision does not restrict the availability of claims for loss of a commercial opportunity in contract and under section 82 of the Trade Practices Act and its analogues. Nor, given the distinctions drawn by Kiefel J, should it affect the recoverability of such losses in claims in tort for pure economic loss.[17] However, the decision reinforces the applicability of the general standard of proof to all elements of the relevant cause of action, and to that extent is as relevant to cases of economic loss as it is to cases of personal injury.

By Vanessa Thomas

Endnotes

1. [2010] HCA 12, decision handed down on 21 April 2010.
2. Studdert J, *Tabet v Mansour* [2007] NSWSC 36.
3. Although other acts and omissions were alleged to have been negligent, this was the only negligence established.
4. *Rufo v Hosking* (2004) 61 NSWLR 678, *Gavalas v Singh* (2001) 3 VR 404
5. *Gett v Tabet* (2009) 254 ALR 504; per Allsop P, Beazley and Basten JJA.
6. The court also found, if it was necessary to do so, that on the evidence any chance that was lost did exceed 15 per cent.
7. With whom Hayne, Bell and Callinan JJ agreed. Gummow ACJ gave a separate judgment, dismissing the appeal. Heydon J also dismissed the appeal, but on different grounds.
8. At [111] to [113].
9. At [114]. The evidence established that, if the tumour had been discovered on 13 January, the treatment that would have been prescribed was the administration of steroids. However, the expert evidence did not support a finding that the steroids would have prevented the deterioration of the appellant's condition on 14 January. See also Gummow ACJ at [6] and [43] to [45]. Heydon J regarded the evidence as so inconclusive that it was not possible to arrive at any conclusion on the question of whether the negligence caused the plaintiff to lose a chance of avoiding or reducing the damage and dismissed the appeal on that ground alone; see [97] to [98].
10. At [124], adopting the words of Brennan J in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. See also Gummow ACJ at [54].
11. See *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.
12. Kiefel J [135] and Gummow ACJ at [23].
13. Gummow ACJ at [39] and Kiefel J at [136] referring to *Malec v Hutton*.
14. Nor did the acceptance of a loss of a chance in medical negligence claims in some civil law countries and in US cases persuade the court to accept the approach for which the appellant contended. Both Kiefel J and Gummow ACJ preferred the reasoning of the majority of the House of Lords in *Gregg v Scott* [2005] 2 AC 176, see [59], [60] and [144] which has confirmed that the general standard of proof should be maintained with respect to claims for damages for medical negligence.
15. Kiefel J at [152]. See also [143] and Gummow ACJ at [46].
16. Gummow ACJ at [59].
17. See also Gummow ACJ at [27].

Judicial biography: one plant but several varieties

By New South Wales Solicitor General M G Sexton SC*

There was at one time a considerable overlap between the subjects of political and judicial biography because of the number of prominent figures who had careers as both politicians and judges. This has, however, become a very unusual – if not extinct – species.

There have been very few examples in the last 30 years where a serving or recently retired politician in Australia, Britain or the United States has gone to the bench. This was once quite common, as illustrated by Australia's first chief justice, Sir Samuel Griffith, who had been premier of Queensland, and Charles Evan Hughes, who went to the US Supreme Court after being governor of New York State. It was always rarer for judges to step down from the bench to enter the political arena, although Dr Evatt resigned from the High Court to stand for the House of Representatives in 1940 and Hughes left the Supreme Court in 1916 to run as the Republican candidate against president Woodrow Wilson in the election of that year. Although he lost that election very narrowly, Hughes capped off an extraordinary career by becoming secretary of state between 1921 and 1925 and then returning to the Supreme Court as chief justice in 1930[1]. There are certainly no modern examples of judges moving to the political stage.

There are a number of reasons for these changes, although perhaps the most obvious is that over the last three decades, particularly in Australia but also in other western countries, persons taking up political life have done so at a much younger age and without really pursuing any other career – such as legal practice – beforehand. Many of these have, of course, left politics at a much earlier age than in the past but in most cases this has been to take up a career in business or the media rather than the law. This is a very different world from that portrayed by David Marr in his biography of Sir Garfield Barwick.[2] Barwick was in many ways the leader of the bar in Australia when he went into federal politics in 1958. Then, after serving as attorney general and minister for external affairs, he became chief justice of Australia in 1964 and remained in that position until 1981.

Bearing these changes in mind, it is possible to set out some traditional styles of judicial biography, although it will be noted that there is something of an arbitrary character to these categories and, quite a degree of overlap between them as well.

Famous cases at the bar followed by life on the bench

At one time, most particularly in Britain, judicial biography could commence with an account of its subject's most famous cases while at the bar. A good example is the biography of Norman Birkett by H Montgomery Hyde.[3] Birkett was called to the bar in 1913 and went to the bench in 1941. In the absence of the specialisation that is now the rule rather than the exception at the bar and also the multitude of competing celebrities, the most prominent trial lawyers were famous public figures. It might be noted that even Birkett had a brief period as a Liberal member of the House of Commons between 1923 and 1924 and then between 1929 and 1931, although this was at a time when parliamentary duties did not prevent a full practice at the bar.

Edmund Barton and Alfred Deakin. Photo: National Library of Australia

Another example of this category is the biography of Rufus Isaacs by Derek Walker-Smith[4]. Isaacs was called to the bar in 1887 but he also had a significant public career before going to the bench. He was elected to the House of Commons in 1904, becoming solicitor general in 1910 and attorney general later the same year. In 1913 he became – as Lord Reading – Lord Chief Justice, only to return to public administration in 1921 as viceroy of India.

Judicial life combined with significant political careers

One of the best examples of this category is Geoffrey Bolton's biography of Australia's first prime minister, Edmund Barton[5]. Barton was elected to the NSW Legislative Assembly in 1879 and was appointed to the Legislative Council in 1887. He was attorney general in 1889 and 1891 and acting premier for six months in 1892. Although he left the NSW Parliament in 1893, he was heavily involved in the movement for federation in the 1890s and became the first Commonwealth prime minister in March 1901. In October 1903 he was appointed as one of the three members of the High Court.

One of his colleagues after 1906 was Henry Bournes Higgins who is the subject of a biography by John Rickard[6]. Higgins was a delegate to the 1897 – 1898 Federal Convention and was elected to the first Commonwealth Parliament. Although not himself a member of the Labor Party, he became attorney general in the brief Watson administration. He combined his time in the High Court with the presidency of the Federal Court of Conciliation and Arbitration from 1907 to 1921.

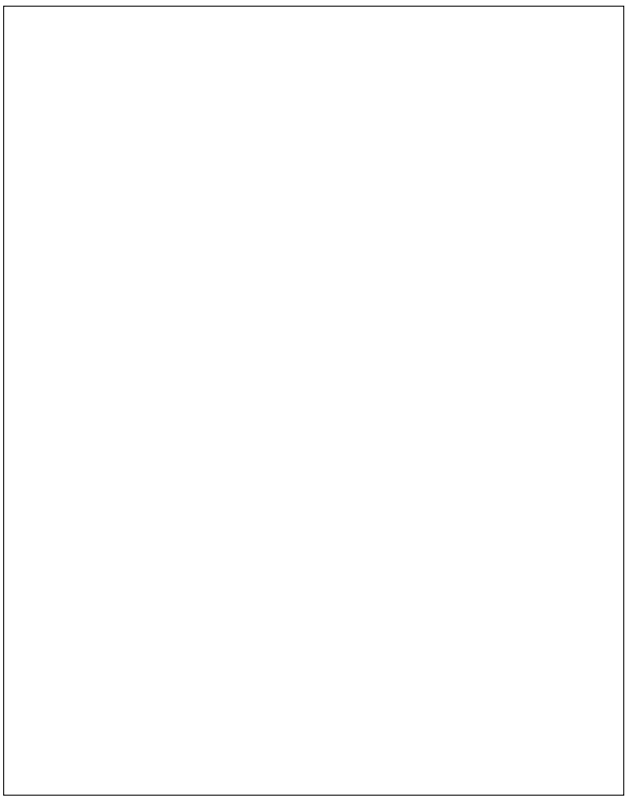
Perhaps the most controversial combiner of judicial and political careers in Australian history was Herbert Vere Evatt. Evatt has been the subject of three detailed biographies, although none really deal adequately with the complexities of his character.[7] Evatt was a member of the NSW Legislative Assembly from 1925 until 1930. He was appointed to the High Court in 1930 but stepped down in 1940 to enter the House of Representatives. He was attorney general and minister for external affairs in the Curtin and Chifley administrations and president of the UN General Assembly in 1948-1949. Evatt was leader of the Opposition in the federal parliament from 1951 to 1960. He returned briefly to the bench as chief justice of NSW in 1960 but resigned in 1962.

An English example of this mixture of roles is John Campbell's life of F E Smith.[8] After a dashing early career at the bar, Frederick Edwin Smith became solicitor general in 1915 and later that year attorney general until 1919. He then became lord chancellor over the period 1919-1922 and sat in this role on many cases in the House of Lords. He returned to politics in 1924 – now earl of Birkenhead – a secretary of state for India in the Baldwin government until 1928.

Judicial life simpliciter but in a social setting

On the face of it this category presents the biographer with the most difficult task. There are examples of long periods of judicial life that are not combined with a political career or a series of famous cases as a trial lawyer. In many ways this was the model for Professor Ayres' biography of Owen Dixon.[9] It is true that Dixon went to Washington in 1942 for two years in the role of what was effectively Australian ambassador to the United States and acted as United Nations mediator in 1950 in the Kashmir dispute but otherwise he spent 35 years on the High Court between 1929 and 1964. During this time, therefore, his only public profile was his record of judgments. Nevertheless, the book does very well in placing Dixon in his social milieu. He was essentially a product of the late-Victorian and Edwardian eras in Melbourne and remained so all his life.

Another recent example of this style of biography is that of Roma Mitchell by Susan Magarey and Kerrie Round.[10] Mitchell spent 18 years on the South Australian Supreme Court. She was the first woman appointed – in 1965 – to any state Supreme Court in the country. She was born in 1913 and brought up in Adelaide in comfortable but not ostentatious circumstances. In many ways the book is not only a biography of Mitchell but a social history of Adelaide – particularly of its bourgeoisie – over much of the last century. Although Mitchell did not come from one of the old families that dominated its close-knit world, she moved on their fringes and had access to corners of their domain.



Herbert Vere Evatt preparing to call first meeting of General Committee to order. (Photo by Yale Joel//Time Life Pictures/Getty Images)

Perhaps the most controversial combiner of judicial and political careers in Australian history was Herbert Vere Evatt.

This had to be the model, of course, for G Edward White's biography of Oliver Wendell Holmes.[11] Although Holmes's youth can hardly be described as uneventful – he fought and was badly wounded in the Civil War – he then became a legal scholar, even when he was practising law, and he joined

the faculty of Harvard Law School in 1882. That same year, however, he was appointed as a justice of the Massachusetts Supreme Court. Holmes spent 20 years as a judge of this court, ultimately becoming chief justice, before leaving in 1902 to join the US Supreme Court. He then spent almost 30 years on that body before retiring in 1932. The book paints an interesting picture of Holmes's world in Boston and London – where he spent considerable periods of time over the years – although this world was a very rarefied environment and said little about society generally. The book is, however, a dramatic example of the judicial biographers' difficult task of translating judgments – and in this case legal text as well – into an account that can engage the general reader.

A similar exercise can be found in Gerald Gunther's biography of Learned Hand.[12] After a relatively brief period in private practice, Hand was appointed to the US District Court in 1909 at the age of 35. He then spent 52 years as a federal judge. In 1924 he was promoted to the US Court of Appeals for the 2nd Circuit and was the chief judge of that court between 1939 and 1951. Hand was, in fact, particularly interested in politics, both in the broad and narrow senses, but he was, of course, unable to indulge that interest publicly after his appointment to the bench.

In many ways judicial biography shares the particular problem of literary biography – the fact that the subject is essentially a writer, albeit, usually of a different kind, and is not a man or woman whose life is filled with action in the way that is sometimes true for a politician, a soldier or a public administrator.

Judicial autobiography: a rare species

The notion of judicial autobiography is certainly uncommon. One example is the two volumes by William O Douglas who was a member of the US Supreme Court between 1939 and 1975.[13] It should be noted, however, that one of Justice Douglas' biographers has argued that there is a considerable amount of fiction in the two volumes of autobiography.[14] There are other cases of this kind of conflict between biographer and subject but this is a particularly serious dispute.

Problems of judicial biography

In many ways judicial biography shares the particular problem of literary biography – the fact that the subject is essentially a writer, albeit, usually of a different kind, and is not a man or woman whose life is filled with action in the way that is sometimes true for a politician, a soldier or a public administrator. As already noted, this does not mean that the judge's private life should be neglected and it will often be a source of considerable interest to readers. And it has already been suggested that putting the judge in his or her social setting is likely to provide valuable background and add real colour to the story.

It is also true that, in the case of multi-member courts, like the High Court of Australia, the interaction between the various members of the court may provide useful background material. It will not always, of course, show some of the judges in a good light. As Justice Barton said of Justice Isaacs in 1913 – writing to Chief Justice Griffith who was overseas – 'his judgments… are very weighty – in respect of paper, and he has assumed an oracular air in Court that is quite laughable'.[15] Justice Higgins was coupled with Isaacs in another of Barton's letters to Griffith when he said: 'You will see how little decency there is about these two men'.

The biggest problem about judicial biography is obviously how to describe litigation and the legal doctrines that govern its resolution in a way that avoids over-simplification but allows the general reader to understand this process. This statement of the problem assumes, of course, that the author is aiming at a readership beyond lawyers. That would seem to be a reasonable assumption in most cases. In addition, there are many lawyers who would need assistance in decoding the judgments of, for example, the High Court of Australia. This is, of course, not a skill that is confined to judicial biography but one that is required whenever writing about the legal system and decisions of courts.

It is easier, of course, to achieve this goal in relation to some kinds of cases than others. The subject matter of criminal trials, for example, is often more interesting to general readers than civil litigation and questions of guilt and innocence are more readily dramatised than many of the issues that arise in commercial causes. Sometimes, however, the underlying facts in a civil case may make it easier to bring the legal principles to life if, for example, a public figure is suing in libel or a well-known sporting figure is challenging a restraint of trade. Complex corporate litigation obviously presents a considerable

challenge to the writer but often arises out of fact situations that are of considerable interest to many members of the community. A recent example is the civil proceedings against the directors of James Hardie in relation to the provision made by the company for the compensation of victims of exposure to asbestos.

Judicial biography has some particular problems but, like biography generally, it requires portraying the subject's life and work in the context of his or her immediate environment and against the currents of the surrounding society. How these various elements are woven together and dramatised will reflect the skill of the biographer. In the case of judicial officers, the task is often especially challenging but the rewards for the author – and for the reader – can still be handsome ones.

Endnotes

1. See generally Merlo J Pusey, *Charles Evan Hughes* (MacMillan, 1951).
2. David Marr, *Barwick* (George Allen & Unwin, 1980).
3. H Montgomery Hyde, *Norman Birkett: The Life of Lord Birkett of Ulverston* (Hamish Hamilton, 1964).
4. Derek Walker-Smith, *Lord Reading and His Cases: The Study of a Great Career* (Chapman & Hall, 1934).
5. Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000).
6. John Rickard, *H B Higgins: The Rebel as Judge* (George Allen & Unwin, 1984).
7. Kylie Tennant, *Evatt: Politics and Justice* (Angus & Robertson, 1970); Peter Crockett, *Evatt: A Life* (Oxford University Press, 1993); Ken Buckley, Barbara Dale and Wayne Reynolds: *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (Longmann Cheshire, 1994). See also the memoir by Allan Dalziel, *Evatt the Enigma* (Lansdowne, 1967).
8. John Campbell, *F E Smith*: *First Earl of Birkenhead* (Jonathan Cape, 1983). See also Ephesian, *Lord Birkenhead* (Mills & Boon Limited, 1926).
9. Phillip Ayres, *Owen Dixon* (The Miegunwah Press, 2003).
10. Susan Magarey and Kerrie Round, *Roma the First: A Biography of Dame Roma Mitchell* (Wakefield Press, 2008).
11. G Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993).
12. Gerald Gunther, *Learned Hand: the Man and the Judge* (Knopf, 1994).
13. William O Douglas, *Go East, Young Man: the Early Years* (Delta, 1974); *The Court Years 1939-1975* (Random House, 1980).
14. Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O Douglas* (Random House, 2003).
15. Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967) at 116.

* This article is based on a paper presented in December 2009 at a seminar on judicial and political biography organised by the University of Adelaide Law School and the Australian Association of Constitutional Law.

Verbatim

'The English common law is now proceeding within the confines of European canals, in which most of the locks have been constructed by civil lawyers. Traditionally, the common law finds the constraints of barge life too restrictive.'

Spigelman CJ in launching the 8th edition of *Nygh's Conflict of Laws in Australia*

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'In September 2008 I spent Lehman Brothers weekend in Shanghai attending an international conference of insolvency practitioners. A highlight of the conference was the sudden departure of a significant number of American insolvency practitioners who were scheduled to speak. … It is fair to say that the insolvency practitioners from all over the world who were left behind in Shanghai were not engulfed by any sense of gloom about their immediate prospects in the practice of the black arts of a commercial undertaker.'

Spigelman CJ, beginning his lecture on 'The Global Financial Crisis and Australian Courts' at the Inter-Pacific Bar Association Conference, Singapore, 4 May 2010

Sir George Rich

By David Ash, Frederick Jordan Chambers[1]

> Sir George Rich… was reading in the Association's library. The chair in which he was sitting collapsed under him and, being somewhat shaken he accepted from the librarian a glass of spirits, which effected sound restoration. His Honour jocularly submitted to Barwick, then President of the Association, a claim for damages, which led to a good deal of humorous correspondence between them and an ultimate 'settlement' in the presentation of the maple chair [presented by Barwick to the bar]. Barwick sought a latinism for the chair and Mr. John Sparrow, Warden of All Souls' College, Oxford, was enlisted to supply the inscription 'Hic parumper requievit Georgius Rich donec lyaeis laticibus suscitatus est,' his translation being 'Here George Rich reclined in rest until he was raised up by strong waters'.[2]

Today, the association's president presides over meetings from that same chair.

This is the fourth prosopography of men and women of the High Court for whom the New South Wales bar had been home. I say 'home'; we have had distinguished licensees; the Queenslander Sir Samuel Griffith was admitted in 1881, followed by Isaacs (in the colony's centenary year) and Higgins (another decade after that).

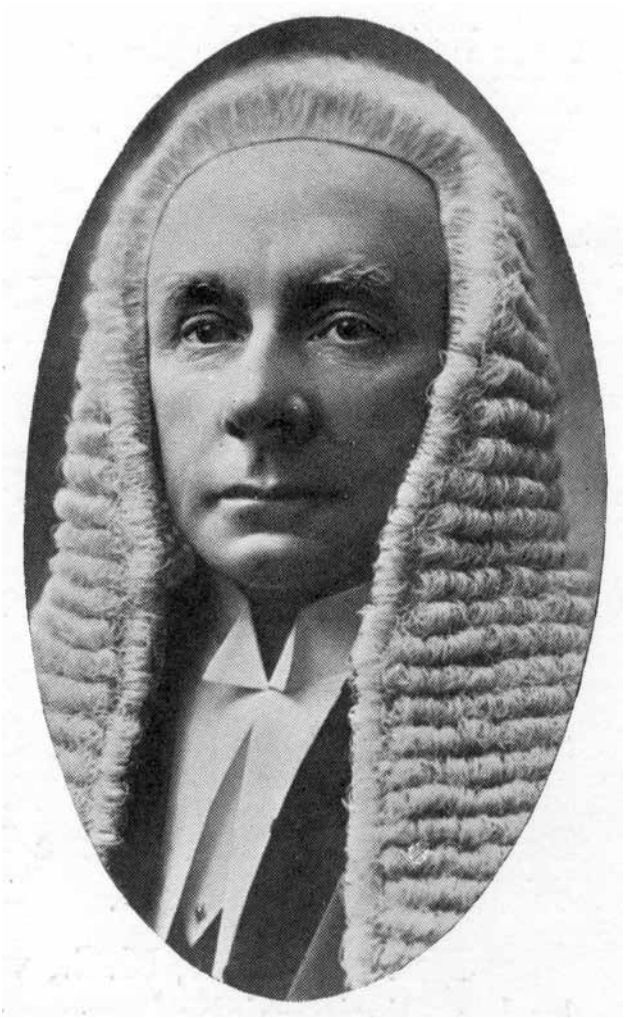
When those two judges were sworn in on 15 October 1906, Purves KC for the Victorian Bar said that he felt like being told by the nurse that it was twins and that 'Both are intelligent and both are beautiful'. After this and the other addresses, one source suggests that 'a disreputable-looking man at the back of the court room, which was crowded, rose and said in ringing tones: 'A voice from the Inner Temple! Congratulations to Mr Justice Higgins! Not quite a lawyer! Not quite a statesman! Not quite a gentleman!''[3]

Higgins recorded that the man was in fact being flattering (by pointing out after congratulations that he himself, unlike Higgins, was not quite these things) and that the person was Cornewall Lewis (the drunk nephew of the chancellor of the exchequer who first said that 'Life would be tolerable but for its pleasures').

Even if Higgins hadn't put the record straight, we could be sure it wasn't George Rich, a man who was quite a lawyer, quite a statesman and quite a gentleman. Some say he reclined too much. Others say he rested too much. The purpose of this outing is to determine whether it is too much that he now be raised up.

Early days

George Edward Rich was born at 5.10pm on 3 May 1863 in Braidwood, the son of Isabella Tempest (nee Bird) and Charles Hamor Rich, whom Simon Sheller has described as 'a highly respected and scholarly Anglican cleric of the district'.[4] Charles had arrived in Australia at the age of three. His first job – suitably enough, given his son's destination – was as headmaster of St James Grammar School in Phillip Street.



Unexceptionally for the times, two of their children died in infancy. The remainder included Hamor Charles Ellison Rich, known as Ellison and born on 25 July 1856 (at 7.00am). Ellison became a solicitor and, like his brother, served on his professional body. In fact, page 36 of the *New South Wales Law Almanac* for 1901 records that Ellison was a member of the Incorporated Law Institute of New South Wales and that George was – with their honours the judges and the attorney general and one A B Shand – on the Barristers' Admission Board. Page 31 records that the Bankruptcy Department of the Supreme Court included as acting chief clerk, one HA Rich. He does not appear to have been closely related. However,

I can confirm that for that year, the BAB was offering law & equity; Roman, constitutional, and international law; Latin; Greek; geology & algebra; French language & literature; logic; and history.

There was Mary Isabella Tempest Rich (9.00pm, 21 April 1854). Her address was eventually 52 Darlinghurst Road, Darlinghurst, which of course now houses the Kings Cross branch of the City of Sydney Library. She died in 1933.

One other Rich passed into adulthood, someone whose connection with this end of Phillip Street is enduring. This is Emily Tempest (3.00am, 20 May 1858). Emily would pass through a fair portion of her life as Sister Freda, a member of the (Anglican) Community of the Sisters of the Church, better known as the Kilburn Sisters. The arrival of this sisterhood in 1892 and 1893 created a furore in the Sydney (evangelical) church. Sisterhoods were essentially High Church, a little too much like papish nuns for many Sydney Anglicans. Far better deaconesses, always under the control of the local clergy.[5]

The significance of Freda's vocation is twofold. First, it may give some support for the view that Rich's family was more – and this is always a difficult word, out of context – liberal, at least as regards women, than others from an otherwise similar background.

Second, and of interest to Anglican barristers, the Sister Freda Mission for the homeless run from St James Church is rooted in the work for the homeless done by her and William Isaac Carr Smith. (As a biographer of the latter notes with due understatement, 'The career of an Anglo-Catholic Christian socialist in Sydney had its pitfalls…')[6]

Sister Freda herself lived at St Gabriel's, dying in 1936. St Gabriel's was a highly regarded school, although it closed through a lack of teaching sisters in 1965. Barristers who aim for the jack at the Waverley Bowling Club in Birrell Street will know that the club purchased the school's last site in 1965 for £227,000.[7]

Notwithstanding this rendering to Caesar, Birrell Street has the sectarian satisfaction of rendering also beyond; on the low side of its highest point and capped by a statue of Mary is the well-known institution for young Catholic gentlemen, Waverley College; while on the high side of the high point lies Saint Mary the Virgin Anglican Church, historically high.

Rich's education – a High Court standard

In the steps of Barton and O'Connor – although not of Piddington – Rich attended Sydney Grammar School, where he was a most successful student. He was a winner of one of the prestigious Knox prizes, which I assume were donated by the father of Rich's – and the nation's – second chief. He shared that particular prize – the junior prize for 1875 – with one 'Banjo' Paterson.

The prize has a solid literary pedigree. A two-time winner (1870 and 1871) was Joseph Jacobs. Now almost forgotten in Australia, Jacobs was one of the distinguished Jewish historians and the leading English folklorist of his day, eager to do for England as the brothers Grimm had done elsewhere. Without Jacobs's work, barristers' children would have been deprived of *Jack and the Beanstalk*[8] and *Three Little Pigs*.[9]

At the University of Sydney, Rich studied his classics under Professor Badham, and with the professor arranged for the introduction of night courses. A BA came in 1883 and an MA in 1885. Rich was also a founder of *Hermes* magazine, today an exclusively literary effort but then really an *Honi Soit* with a *Chaser*-ish bent. Someone, presumably Rich, penned for the first issue:[10]

> *Te, nefarium*
> *Calendarium*
> *Cum classificationibus*
> *Expectat studentium*
> *Cohors, utentium*
> *Teterrimus damnationibus.*

There are editors and Federal Court judges who write letters when people abuse the classics, but I'm game. [Ed, is it] 'Oh abominable first day, You with your 'classifications' expecting from this student body useful things, Oh most abominable damnation'[?]

I think the least of my sins is an abused ablative, but given that I always thought that Sydney University's now scotched motto *sidere mens eadem mutato* meant 'to sit on one's mind and change it', forgive me. More on Rich and mottos later.

From that first issue, Rich pulled for a nascent boat club, and a later issue records his contribution: 'The Hon. Sec., G E Rich, has just been called to the Bar, and intends to take a trip to England. His loss will be irreparable to us. His energy and activity have been an incalculable benefit to the interests of the Club. I hope his mantle will fall on a worthy successor.'[11] Rich did travel to England, going to the bar on 10 March 1887.

Going to the bar

1887 was a varied lot. Foremost for our generation is probably Alexander Barclay Shand, already mentioned and, of course, the first of the dynasty. For earlier generations of barristers, a name which would stand out is Wilfred Blacket, whose

Phillip Street, circa 1900. Photo: New South Wales Bar Association

reminiscences were published in 1927.[12] Comparing the 40 years between, he said:[13]

> In 1887 there were 155 barristers named in the Law List. I counted them very carefully for I was very anxious to know if there would be enough to supply the public need if I should happen to be away ill or on holiday at any time. In that year, Sydney's population was 350,866, and the population of New South Wales was 1,042,919, so that there was one barrister to each 2263 persons in the metropolis, and one to each 6728 persons in New South Wales. In this year's list there are 235 names and Sydney's population is 1,053,180 and that of the State is 2,349,401 so that the relative proportions are now one to 4481 and one to 9997 respectively. I do not think that the Bar forty years ago was more than sufficient for the work to be done. Many very large incomes were being made, and 'briefless barristers' – and they are the sort that readers of journalistic and other fiction hear most about – were deservedly few in number. Most of the juniors were acting in the living present and looking to the time when a beckoning hand would invite them to go to the Inner Bar on their way to the Bench. Certainly, in probates and in pleading there is very much less work than there was then, but in all other respects the volume and range of work have increased enormously.
>
> Federation has been a great boon to barristers, not only in respect of High Court work, but also because of the briefs for opinions and matters arising under Federal Acts. The blessedness of that phrase *ultra vires* is known only to members of the legal profession. *Ultra vires* has built many suburban cottages and has purchased much purple and fine linen and many golf sticks. May it live for ever and continue its annual production of much Costs!

I shall not, 80 years on, attempt to insert 'Difficulty with' before 'Federation' or to replace '*ultra vires*' with 'administrative law'.

Another person admitted in Rich's year was James Conley Gannon, whose practice had a redundant curiosity:[14]

> Jim Gannon, whose work after he attained silk was almost wholly in defending in the criminal courts, obtained a general licence [from the King] dispensing with his services in all criminal cases. This precedent has never been followed, probably because it may have seemed that if the King dispensed with Counsel's services in this general way Counsel would not to any considerable extent remain the King's Counsel.

There was also Edwin Mayhew Brissenden, a distinguished KC who was awarded an MBE for services during the war in France. Beyond this:[15]

> He was the inventor of an improvement of the heliograph, and was for a long time associated with General Rosenthal before the war in signalling of various descriptions. In conjunction with Mr. Bartholomew, of Beard, Watson, Ltd., he invented a signalling lamp, and in the early days of wireless telegraphy in Australia he was working on a private wireless plant owned by Mr Bartholomew, at Mosman.

Then there was Frank Dobson. The *Herald* of 27 April 1887 recorded:

> On Monday evening Mr. Frank Lambert Dobson, barrister, was found dead in his bedroom at No. 205½, Brougham-terrace, Victoria-street, by a fellow-lodger named James Adams. It appears that Mr. Dobson was last seen alive at noon on the

> same day, and that he then appeared to be in his usual health. When his dead body was discovered upon his bed, a sponge saturated with chloroform was lying by the side of his head. Dr. Kyngdon was called in, and he expressed the opinion that an overdose of chloroform caused the man's death. It is reported that Mr. Dobson had for a long time past accustomed himself to take chloroform, in order to induce sleep, as he was greatly troubled with asthma. Fifteen bottles labelled 'chloroform' and 'poison' were found in his room. Mr. Dobson was a single man, 25 years of age. Information of his death has been communicated to the city coroner, who will hold an inquest upon the body to-day.

Whatever the outcome, I doubt whether it was more suspicious than merely sad. Dobson's father was a respected and competent chief justice of Tasmania who had himself been troubled with asthma, having the good fortune to have it go away.[16]

The son of Sir William à Beckett, Victoria's first CJ, was admitted here in 1889, while Henry T Wrenfordsley, regrettably for Western Australia its chief justice from 1880 to 1882, somehow found his way on to our roll in the previous year. Wrenfordsley had also been chief in Fiji, an experience which has left us with most perfect evidence of the Colonial Office's dominion not only of the world but of the English language when it opined that his debts 'were not a credit to us'.[17]

Also in Rich's year was William Hessel Linsley, presumably the Hessel Linsley who commissioned his friend Tom Roberts to paint the actress Hilda Spong. In 1893, Roberts did, in *Practising the Minuet: Miss Hilda Spong*.[18] Spong saw some later success on the London stage, including a 1926 appointment with Basil Rathbone in *The Importance of Being Earnest*, Sherlock Holmes playing Ernest. Theatre-lover Walter Sickert also caught her, in *The Pork Pie Hat: Hilda Spong in 'Trelawny of the Wells'*. Despite one reviewer commenting that Mr Sickert 'occupies a self-defeating quantity of wall space', his work is the better.[19] Others admitted in Rich's year of 1887 were Geoffrey Evan and James Oswald Fairfax. This was not a dalliance:[20]

> [The James and Lucy Fairfax] family visited every continent of the world, every country of Europe, Palestine, Russia, Japan, the United States and parts of South America. During the 1881 expedition, their second and third sons, Geoffrey Evan and James Oswald, entered Balliol College, Oxford, thus beginning a family tradition which was to continue in later generations. Both rowed for their college, and both later went to the Bar at the Inner Temple.
>
> … [After the death of one of the other Fairfaxes in 1886]… James decided to buy his brother's interest in the business and bring in three of his sons – Charles, Geoff and Jim. Charles had already decided to join the company, and James now asked Geoff and Jim to choose between law and journalism.

They did, doubtless to the bar's loss.

A foundation Challis lecturer

From 1890, Rich was a (foundation) Challis lecturer. For those who have ever wondered about the ubiquity of Challis in Sydney University, or the presence of Challis House at the bottom of Martin Place, or the reason why there is a Challis Avenue in Potts Point, John Henry Challis made his money in wool trading and in property. He sold up in the 1850s and returned to England, spending the rest of his life travelling around Europe, dying in 1880 and leaving the residuary estate, after his wife's death, to the university.

The fund arrived at the university in 1890. The sale the previous year of 45 residential sites on the Challis Estate – i.e., bordered by Macleay Street, Challis Avenue, Victoria Street and McDonald Street – was probably unrelated. I assume McDonald Street used to run through from Macleay all the way to Victoria. The auction was by Hardie & Gorman in conjunction with Richardson & Wrench, the terms 10 per cent deposit, 15 per cent after three months interest free, the balance in equal yearly payments at 6 per cent.[21] Ah Sydney, the more things change…

Rich lectured until 1910, his first course being the Law of Obligations, Personal Property and Contracts.

Life at the bar

The bar's first professional association was formed in July 1896. Its address was 'in the chambers of one of its members at Wentworth Court on the eastern side of Elizabeth Street between King and Hunter Streets. Its bankers were the Union Bank of Australia.'[22]

An undoubted prompt for associating was the prospect of an amalgamated profession, for a bill seeking to achieve just that had passed the Legislative Assembly toward the end of 1895. The bill itself was resoundingly defeated in the Legislative Council, Attorney General Want saying 'of all the wretched abortions of a Bill which was ever produced, this Bill is about the worst'.[23]

The bar's first association floundered through a lack of interest and support from the bar generally. On 13 March 1902, Attorney General Wise called a meeting to consider proposals for a new association. At a broader level, these were new times; a new century, a new monarch. It was three years to the day after the man who would win Gallipoli for the Turks went to military college and thirty-one years to the day before Herr Goebbels became a late appointment to Chancellor Hitler's Cabinet, as minister for propaganda.

Members of the New South Wales Bar, June 1906, including Wade KC (centre), Reid KC, Blacket and, Brissenden (to the left). Photo: New South Wales Bar Association

On 20 March 1902, the meeting was held in the Banco Court with Wise KC presiding. The meeting resolved that a General Council of the Bar be formed, and that a provisional executive committee, which included Rich, Barton's son-in-law and Charles Windeyer's great grandson David Maughan, and Brissenden. (Maughan didn't rest on others' laurels; he pipped FE Smith and Holdsworth in his exams.)

The council was to be fifteen in number, the attorney general ex officio and fourteen other practitioners, of which no more than three could hold silk. The elected candidates included Want KC, soon to be Prime Minister Reid KC, later Supreme Court justices Ferguson, Gordon, Sly and Wade, Rich's contemporaries Blacket and Brissenden, and, as the first treasurer, Rich himself. Rich would sit until, I think, his appointment as an acting judge of the Supreme Court in 1911, serving as treasurer until 1905.

Rich found rooms in Selborne Chambers, which was built in 1883 (to honour the lord chancellor from 1872 to 1874 and from 1880 still then in office), but only established as chambers by Want [still then] QC finding a room there in 1896; it being filled with eleven more barristers the following year. Sir Jack Cassidy later recorded:[24]

> In September 1883 gas was first laid on to Selborne Chambers (it has flowed freely since) through a new four inch main ordered that year.... In the nineties electric light supplied by Sydney Electric Light Company made its partial entry into the building. In those days light wires could not go underground and, in order to supply electricity needs to Macquarie Street the company found in necessary to install an electric light pole on Selborne Chambers. This meant a windfall for Room 17 on the first floor and the one above for, as a quid pro quo for allowing the erection of the pole, the tenants received as a concession free electric light. A. B. Shand was the lucky recipient and remained the envy of his brothers, who had to wait years for electricity!

Rich was clearly popular at the bar; he seems to have spent much of his career there as a senior junior in the widest and best sense of that expression. He probably enjoyed a chuckle or two with his pupils, one of whom was Frederick Jordan, whose own wit was hidden behind 'a few well-frozen words':[25]

> Most newly admitted barristers read for six months with one or other of the leading juniors practising in common law or equity. A number read with two practitioners, one law and the other equity. R. M. Sly, G. E. Rich, D. G. Ferguson and J. M. Harvey had a number of pupils… Some barristers like Harvey kept their pupils at work all the time in their chambers writing opinions and drawing pleadings but others, like Rich, Ferguson and J. L.Campbell, took their pupils into court with them as their juniors.

Rich survived Jordan. Upon the latter's death, Lionel Lindsay would arrange for Ure Smith to publish *Appreciations*, a collection of Jordan's jottings:[26]

> For the publication of this memorial we are indebted to Mr. J. R. McGregor; I have contributed the woodcuts; and we have to thank Sir George Rich for the Greek and Latin, Mr. F. Hentze for the French and German, and His Excellency don Giulio del Balzo for the Italian translations of the Parallels.

I mentioned earlier that 'liberal' is a difficult word. Context is all. For Lindsay, was the Jordan he wrote of a conservative or a liberal?[27]

> Humanist and good European, Sir Frederick Jordan was saved by a delicate sense of humour from the snare of pedantry. His place is with that permanent minority, which, evading the market place, continues from generation to generation the perpetuation of culture.

I suspect that Rich, a late Victorian and early Edwardian liberal, shared Jordan's views of modernism:[28]

> In more recent times, James Joyce, having written in ordinary prose *Dubliners* and *Portrait of the Artist as a Young Man*, and evidently realizing that they were not better than good second-rate stuff, decided that desperate measures were necessary. The result was *Ulysses*, a work which in structure and content resembles nothing so much as a dunghill.

The Women's College

It is possible, and possibly necessary, to write a history of western feminism in terms of a competition between radicalism and liberalism; indeed the use by the author of 'enfranchisement' or 'liberation' or 'equalisation' – or, for that matter, 'frustration' or 'disappointment' – will indicate where the author stands.

For current purposes, it is important to acknowledge first that John Stuart Mill, the leading liberal of his day, was also the leading feminist, and second, that Mill would not understand how one could be one and not the other. In a recent essay in the *New Yorker*, a reviewer observed:[29]

> Mill believed in complete equality between the sexes, not just women's colleges and, someday, female suffrage but absolute parity; he believed in equal process for all, the end of slavery, votes for the working classes, and the right to birth control (he was arrested at seventeen for helping poor people obtain contraception), and in the common intelligence of all the races of mankind. He led the fight for due process for detainees accused of terrorism; argued for teaching Arabic, in order not to alienate potential native radicals; and opposed adulterating Anglo-American liberalism with too much systematic French theory—all this along with an intelligent acceptance of the free market as an engine of prosperity and a desire to see its excesses and inequalities curbed. He was right about nearly everything, even when contemplating what was wrong: open-minded and magnanimous to a fault, he saw through Thomas Carlyle's reactionary politics to his genius, and his essay on Coleridge, a leading conservative of the previous generation, is a model appreciation of a writer whose views are all wrong but whose writing is still wonderful. Mill was an enemy of religious bigotry and superstition, and a friend of toleration and free thought, without overdoing either.

It is no surprise that the men and women who founded the Women's College within Sydney University drew heavily upon an athletic brand of Millian liberalism.[30]

Rich was one such man. In a ballot in May 1891, he became one of five women and seven men elected. Others included Richard Teece, father of senior counsel in that extraordinary piece of litigation, the *Red Book Case*, and Rich's old headmaster, Albert Bythesea Weigall. Mr Justice Windeyer was an ex officio member.

The choice of the arms and motto was entrusted to the first and famous principal Louisa Macdonald, as well as Rich and J T Walker, a prominent financier, later fascinated with the finances for federation and elected as a liberal in the first senate.

Rich must have enjoyed Walker's company; the latter was keen 'but composed and exuding rectitude, with classic features enhanced by elegant whiskers, [and] nonetheless, warm-hearted and capable of fiery response'.[31] The motto chosen was 'Together', taken from Tennyson's 'Princess', whose heroine declares as her object 'To lift the woman's fallen divinity / Upon an even pedestal with man'.[32]

Rich became honorary treasurer, perhaps from the outset but in any event being recorded as such in the first calendar, published in 1893. Which, by the bye, records the college's temporary residence at Strathmore, Glebe Point, formerly and for many years the city base of Sir George Wigram Allen. The college history records that 'it was the wise and careful guidance, and the hopefulness also, of men such as Mr. J. T. Walker and Mr. (later Sir) G. E. Rich which guided the College through the financial difficulties of its early period.'[33]

Involved in such a way, it is likely that Rich attended or at least supported a benefit performance in May 1891 of *A Doll's House*. Not so Lady Jersey. Although the family of her husband, the then governor, had provided bedfellows for Charles II, William III and George IV in his princedom, the Jerseys decided not to support a somewhat radical view of marriage norms, with one commentator suggesting her decision was:[34]

> presented not as personal distaste for the play, but as an act of moral responsibility; if the colonists lacked the cultural sophistication to view the play as an 'ordinary spectacular

> representation' but would instead take it as the exposition of a 'philosophy of life' it behoved her as the Queen's representative not to endorse that 'detrimental' philosophy.

Rich is also likely to have attended what has been called 'perhaps one of the most outstanding events at the College', a masque performed in 1913 and later, I think, as a Depression fundraiser:[35]

> Between seven and eight hundred persons viewed the production, which was an outstanding artistic success. The verses were composed, at the instigation of Miss Macdonald, by two distinguished poets of the period, Christopher Brennan and John Le Gay Brereton.

Macdonald and Rich hit it off. In 1996, a collection of this remarkable woman's letters was published. It records that on 24 June 1892, she wrote to a friend that Rich 'is such a comfort to me for he manages everything, and his power of seeing the cornie [sic] side of things cheers me up.' Two years later, she wrote to the same friend:

> In the evening I went to Miss Scott's, where she was entertaining what Mr. Rich called with rather a wry face 'a mixed party'. Several of the Labour members, a Mistress-Laundress who is a member of the suffrage council, Mrs Lane the wife of the New Australia man and a few socialists scattered amongst the more ordinary people filled her room. I thought the entertainment was most entertaining, though I very nearly came to blows with one labour member and only saved myself from throwing something at him by precipitate flight!

In March 2010 in the Mitchell Library, I held a UK 6d aerogramme dated 28 July 1948, a good half century after the soiree. It was from Macdonald to Rich, thanking him for a food parcel he had sent and concluding:

> We have had a visit from your Prime Minister Mr. Chifley – but noone takes much interest in him – for bad manners and queer dealing our Government can give any politician points + beat them hollow – but everyone is absorbed in the Australian cricketers + the crowds to the matches have been abnormal. It's a relief to turn to something honest after all the folly + trickery of our public life.

It is a delicious coincidence that the then-principal of Women's College was one of Australia's most famous cricketers, Betty Archdale, whose claim it was that one of her own earliest memories was visiting her mother and leading feminist, in prison.[36]

In relation to the appointment of an earlier principal, Macdonald's successor in fact, we learn something of Rich's views of us as a nation. An unsigned letter from 'Judge's Chambers, Melbourne' and dated 20 May 1919, urges:[37]

> There used to be a snobbish feeling that everything from home must be superior to the native product.... I hope that we have outlived that and can judge people and things by merit and not by labels.
>
> We cannot expect to get anyone of the same class and calibre as Miss Macdonald. It must be remembered that the conditions of the appointment in 1919 are not so attractive as they were in the beginning – what is the earning capacity of £500 p.a. now as compared with then? Miss Macdonald told the Council from her observations in England it would be difficult to attract anyone of the highest capacity. We cannot expect such a person to give up her home and friends and exile herself amongst strangers in a new country (the conditions of which are foreign and probably obnoxious to her) and to remove herself so far from the centre of culture and learning.
>
> Parliament delegated the task of managing the College to us – can we trust the say-so of people in England when we have interviewed and tried candidates out here?

In context, the letter is a prime example of the unintended irony of the word 'home' for English speakers abroad. And those who persist in thinking that the use of the word is solely a rather embarrassing affectation of middle class Australians of the 1800s and 1900s may have regard to an earlier use: in 1755, some twenty or thirty years before his own domestic problems, George Washington would write to his brother Augustine that 'My command was reduced, under a pretence of an order from home.'[38] Unlike Rich, Washington had never gone and would never go, 'home'.[39]

The college interviewed and appointed an Australian, a daughter of a leading liberal and wool manufacturer and herself a brilliant classicist, Susie Williams.

Rich sat on the council from 1891 to 1937. At various times, he sat alongside names such as Garran, Cullen, Leverrier, Langer Owen, Street, Hughes (Hughes QC's grandfather) and Windeyer.

Rich also sat with his predecessor A B Piddington. Piddington's tenure was from 1915 to 1917, a time when he was at a loose end, Rich and his new colleagues having used the *Wheat Case* to neuter its constitutional rival, the Inter-State Commission, a body of which Piddington was chair.

Possibly the last formal involvement Rich had with the college, was to open in June 1952 the Mary Fairfax Memorial Library. She died in 1945, having been a noted philanthropist and

women's leader. Did Rich reminisce with her about her two brothers who had come to the bar with him so briefly, those 65 years before?

Unfortunately, I have no idea whether college resident and first female barrister to practise in NSW, Sibyl Morrison, ever appeared before Rich or what his reaction was. Any reaction was probably favourable; she practised in the whispering jurisdiction.[40]

Publications

For and of course, Rich's area was equity, along with probate and bankruptcy. He was a co-author with Tom (later his Honour Judge Thomas) Rolin of *The Companies Acts of 1874 and 1888*[41] and the *No Liability Mining Companies Act, 1896*.[42]

Those of us who use the word 'company' interchangeably with 'corporation' may be disarmed by the opening sentence of the former: 'Companies are either (1) incorporated or (2) unincorporated'.

Yet Rich the Latinist would have had no difficulty in seeing the distinction, corporation depending ultimately on the Latin verb 'to embody', thus conveying a sense of unity, whereas the softer and more general company, like companion, comes from 'panis', or bread, the sense of breaking bread together. He would have approved the comments of Buckley J upon construing a power in the will of Henry Morton – Dr Livingstone, I presume – Stanley:[43]

> The word 'company' has no strictly technical meaning. It involves, I think, two ideas – namely, first that the association is of persons so numerous as not to be aptly described as a firm; and secondly, that the consent of all the other members is not required to the transfer of a member's interest. It may, but in my opinion here it does not, include an incorporated company.

For those who wish to know where the legal etymology stands today, reference can be had to the *Corporations Act 2001* (Cth). Section 9 has a statutory dictionary meaning of 'company', while section 57A is headed 'meaning of 'corporation''. Liquor is quicker.

Rich also co-authored *The Practice in Equity*, itself founded on his and Gregory Walker's *Practice in Equity* and on J M Harvey's *Service of Equitable Process*. The reprint therein of the 1901 consolidation contains an interesting and perhaps desirable beast, 'The Memorandum + Certificate of the Commissioner for the Consolidation of the Statute Law', C G Heydon:

> I certify, except as aforesaid [a passage including qualifications and a thank you to A H Simpson CJ in Eq], this Bill solely consolidates, and in no way alters, adds to, or amends the law as contained in the statutes therein consolidated.'

Finally, Rich began and co-edited with R W Manning the first in the series *New South Wales Bankruptcy Cases*, published by Maxwell from 1891 to 1899.

The Riches' children, part I

On 14 May 1915, Jack Rich wrote:

> My darling Mother,
>
> I am writing to you, perhaps, on the eve of one of the greatest shows we have ever been in, and when, perhaps, we are seeing one another for the last time – officers and men.
>
> The room is thick with tobacco smoke, three French peasants are sitting around their kitchen fire, and have just made us some coffee. This is a farm and we are in the kitchen – there is no place, I think, like a kitchen for a last night. Our men are all around in the barns and up on the top floors. We can hear their voices – why do they sing always their sad home songs on nights like this? They have beautiful voices some of them, and always their sad songs at night. We hum in tune with their voices and then lapse into thought.
>
> It seems a long time since I last saw you all, and a long time since I was in Australia. I often think of the beautiful blue water around Darling Point, and that nice little beach at North Harbour. Those were good times – those long quiet Sundays in the launch. I am quite confident I shall see you again. Will I ever find anyone like my mother? I nearly had to go away – I didn't want the others to see me crying, but it is alright now. I am always thing of you and long for my weekly letter. I got one from father he seems cut up about that cable, but I am doing my bit, and am always thinking it will soon be over. Will you come home when peace is declared?
>
> I was touched by a shell for the first time this morning, although they have been bursting round me for months, and close enough too. I find if they are quite close there is, of course an awful explosion, but the bits go right up in the air and over. I have this piece (a Black Maria), it hit me on the arm, and tore my macintosh, but went no further – I was too far away and it was almost spent. They were shelling our front trenches, and losts of wounded were coming in mostly Inniskillings. I had a working party and we saw a lot of the wounded, some of them were pleased with themselves, they had 'jamy' ones and would go back to old Blighty, others, poor chaps, were moaning dreadfully. Bishop Gwynne, the 5th Brigade Chaplain was there talking to me and they brought two dead in – he buried them immediately. I wondered when he was saying the last prayers whether their people would ever be able to come and visit their graves.
>
> I saw a disgusting sight the other day. The Germans had been shelling the church by Neuve Chapelle very badly and had blown it absolutely to bits. One of the graves was blown up and

> no one had covered the bones up – the poor woman had been dead for years. The Tommies had a look over the ruined church, only the four walls stood, and yet they took off their caps. Some of the crucifixes were untouched and you could gather from their whispering that they were very much impressed.
>
> They hate the Germans, they would do anything to get at them, but it is impossible (it seems). They do some awful things, that sinking of the 'Lusitania' was dreadful. I really don't know how the submarine Commanders can carry their orders out. At least they could give them time to escape.
>
> The men have almost stopped their singing now; they are going to bed, and I must go too.
>
> It has been a lovely day, and one would hardly know we were at war. Sometimes when there is a lull in the firing, but it is only for a minute, we here get a particularly noisy time of it, as there is a battering of 60 pounders just in front of us – it has already broken four windows, the row is sometimes terrific, especially when the gun opposite us fires. There is a huge flash, and you can see the thing recoil, it seems quite its own length back.
>
> I must say 'goodbye' now darling, give my love to everybody, and tell Grannie I am going to write next week.
>
> Your loving son.
>
> Jack.
>
> God bless you all.

Three days later, Jack was shot through the head while leading back a straggler under his command. As a memoriam of sorts, I record that the reference to 'jamy' wounds pips by about a month the reference by Denis Oliver Barnett cited in the OED; on 10 June 1915, Barnett wrote to a friend 'If I get a 'jammy one' as it is called, I shall be back pretty soon, and that will be fine.' [44]

Meanwhile, on 19 May 1915, Laurence Whistler Street was killed in Gallipoli. His father was then the judge in bankruptcy and probate, and would join Rich on the Women's College council two years later. Street was also the council chairman of Sydney Grammar School. Perhaps he or Rich was present the day the list of the latest fallen was read out, Jack at number eight and Laurence at number nine. As to the High Court, O'Connor (by then himself dead) lost two sons, while Gavan Duffy and Higgins suffered one a piece. Many other legal figures suffered similar tragedy.[45]

Jack Fitzgerald

When Einstein died, his last words were in German but his nurse only spoke English. So the story goes. It has an obvious hole, but also an excuse for me. One thing has continued to puzzle me, and that is the basis for appointing the junior NSW judge in place of Piddington. Yes, I accept the standard line that Hughes was running for cover and went for someone who would not scare the big end of town. But I want to know, 'Why Rich in particular?'

While researching this piece, I found out that Rich had close correspondence with Jack Fitzgerald. Who, you ask? On 26 November 2009, the *Herald* published a piece by Damien Murphy on early Labor:[46]

> It was on April Fool's Day 1891 that The Sydney Morning Herald reported to the colony: 'The Balmain Labourers have called a public meeting, to be held on Saturday, for the purpose of forming the first branch of the Labour Electoral Leagues (LEL) of New South Wales.' That meeting was attended by the Balmain Labourers' Union secretary Charles Hart and Trades and Labour Council executive members, including Jack Fitzgerald, who later became an MP of prominence and associated with the push for a Greater Sydney, and Fred Flowers, who would go on to help the new sport of rugby league become established. There was also a short bloke who ran a mixed business with his wife selling books and fixing locks and umbrellas around the corner in Beattie Street - William Morris ''Billy'' Hughes, a future prime minister of Australia.

The answer to the question is, a man who was in on the ground floor with Billy. I was therefore excited when I went to look at Fitzgerald's letters at the Mitchell; I thought there might be some inkling as to an unknown and unexpected Labor connection; unfortunately, I am to much of Rich's handwriting as Einstein's nurse was to his dying words. No matter, for I have been able to transcribe some of the material, and I set it out in an order which gives this section a relevance beyond the interludial.

First, we learn that Rich once thought himself young compared to his colleagues. On 19 December 1912, he writes from the South Australian Hotel, North Terrace, Adelaide:

> [After inspecting some mines via the cages, and, semble, declaring some of the 'very wet + slushy'] That is one thing most of my [Supreme Court] brethren cd. not do…
>
> Two foolish [?] mines are having a little suit wh. is to last till Xmas. I thought an inspection wd. familiarise me with things.
>
> Nothing but rain down here.
>
> Just heard [?] of from [?] O'Connor's death. Difficult man to replace.

Second, we know that you weren't going to get lost, going to Rich for dinner:

> My dear Fitzgerald,
>
> How is it that we have not met in Sydney?
>
> It will give my wife + me great pleasure if you will sup with us on Sunday next at 7 o'clock at Belton, Mona Rd, Darling Pt.
>
> Ocean Street, Tram [?] to Mona Rd.
>
> Right side pass a terrace 2 semi detached houses + stop at 3rd detached house on hill.
>
> With kind regards,
>
> Sincerely yours, George Rich.

As to villa naming, Rich relied on his wife. He had married Elizabeth Steer Bowker in December 1894 in Paterson. Her father was a well-known doctor and horse fancier, Richard Ryther Steer Bowker, and her mother a daughter of an early settler in the Newcastle district. *Belton*, the Darling Point residence, was named for a town in Lincolnshire whence the Steers came. The Riches' first family home in Turramurra, was *Temple Belwood*, named for a property in Belton. When Rich died, it was at *Stanser*, along with Ryther, Steer and Bowker one of Rich's (by now late first) wife's family's names. The holiday house at Cronulla was *Sandtoft*, a return to the Belton realty.

On 29 May 1915, Rich wrote:

> My wife is splendid so calm + brave. He would have us brave she says. I was handed the cable as I took my seat on the bench in Adelaide. Poor child…
>
> His school pals write such fine things of him he had the keenest sense of honour the strictest sense of duty Keith Ferguson says.
>
> Time + work will I suppose help me. My wife will in full [?] time feel more but her pluck is admirable.
>
> Adieu

The news came on 24 May. That was the first day of a significant hearing on the High Court's criminal jurisdiction, *R v Snow*. Rich did not sit on the day, and the hearing proceeded over another seven days, with judgments given on 16 September. Francis Hugh Snow was a prominent merchant who had been charged under the *Trading with the Enemy Act 1914* (Cth), but his counsel argued successfully (a) that the Act was not retrospective; and (b) that there was no evidence fit for the jury as to any attempt after the Act's passage, being 23 October 1914.

Sir Josiah Symon KC – a former attorney who had forced the High Court to strike a decade earlier and certain of whose testamentary words were omitted from probate as 'scandalous, offensive, and defamatory to the persons about whom they were written' – led Piper KC and WA Norman, while Rich's old companion Blacket (now KC) led future premier Bavin (and, for Piddington, scourge turned saviour). Those interested in gardens of the period should visit *Beechwood* in Snows Road at Stirling. This was established by Snow as early as 1893.[47]

The Riches' children, part II

Jack's loss followed Rich. Possibly because of Jack's comments about the two that Bishop Gwynne buried, Rich followed up his son's recognition in the appropriate war memorial, and there is a letter from Menzies dated 20 December 1939 (with 'Canberra' blocked out and 'Melbourne, Victoria' typed over) which reads:

> Dear Sir George,
>
> Thank you for your note of 15th December. I have already written regarding your son, George, and hope to let you know something in the near future.
>
> I am returning herewith the 'In Memoriam' to your son John.
>
> You are well justified in being proud of him.

George Steer Bowker Rich had been born in 1902. He joined up in October 1939.[48] I have no idea what request was being made of Menzies, but he was discharged with the rank of captain in 1943. He died in 1964 leaving one daughter.

The Riches' middle child was a daughter, Lydia Tempest. Confirmed at St Mark's Darling Point and educated at Ascham, she might have been regarded as a typical upper middle class girl of her time. In fact, she fell completely deaf in her teens, later marrying Ashby Arthur William Hooper, who had taken an MC.

One wonders what feelings Rich had when, soon after the Second World War, his grandson John Ashby Cooper took the Sword of Honour at Duntroon. Cooper would see active service and receive the CBE; after his retirement from the army, he acted as private secretary to NSW governors Rowland and Martin. Having thus served the army, the air force and the navy, he died in 2007.[49]

Who's whose who?

A useful shorthand work for getting the gen on prominent people is *Who's Who*. It has a standard format – so you know what you're getting – and (as far as I am aware) it permits its subjects a say (if not the final) over the entries.

Those who have had cause to refer to it will know that one of its standard formats is the reference to children. If the subject has two sons, the entry will read towards the end, '2s'. If the subject has a son and two daughters, it will read '1s, 2d' and so on. I do not know the currency – excuse the pun – of this format, but consider the following, remembering that the Riches had two sons and a daughter.

In the 1914 edition, there was no reference to any children. (A perusal of other entries on the same page suggests it may not have been a standard format.) By 1922, there is '*son* – John Stanser Rich (*b.* 1895), Lieutenant 1st The King's Liverpool Regiment, volunteered 1 Aug. 1914 (killed in action, Festubert, 17 May 1915)'. In 1927-1928, 'elder son killed in action at Festubert, 1915'. In 1935, '2 s. (elder killed in action Festubert 1915), 1 d.' In 1944, '1 s. (elder killed in action Festubert 1915), 1 d.' In 1950, '1 s. (Capt., 2nd A.I.F., Tobruk), (elder son killed in action Festubert 1915), 1 d.'

For Street, the 1922 entry reads '*Sons* – Kenneth Whistler Street (*b.* 1890), volunteered in England, rejected for active service, served on Headquarters Staff in Australia; Lawrence Whistler Street (*b.* 1893; killed in action); and Ernest Whistler Street (*b.* 1898), served in the War (wounded)'; while the 1935 entry – in which the alphabet has relegated him below his nephew (an MC born in 1894); his firebrand daughter-in-law; and his son – reads '2 s. (one a judge of the Supreme Court)'.

To suggest that Street dealt better with what had happened than Rich would be unwarranted and impertinent. However, if the entries can be taken at their face value, and coming from an age where family tragedy is a missed episode of *Home and Away* and where heroism is the ease with which a sportsman escapes a romantic entanglement, one trusts that they reveal at the end a peace of sorts for Rich, his wife and his two surviving children.

The Supreme Court

In February 1911, George Rich had taken silk. He had little time to enjoy the inner bar, though, because later in the same year, he was made an acting judge of the Supreme Court in 1911, an appointment made permanent in 1912.

An early decision in which he participated was *Delohery v Williams* (1911) 11 SR(NSW) 596. Cornelius Delohery was a magistrate, and also the first president of the Public Service Association of NSW.[50] He was himself in public service until May 1900, when he was appointed to the Public Service Board.

The question which interested the court a decade later was whether he was entitled to superannuation from when he said he retired from the service (May 1900), or from the expiry of his board appointment (January 1910).

To describe the case as fun for all the family is to do it less than justice. A jury had awarded Mr Delohery some four thousand pounds, perhaps or perhaps not assisted by an alleged admission by the Crown's counsel at trial to the effect that 'the computed amount of superannuation of the plaintiff on his retirement as stipendiary magistrate, was some four hundred pounds a year'.

The alleged admission fell (allegedly?) from one A B Piddington (admitted 1890), Rich's soon to be predecessor on the High Court, a state of affairs which did not prevent him from leading the charge upstairs.

For Delohery, there was Lamb KC, the contemporary of Rich who would later grill Piddington in a royal commission held upon Piddington's judicial sensitivities and who would still later appear for one Captain de Groot upon a fracas on the newly built Sydney Harbour Bridge.

Of course, Lamb being silk, he needed a junior. The junior was one Cornelius Delohery (admitted 1889) and, in case there was any sense of slighting the other branch of the profession, Delohery's solicitor was A H Delohery.

Albert Henry Delohery was himself familiar with family retainers. It appears that one Henry Charles Smith ('a man of extravagant habits'), owed some six thousand pounds, including to his solicitor, the very Mr Delohery.

Young Mr Smith signed a document empowering Mr Delohery to do various things, a document which, if it were an assignment, would have effected a forfeiture of the youth's interest under his grandfather's will. And so it was that 1910 saw a High Court hear Owen KC and Maughan instructed by one Ash solicitor and his partner, argue successfully for young Mr Smith's non-assignment, against an equally daunting Knox KC and Harvey for Perpetual Trustee.[51]

But – and the point of the digression – Delohery appears in the report as one of the respondent plaintiffs and also as the second of two solicitors for the respondents. By the bye, page 349 of this CLR volume puts forever put paid to the notion that the law is merely black and white.

Fast forwarding to a later time, when Rich had been on the High Court for a quarter century, we find Ash having learnt nothing about having a fool for a client. The very partner referred to above having defrauded a number of clients, Ash was able to compromise one group of claims into seven annual instalments of five hundred pounds. Ambitiously, he claimed a deduction from his income, and, perhaps surprisingly, the full

court allowed him to hold it. Not so the High Court, who in 1938 unanimously found for the tax men. The case[52] interests for three reasons.

First, to close out the family feel of this section, it can be observed that Ash continued to use Maughan – now Maughan KC – together with his child (and grandson of the first Prime Minister Barton), Barton Maughan.

Second, to example the practical difficulties of a dual taxation system. Both the NSW and Federal Commissioners appeared, albeit by one counsel (the latter, by the bye, through the good offices of Commonwealth Crown Solicitor H F E Whitlam).

Third and importantly for current purposes, it gives us a good example of the sort of language Rich employed when he decided to write a judgment, and how it stands against the competition.

Rich v Dixon [No 1]

The report gives Rich in full flight:[53]

> You cannot treat the formation of partnership as if it were no more than the employments of a clerk nor the depredations of a partner as if they were the peculations of an office boy. [An ironic observation, for as Dixon J notes on the same page, the problem arose because Ash 'in an ill hour… admitted his managing clerk into partnership'.]
>
> The partner was a proprietor, and whilst all must sympathize with the taxpayer and deplore the wrong done to him by this partner it is impossible to treat that wrong as a characteristic incident of the carrying out of his profession the consequences of which are to be reflected in the profit and loss account until they are exhausted.

Compare Dixon:[54]

> There is a clear distinction between a transaction by which, on the one hand, an organization of partners is formed or set up to co-operate in the ownership and conduct of an existing business and, on the other hand, an actual carrying on of the business for the purpose of earning profits. The distinction presents a strong analogy between a transaction on account of capital and a transaction on account of revenue.

Dixon does not suffer in the comparison; the passage has a balance and elegance which Rich's statement lacks.

Rich also said 'But here we have an annual payment made for the purpose, in the colloquial phrase, of working off a *damnosa haereditas* of the taxpayer's dead partnership.'

I think Rich does himself an injustice; he is getting dangerously close to a pun. As I understand, the Roman law term dealt with burdensome inheritances; it was only a later co-opting that brought it into the world of bankruptcy, a transition of which a classicist with an interest in probate and insolvency would have been aware.

An 1870 translation of Gaius's Commentaries says:[55]

> 162. Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate vel non adeunda. (163.) Sed sive is cui abstinendi potestas est inmiscuerit se bonis hereditariis, sive is cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum xxv. nam huius aetatis hominibus, sicut in ceteris omnibus causis, deceptis, ita etiam si temere damnosam hereditatem susceperint, Praetor succurrit. scio quidem divum Hadrianum etiam maiori annorum veniam dedisse, cum post aditam hereditatem grand aes alienum quod aditae hereditatis tempore latebat apparuisset.
>
> 162. To extraneous heirs is allowed a power of deliberating as to entering on the inheritance or not.
>
> 163. But if one who has the power of abstaining meddle with the goods of the inheritance, or if one who is allowed to deliberate as to entering on the inheritance enter, he has not afterwards the power of abandoning the inheritance, unless he be under twenty-five years of age. For, as the Praetor gives assistance in all other cases to men of this age who have been deceived, so he does also if they have thoughtlessly taken upon themselves a ruinous inheritance. I am aware, however, that the late emperor Hadrian granted this favour also to one above twenty-five years of age, when after entry on the inheritance a great debt was discovered which was unknown at the time of entry.

The co-optation itself has a past. In 1806, Lord Ellenborough CJ said 'Now it has been decided that assignees of a bankrupt are not bound to take what Lord Kenyon called a *damnosa haereditas*; property of the bankrupt, which so far from being valuable would be a charge to the creditors…'[56]

On its face, there is nothing peculiar in this statement. However, when one recalls that of Lord Kenyon it had been said 'One of his flaws was his defective education; he was too proud to avoid exhibiting his ignorance. He was particularly noted for using Latin incorrectly, leading George III to say 'My Lord... it would be well if you would stick to your good law and leave off your bad Latin',[57] and when one recalls that his immediate successor Ellenborough 'had always been strained relations' with him,[58] one wonders but may never know whether the latter was in fact criticising the looseness of the earlier's language.

The appointment

As to the outcome of Delohery's appeal, Piddington was absolved of any absentminded admission. And, in early 1913,

he was offered and accepted an appointment to the High Court. His subsequent resignation is a tale told elsewhere; as noted above, the thing that interested me for current purposes is whether Hughes had any particular motivation for appointing Rich.

There is the following from Hughes himself to his PM, in the first volume of Fitzhardinge's biography:[59]

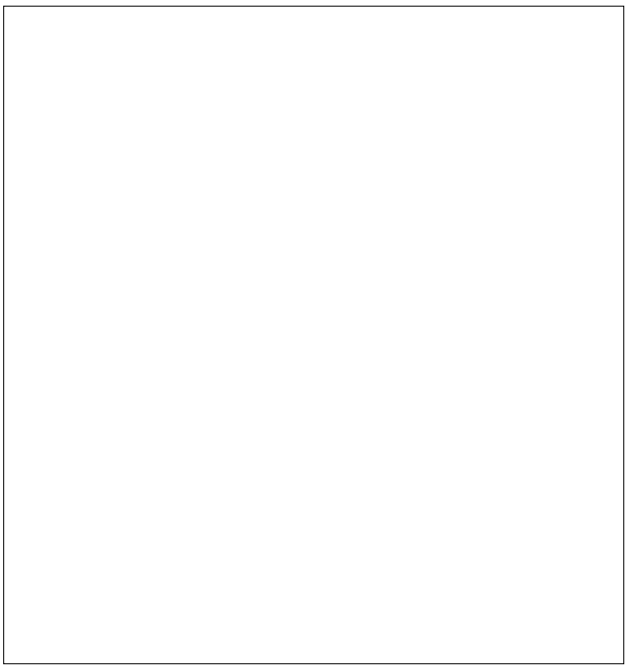
> As you know Piddington had rushed the press before I arrived here and I saw him to-day. His explanation was lame in the extreme. He gave me no reason for his extraordinary conduct beyond repeating what he had said in his telegram:
>
> I told him what I thought of him. He did not like it. But my remarks were quite justified.
>
> I saw Frazer in the morning. He agrees that the appointment should be made at once. He knows nothing of either man: He thinks Starke a good man. So do I but as I understand quite opposed to our view.
>
> Frazer is to see Isaacs J. casually. I am of course not in any way involved. Naturally his view is not conclusive. But it may be useful.
>
> I shall see Charlie again at 5.30: and will write you further.

Rich pipped Starke. If Starke knew this, it may explain their later relationship. Although to be fair to Rich, and without attempting any final statement on the difficult and highly gifted Starke (who cries out for a full biography), the existence of Starke in any relationship is probably sufficient explanation of its state.

Charles Edward Frazer, member for Kalgoorlie, was at this time postmaster-general; he introduced new stamps, although his one-penny stamp, which 'featured a kangaroo 'rampant upon a purely White Australia' was replaced' by Cook's government.[60]

The appointment – Rich's, I mean – was well-received, the *Daily Telegraph* recording:[61]

> At the Bar he had the faculty of clear convincing argument, and such a complete and intimate knowledge of the complicated law to which he bent his studies, that he stood almost alone among its exponents. Such qualifications themselves would strongly recommend any man for judicial preferment, but during his short occupancy of the State bench, Mr. Justice Rich revealed even greater and more valuable gifts. He had infinite patience, never-failing amiability of temper, and a trained glance that perceived a straight path through tumbled masses of technicality.



Sir Owen Dixon, taken when he was Australian minister to the United States, 1942. Photo: Australian War Memorial

Rich v Dixon [No 2]

I think a difficulty with Rich's work, at least as far as posterity is concerned, is that what sounds good as a decision does not always read well as a guide. *Briginshaw*[62] is another opportunity to compare and contrast the two judges.

Rich gives a one-page judgment, including:[63]

> In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion. But to say this is not to lay it down as a matter of law that such complete and absolute certainty must be reached as is ordinarily described in a criminal charge as 'satisfaction beyond reasonable doubt.'

Dixon, after a lengthy discussion, opts for:[64]

> Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a

> state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.

Rich sounds beautiful. Jessel might have delivered it – or the other – ex tempore a half century earlier. But if I wanted something I could pick off a shelf to help me with the problem down the track, Dixon's would be the one. To put it another way, if the judgments were ex tempore, one would walk out of the Court better understanding Rich, but one would walk back into Court with an understanding set ultimately by Dixon.

Other examples of Rich's felicity are given by Fricke. In *The Insurance Commissioner v Joyce*,[65] Rich famously aphorises that 'when circumstances are provided indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold.'[66] Dixon, on the other hand, said:[67]

> It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination.

Rich's words sound good. But if one were met by an appellate judge with Dixon's rejoinder, I don't think 'But his Honour was in the minority' would suffice.

A final case is *Chester v Waverley*.[68] We can only regret the absence of Dixon from this particular bench; it would have been fascinating to see if Evatt and Dixon were to go into full common law combat so soon after *Grant v Australian Knitting Mills*, only clarified in the Privy Council.

Anyway, to Rich. His reasons in *Chester* seem to me to contain the best of Rich (a succinct statement of the issues and a straightforward analysis) and the worst (an attempt, through the use of colorful language, to reduce a complex policy question to a simple extreme of good and bad).

Here is the whole judgment; I think that the best runs to 'impecuniosity'; the worst from 'But the law'; I leave it for readers to demur or to defer:[69]

> This appeal arises out of the difficulties attending the law of nervous shock, which may be described as in a state of development. The facts of the present case are fully stated by Jordan C.J., in whose conclusion I agree. The breach of duty towards the deceased child on the part of the defendant is clear enough. It is of little importance whether it be called nuisance or negligence. The question appears to me really to be whether the kind of harm of which the plaintiff complains caused by the sight of her child's body on its recovery is within the ambit of the defendant's duty not to put the road in a dangerous condition. I am prepared to adopt Professor Winfield's view that nervous shock is 'a particular instance of damage flowing from the commission of some particular tort,' and that 'nervous shock sustained by someone who is not reasonably within the contemplation of the defendant falls outside the scope of his duty to take care' (Winfield on the Law of Tort (1937), pp. 85, 87), or, as was said in Bunyan v. Jordan, 'the harm which in fact ensued is not a consequence which might reasonably have been anticipated or foreseen.' In the present instance I think that a mother's shock on the production of the dead body of her child falls outside the duty of the municipality in relation to the care of its roads. She was not using the road nor a witness of the accident. Her subsequent shock is not reasonably within the contemplation of the defendant as a consequence of the condition of the road. A negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or nausea on seeing his disfigurement. The train of events which flow from the injury to A almost always includes consequential suffering on the part of others. The form the suffering takes is rarely shock; more often it is worry and impecuniosity. But the law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side. The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its progress towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen entirely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries.
>
> In my opinion the appeal should be dismissed.

Of course, no amount of categorisation can get too close to the truth. Consider the following opening to a judgment: 'This case evoked another of the oft repeated and always unsuccessful attempts to determine the connotation of the vague and indeterminate words 'industrial dispute''. In the absence of anything more, I would have said that this would be a(nother) one pager from Rich. In fact, it is a two page judgment from Rich, but at his request, written by Dixon, who had not sat on the case.[70]

Rich v Dixon [No 3]

And so to indolence. The person to first make public such allegations was probably Sir Robert Menzies. In his 1970 autobiography, he wrote:

> Sir George Rich… was not a talkative judge. Social contacts with him outside court were invariably pleasant. He spiced his conversations with Latin tags, was delighted when they were occasionally understood, and had strong and frequently defamatory opinions of some other lawyers which were much enjoyed by his table companions, and particularly by me. But truth requires me to say that he was inclined to be indolent. He certainly wrote a few individual judgments which were a joy to read; but on the whole he preferred to attach his name to a joint judgment, the labour of writing which he left to his judicial partner.

Fricke points out that Menzies had also rejected the same characterisation of Barton, on the basis of his frequent concurrences with Griffith. That is true, but I suspect Menzies would draw a distinction with a concurrence, the sting in the above passage of course being the last clause.

We can assume that main source for Menzies' comment was his hero Dixon, but jointure is something which Rich adopted from the outset. Rich, at least according to the CLRs, was appointed on 5 April 1913. (As to the dating of the commission at 1 April 1913, there are Dixon's own observations on his own retirement, on 13 April 1964.[71]) His first reported case was *Buchanan v Cth* (1913) 16 CLR 318 and the relevant judgment is that of Gavan Duffy J, 'My brother Rich and I concur in the conclusion arrived at by the other members of the Court'.

In every case for that volume where those judges sat, the reasons were given either by Gavan Duffy for himself and Rich, or, where a more senior judge was sitting, that senior judge. Barton's report to Griffith was that Duffy was 'honest', that Rich 'follows him in all things', and that Powers was 'behaving more satisfactorily than either'.[72]

It is Menzies who relates the tale of Rich exclaiming 'Duffy, the trouble with you is that you talk too much from the bench' and of Gavan Duffy replying, 'Small wonder, since I have to talk for two.'

As far as I am aware, Rich's first reported judgment where he sits apart from Gavan Duffy – and comes to the same conclusion – is *Tooth v Kitto* (1913) 17 CLR 421. Rich's reasons inform for two reasons.

First, Rich chooses to express himself quite specifically in terms of the trial judge's reasons, the opening sentence being 'I agree that the construction placed upon the contract by Street J. is the correct construction.' The relevance of this appears later, upon a charge by Dixon.

Second, the nature of the case. It was about the meaning of 'harvesting season' in a written agreement. As more than one writer has pointed out, Gavan Duffy and Powers were lawyers first and last, bringing a lawyer's view to a body which was the final domestic arbiter not only of law in the narrow sense, but also of constitutional matters which had not yet been settled; Sawer observed that the pair tended 'to apply ordinary English common law principles of interpretation in a more literal fashion that did the senior justices'.[73]

The royal commission

In July and August 1915, Rich was a royal commissioner upon an inquiry into the administration of the military camp at Liverpool. He appears to have gone about his work with great diligence, it no doubt being a tonic for his own tragedy those months before.

Of all people, Rich must have loved the opportunity to find 'The evidence proved that there were not sufficient rifles for instructional purposes, and that the rifles used (Mark I) were obsolete here, or, as Major Heritage said, obsolescent in England.'[74]

He investigates, considers, and writes, well. He concluded:[75]

> The recruits are offering their lives for their country, and they are entitled to reasonable care and comfort without coddling and pampering.
>
> The duty of the Camp officers is to train and harden the men by plenty of exercise and good food, and enable them to take the field fit and well.
>
> The Spartan-like method of exposing soft recruits to unnecessary privations and hardships is not only cruel, but calculated to endanger their lives. In many cases the men may be permanently incapacitated and so become a burden on the country before they have had a chance of fighting on its behalf. This method, while increasing the expense of administration, impairs the efficiency of the force, and diminishes the numbers ready for active service.

The League of Nations

In 1922, Rich was a delegate to the League of Nations, and sat on its constitutional, judicial and political committees.[76] He also sat on the Nauru mandate sub-committee. In his papers at the Mitchell Library, there is a speech – longer than most of his judgments – given to a union (possibly the University

of Sydney Union) in 1923 and entitled 'The Work of the Third Assembly of the League of Nations'. Rich observed

> Another member of the [Indian] delegation was the Maharajah Jam Saheb of Nawanagar, better known to us as Ranjit Sinhji, the famous cricketer. He is one of the ruling princes in India. I heard two very good speeches from him in the assembly.
>
> One on the opium question where he made the point that the Indian worker takes a small amount of opium without harmful results in the same way as Europeans take beer or wine or coffee.

It was some years since K S Ranjitsinhji had received the Cardusian epithet, 'the midsummer night's dream of cricket'.[77] One wonders whether Rich – who would be passing judgment on Egon Kisch in little over a decade – had been at the public function in Sydney in 1897 when Lord Hampden the governor pointed out that the result of extending the *Chinese Restriction and Regulation Act 1888* might be that this star of the English team could not enter the colony.[78]

Rich finished in 1923 with an idealistic and doubtless for him melancholic observation:

> Do not indulge in a spirit of fatalism which sees no hope for the future but is resigned to the inevitable that wars must be waged.

Frederick Alexander James

The case for which Rich is best remembered is *James v Cowan*.[79] Frederick Alexander James was to Australian constitutional lawyers as Mr Diplock (decd) was to the English chancery bar. His biographer paints the opening scene:[80]

> When learning typing and shorthand, James had practised by repeatedly copying the Commonwealth of Australia Constitution Act. His familiarity with it now led him to suspect that vital provisions of the marketing-scheme legislation were in conflict with section 92, guaranteeing freedom of interstate trade. He obtained a licence for his packing-shed and registration as a dealer, but resolved to obey the directives of the dried fruits boards only when they suited him. In 1925, without prior notice to the Commonwealth board, he managed to sell most of his export quota in New Zealand where prices averaged £16 a ton more than in London. When he tried to do the same in 1926, the board annulled the contracts.

Cowan was one of James's many forays. Cowan himself in 1929 had taken refuge in the South Australian parliament after being served with a subpoena.

In *Cowan*, Starke gives the judgment at first instance, which Knox and Gavan Duffy adopt in a paragraph. Isaacs hammers out his hard dissent, and for frustration's sake, Rich hammered out a lengthy support of the majority.

The following is said by many if not all to be the exemplar of Rich's felicity:[81]

> The rhetorical affirmation of section 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words 'absolutely free', the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this Court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution.

I disagree. It is not merely too florid; it has a petulance and personalised grievance which is usually lacking in Rich. I prefer the following much gentler jibe:[82]

> At an early stage of the long controversy as to the true meaning of what sec. 92 omits to say, I joined with my brother Gavan Duffy in thinking that the immunity was confined to legal restrictions imposed upon trade and commerce in virtue of its inter-State character. The justification for this view, if any there be, is set out at length in Duncan v State of Queensland. One demerit was found in this view which was sufficient to make it untenable, namely, a majority of the Court steadfastly refused to adhere to it. It must be confessed that it supplied a criterion which was difficult of application, but it may also be claimed that no criterion which is easier of application has hitherto been revealed. But with the progress of time and in spite of the fluctuations of mind and matter the Court has arrived at definite decisions which declare that some things are and some things are not impairments of the freedom guaranteed by sec. 92.
>
> …
>
> After many years of exploration into the dark recesses of this subject I am content to take the decided cases as sailing directions upon which I may set some course, however

> unexpected may be the destination to which it brings me, and await with a patience not entirely hopeless the powerful beacon light of complete authoritative exposition from those who can speak with finality.

Of James, two more things. First, a spectacular climax to his efforts, when in 1938 and 1939 he sought damages from the Commonwealth on inter alia two grounds: that a breach of section 92 conferred a private cause of action; alternatively that the Commonwealth by its actions had offended the principle in *Lumley v Gye*.[83] He drew Dixon, who rejected the arguments but gave him £878 5s 7d on a conversion argument. Costs were adjusted to suit the outcome. Second, and something for us all to remember; the government, like any elephant, never forgets. As his biographer says:

> In 1936 his marriage finally broke down and his wife instituted divorce proceedings. She dropped the suit when James settled out of court, but the extent of her alimony demands had surprised tax inspectors who promptly wrought vengeance on her spouse.

The Privy Council

Mr James gives an introduction to another aspect of Rich's life, the Privy Council. James appealed and the judgment of their lordships preferring Isaacs over his colleagues was delivered by Lord Atkin. The judgment is sandwiched for posterity between those other staples of the law student, *Trethowan* and *Donoghue v Stevenson*.

In the family vein, I observe that the first two cases had a variation on a theme: Greene KC (later MR) led Maughan KC, Wilfred Barton and Bailleau led for the victors in the *Trethowan* while Greene KC led Barton in the second, the variation being that Maughan KC was not this time senior to his son but to his brother-in-law. As for Bailleau, I regret that I have been unable to ascertain whether this is the later Baron Bailleau, who was called to the bar but distinguished himself in business.[84]

James kept the council waiting four years for his next visit, *James v Commonwealth*. They did not feel slighted. Rather, the council overruled the High Court and decided that section 92 would bind the federal legislature. It was argued before, inter alia, Lord Russell of Killowen, in July 1936, the same month that Russell was sitting with Rich on an appeal from New Zealand.[85]

For the purpose of this article, it is interesting to record that the council's judgment in the 1936 Australian case was delivered by Lord Wright MR. Lest Australian lawyers think that it was only they and the High Court who couldn't make sense of section 92, in 1954 the *Sydney Law Review* managed to extract from Wright 'Section 92 – A problem piece'.[86] The particular pertinence is that Wright sets out an extract from Rich's 1930 reasons not only with approval but with reference to 'the language of a brilliant judge, now retired, Mr. Justice Rich'.[87]

I'm sure that the fact that I have criticised the language will not trouble Wright's spirit for a second. What is interesting is that even allowing for curial backslapping, 'brilliant' is a strong word. I would be curious to know whether Wright and Rich actually sat together during Rich's time.

Starke's reaction to the appointment was a note to Latham, 'Rich will be like a dog with two tails… But I thought the Privy Councillorship was reserved for those who had rendered distinguished political, judicial or other services. It is a pity to degrade the rank by such an appointment.'[88]

Rich's other duty while 'home' was less onerous; he was Australia's representative at the coronation of King George VI in May 1937. Pears' Soap was by appointment providers of soap to the royal couple, and I have a copy of the commemorative family tree issued for the occasion, 'The Royal Line in relation to European Royalty'.

Maybe Rich was in company too rarefied to need such a document. Even so, I think he would have enjoyed working his way from Princess Elizabeth, daughter of King James I of England, and Frederic V Elector Palatine and king of Bohemia, to the photographs of each of the extant leaders, Leopold III (king of the Belgians); Boris III (king of Bulgaria); Victor Emmanuel III (king of Italy); George; Carol II (king of Romania); Peter II (king of Yugoslavia); Gustavus V (king of Sweden); Wilhelmina (queen of Holland); Christian X (king of Denmark); Charles (King Haakon VII of Norway); and George II (king of Greece).

Two last matters from the 1936 case. First and again, Wilfred Barton was for James, this time leading Kevin Ward, the former Bulli solicitor whose career James made. Second, both the summary of the government's argument and what the council had to say at the end of their reasons about the calibre of the arguer, is a healthy reminder of the precocious brilliance of the 42-year-old Attorney-General Menzies, leading Simonds KC. Simonds himself – at 54, I think – was a year off his distinguished judicial career. Later, Simonds would lose one son at Arnhem and another from illness contracted on active service in East Africa.[89]

A Greek interlude

Ayres records:[90]

> More to [Dixon's] liking was what he heard the following night at the dinner Rich gave for young Enoch Powell, the new Professor of Greek at Sydney and the youngest man ever appointed to an Australian university chair. It was a small party, at the Australian Club – Rich, Powell, Alan Brown (Fellow of Worcester College, Oxford), the physician Alan Holmes à Court, A C Gain, and Dixon. Powell told Dixon of the work he was doing on the manuscripts of the ancient Welsh legal codes, saying he was tempted to try for a chair of Celtic studies. Dixon thought him an 'Enthusiastic scholar', 'Pragmatical', 'Clear about a German war, but apparently full of guts'. Powell would resign from his chair on the outbreak of war to join the British Army as a private in the Royal Warwickshire Regiment.

Holmes à Court's son would die in 1943, training as a RAAF pilot.[91] One of Powell's pupils was the son of the crown solicitor, Edward Gough Whitlam. I heard Powell once; whatever one thought of his views, his voice was extraordinary.

I think that Powell's experience with religion best sums him up; he went from atheist to devout Anglican, only to spend much of his later life 'trying to prove, with close textual reading, that Christ had not been crucified but stoned to death'.[92] His last words were from his hospital bed: he asked what was for lunch; on being informed that he was being fed intravenously, he said 'I don't call that much of a lunch'.[93]

Dixon v Dixon; ex parte Rich

As I have said, Menzies's accusation of indolence may well have found its root in Dixon. It is from Dixon that we have the first evidence that someone else was doing Rich's work; Dixon himself, in fact.[94]

A good example stems from Dixon's interesting dissent in *R v Brislan*, where he argued that section 51(v) of the Constitution was limited to two-way communication and so could not apply to mass media. It appears that he was able to be two-way by assisting Rich pen reasons reaching the opposite conclusion.[95]

Dixon's diary for 14 September 1938 read 'Spent all day doing R's Sun Newspapers Ltd and Associated Newspapers Ltd… Finished R's judgt at 2.15 am.'[96] Fortunately, this was in good time for Rich to deliver it, as on the 17th he did. It was also in good time for Dixon to hear and consider the appeal, Latham, himself and McTiernan affirming Rich the day before Christmas Eve.

Clyde Packer was a partowner of – and had come in as managing editor to help save – Associated Newspapers, publisher of Sydney's *Daily Telegraph*. Meanwhile, the sometime Labor treasurer E G Theodore and young Frank Packer came up with an offer which poor old Associated Newspapers found too good to refuse.

The offer consisted of a proposal not to publish a competitor. For a price. The chairman of Associated Newspapers thought the best person to deal with the task was the redoubtable managing editor, moonlighting as Frank's father.

And deal with the task Clyde did. He did so by authorising the company to pay Frank and EG almost a hundred thousand pounds, just enough, as things turned out, to get another magazine called *Women's Weekly* off the blocks.

After such a debacle, the High Court's refusal to allow the company to deduct the ransom might well have been the straw that broke the proverbial. Anyway, Dixon – wearing his own wig in the appeal – makes major headway into articulating a test for delineating which expenditure fell to the capital and which to the revenue accounts.

Rich v Dixon [No 4]

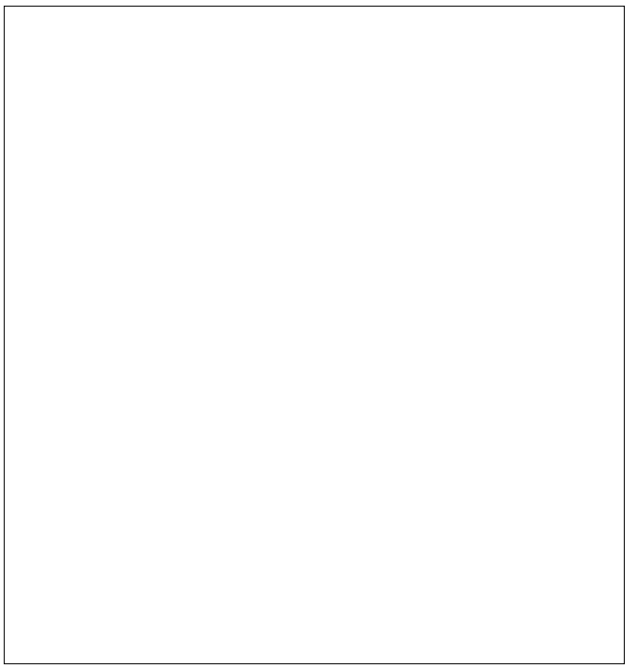
Dixon's usual practice, at least as regards judges from other (and therefore junior) courts was never to discuss a case, who had heard or was hearing it, if it might conceivably come before the Court.[97]

Which in isolation explains why Dixon was positively irate some years later when he came to believe that Rich's judgment on an appeal from the bankruptcy judge Mr Justice 'Sammy' Clyne, was written by Clyne himself.[98]

But this hardly sits well with Dixon's earlier – and presumably continuing – practice. I share Ayres's interest when he observes of the Packer case, 'Rich, one assumes, made the actual judgment and Dixon then wrote it up for him. Interestingly, in 1949 Dixon would take strong exception to what he would take to be T. S. Clyne's writing of a judgment of Rich's in an appeal against Clyne himself.'[99] This is a form of strict and complete legalism which I confess eludes me.

Be my musing as it may and while I am not aware of any direct corroboration (in Ayres's account, none of the other players ever expressly confirmed that Dixon was correct), there are two things which confirm Dixon's account.

The first is the text of Rich's reasons. He opens by saying 'I have read the judgment on this appeal prepared by my brother McTiernan, and am in substantial agreement…' This is doubly – or perhaps trebly – ironic, given Dixon also ghosted for McTiernan. Worse, Rich opens the next paragraph 'I should like nevertheless to add a few words of my own…' When one remembers Clyne and Dixon were pals, I suspect the real



George Rich on his 90th birthday. Photo: The Oxford Companion to the High Court of Australia.

reason Dixon saw red is that Clyne was – to use the words of the utter bar – taking the piss.

The second reason is far less patent but no less telling. If Clyne was a close friend of Dixon, he was also well-regarded by Evatt (who had, inter alia, appointed him to look into the Australia First Movement).[100] Note the last words in particular of Dixon's diary entry of Clyne's report to him that Evatt – as the government's advocate in the *Bank Nationalisation Case* – was using Clyne to get to Dixon:

> [Dixon records that Clyne had told him at a drinks party that] The A-G had said (1) the case was the most important ever before the Court legally as well as otherwise (2) he had put Starke right particularly over the interest question (3) Latham was a very difficult man (4) the Bench had been very decent to him (5) he liked old Rich (6) he wanted to get rid of two of the JJ. & how wd Clyne like to take the place of one (6) [sic] I was very subtle or had a subtle mind & had not shewn my hand (7) Barwick was a young upstart who had not inquired after the AGs health, though the AG was manifestly ill (8) I looked very ill at times. Clynes view was that the object was to discover my position & prepare Clyne should Rich seek his assistance.

The prospect of a bankruptcy judge heeding the call of the attorney to assist the senior puisne judge of the nation's supreme court determine the major political issue of the day, the nationalisation of banks, is a neat one.

In the matter of Clyne; re Rich, Dixon & ors

When *Isaacs v Mackinnon* was being debated, Rich was only months away from retiring. He did so in May 1950, making way for Frank Kitto. I think that *Isaacs* is an unfortunate place to leave matters. In particular, if we are to have Clyne, Rich and Dixon as catalysts for an analysis of who gets credit in joint judgments on bankruptcy, we must finish with *AWU v Bowen*,[101] in which the rights of joint creditors in a bankruptcy receives a curious judgment, remembering in prelude the following.

First, one would have thought that this was the best possible forum for discussing a neat and rarely litigated question of bankruptcy law. The primary judge was Clyne. Leading for the respondent was Barwick KC. On appeal was as strong a bench that that time in that area would afford: Latham, Rich, Starke, Dixon and Williams. Rich himself had been a bankruptcy expert for the previous 60 years.

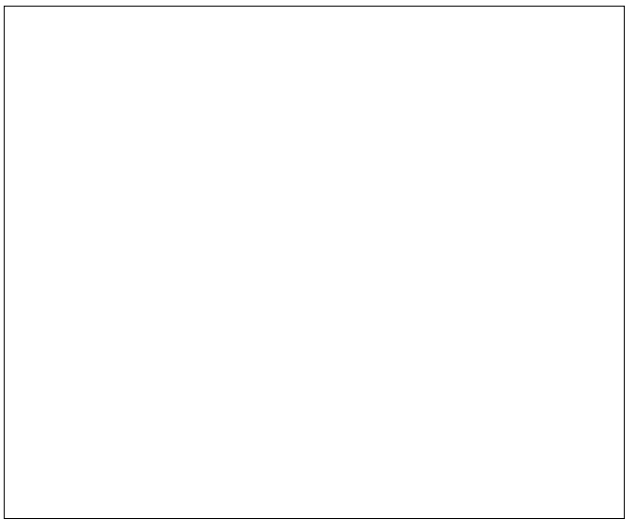
Second, and however wrong it is for an appellate judge to form as a habit the adoption of the trial judge's view, the fact is that Rich, whether from laziness or from a misplaced sense of economy, was not averse to this particular form of judgment. As noted above, he did this with an appeal from Street.

Third, and again however wrong it is for an appellate judge to avoid discursion, the fact of the matter is that Rich had nailed his colours to the mast in early days. In the important decision *Hoyt's v Spencer*, and after reasons from Knox and from Isaacs, Rich as the third says:[102]

> I have had the advantage of reading the judgments just delivered. As I agree with them, I consider that it is inexpedient to add, and I refrain from adding, collateral matter which, at best, merely paraphrases and often blurs the clearness of the main judgments, and so increases the difficulty of the profession in interpreting the decision of the Court.

It was not too long prior to this that Rich started to prefer writing jointly with Isaacs and not Gavan Duffy. Perhaps on a three-bencher, Knox had expressed the view that joint majority judgment in the same result was a little embarrassing for him as CJ. We may never know. Anyway, in *Bowen*, Clyne J gave reasons.[103] It is a succinct statement of the necessary issues. It succinctly raises but does not determine another issue.

The union appealed; Rich J said that he agreed with Clyne's reasons, while the other members – Latham, Dixon, Starke and Williams – gave fuller judgments. A well-regarded bankruptcy judge of a much later era, Burchett J, sums up the position in *Re Pollnow*.[104] Although there is a full reference to each of



A portrait of Sir John Latham sitting at his desk in the High Court. Photo: Australian War Memorial.

the other judges' reasons, I think the guernsey is rather neatly given to Rich:

> 13. When the matter went on appeal to the High Court as Australian Workers' Union v. Bowen (supra), Rich J (at 584) said:
>
> > 'I agree with the order made by the learned primary judge and with his reasons for holding that the bankruptcy notice and the petition for sequestration founded thereon were invalid.'
>
> 14. Accordingly, the remarks of Clyne J which I have quoted have the authority of Rich J. The other members of the High Court, apart from Starke J who dissented, also support the view which Clyne J had taken.

A brilliant classicist, formerly a lecturer in European history at the University of Melbourne and pupil master to Harold Holt, to say that Clyne died in harness is an understatement. Page 4 of the *Herald* for Friday 14 April 1967 finished its notice of the 80 year old's death on the Wednesday as follows:[105]

> Yesterday, the Sydney Registrar in Bankruptcy, L. G. Bohringer, adjourned to various dates in May, the 18 cases listed for hearing by Sir Thomas.
>
> Another 21 cases will be adjourned today.

Dixon v Rich settles

Despite their difficulties, Dixon clearly enjoyed Rich's presence. Upon his own elevation to the middle of the bench, he said:[106]

> I have the happiness to have with me once more Sir George Rich, who for so long, during I should think the greater part of my life as an advocate and as a judge, has given by example a lesson in the place that humanity, urbanity and wit may take in a court of ultimate appeal.

And during 1953, half way between Rich's retirement and death, Dixon observed in good humour:[107]

> We can no longer watch Sir George Rich shuddering as counsel stressed the second syllable of 'exigency' or pronounced 'economic' with a short 'e' or 'tenable' with a long one.

The Dixons were able to join the 90th birthday celebrations in Sydney. Dixon spoke, and while Rich was too overcome to respond, he insisted 'Australians should work'. Later, Dixon reported to his daughter, 'The idea of Sir George preaching the doctrine of work struck Mum as particularly amusing'.[108]

Acting chief justice

Ayres records:[109]

> In early March 1935 Evatt was encouraging Rich, as the Court's senior puisne judge, to press for a commission as Acting Chief Justice. 'Doubtless it might help towards his selection for the office but it is only a very trifling thing', Dixon thought after Rich had broached the subject. It would have suited Evatt, if he expected to be offered the position of Chief Justice by a future Labor government, to have it in the meantime go to someone who might not be expected to hold it long – Rich was now into his seventies.

It has been suggested that Rich 'procured amendment of the Judiciary Act to allow his designation during Sir John Latham's absence [as Ambassador to Japan]. While Rich's desire for the title amused most of his colleagues, it widened a rift between him and the irascible Starke who was next in seniority'.[110]

I don't have access to the records that the person who suggested this had. However, the second reading speech suggests a different story. The bill – the *Judiciary Bill 1940* – was 'for an act to enable Justices of the High Court during the war to accept and hold other offices, and for other purposes'; as to the provision Rich is supposed to have procured, the second reading speechmaker said:[111]

> There is only one other provision in the bill, and that is ancillary to the clause I have just quoted. It provides that, in the absence of the Chief Justice from Australia, the senior

> justice shall, during such absence, be designated Acting Chief Justice. The principal act does not make provision for that and, on previous occasions, when the Chief Justice was absent on leave, the judge who acted in his place could not be designated as Acting Chief Justice. This is entirely a war measure arising out of the appointment which the Government desires to make.

The bulk of Hansard is given over to the far more interesting issue of the extent to which a judicial officer ought be involved in other arms of government. On the one hand, the member for Batman argued that 'we are departing from a principle, and establishing a precedent, in a way which, to my mind, suggests danger'. On the other, the member for Bourke gave the (not wholly sensible) example of John Jay, who was sent by Washington to allay concerns between 'the parent and the revolted child'.[112] For current purposes, readers will be bemused if not relieved to find that the attorney in charge of the second reading – on this 21st day of August 1940 – was the same attorney who had elevated Rich those 27 years before, William Morris Hughes.

Rich et al

Rich and Starke were at least united – perhaps by age – on travelling to 'outlying states'.[113] When Rich arrived in Melbourne at 2am after a detour to avoid railway washouts, he wrote to Latham 'Water everywhere, but no drinks on train.'[114]

Rich was appointed KCMG on 3 June 1932. As recorded earlier, Rich was a privy councillor, and was made so in 1936. Rich had a rather bizarre introduction to Latham as his chief; when he was explaining his failure to send written congratulations, Latham replied 'Excuse accepted', leaving Rich to protest 'It is not an excuse, it is an explanation.'[115] Yet Rich seems to have recovered. Soon after 's appointment, Rich asked him 'I wonder if you look back on the fields of Canberra. Ours is a hard life and we have strange bedfellows and many restrictions.'[116]

In 1937, Starke insisted on a rehearing. Latham and Evatt despaired. Rich wrote to Latham much later (in April 1939) saying 'The old-fashioned idea is to deal with the case or not deal faithfully with your colleagues.'[117] In fact, Starke won that particular outing and the re-argued case is reported as *Nassoor v Nette* (1937) 58 CLR 446. I find the whole matter odd; the report records the rehearing[118] but conspicuous in his absence is Starke J. Latham CJ went one way, the balance in a joint judgment the other.

In another 1939 letter to Latham regarding some delay while Evatt added another citation to his judgment, Rich said 'It is difficult to play games with a sport who works outside the rules of the game'.[119] He had seen worse. In a letter to Latham he wrote 'My mind goes back to the time when Duffy opposed the acceptance of Isaacs' portrait, and with the aid of Knox and Starke prevented the court having it.'[120]

On 10 November 1950, Rich married again, his wife having died in 1945. Although he married in England, the marriage was to Letitia Fetherstonhaugh Strong nee Woodward, a widow from Victoria. The celebrations did not prevent him from writing to Latham the next day:[121]

> I have not seen the bill but I have always felt doubtful and have stated my anxiety. I hate the Commos… but I'll fight for liberty and justice and the old principle of innocence of the accused. Tomorrow one of us may be in the dock and you must prove your innocence and so on.

When Rich died in May, Dixon spoke warmly from the bench. Richard Searby, then Dixon's associate, remembered Latham phoning Dixon:[122]

> to say how furious he was. How could Dixon possibly do that, bring down the reputation of the Court by speaking like that about Rich? Of course that was nonsense, when somebody dies you don't necessarily say what you think about their foibles. But he always liked Rich, he was very fond of Rich and got on extremely well with him. He got on with Starke. He got on with every one.

I confess to preferring Rich on the Commies to Latham on the Rich.

Statistics

There has been considerable academic work on the court, in particular statistical work on the Latham years. Apart from Clem Lloyd's lively overview (*Not peace but a sword! – The High Court under JG Latham*), there is Russell Smyth's *Explaining Voting Patterns on the Latham High Court 1935-50* and *Explaining Historical Dissent Rates in the High Court of Australia*; and R N Douglas's pieces *Judges and Policy on the Latham Court*. (Other leaders in the area are Zelman Cowen and Tony Blackshield.)

In Smyth's work, there are two tables which make fascinating reading. I trust I am well within 'fair use' parameters (as to which, see section 40 of the Copyright Act); whether I am or not, I urge barristers to have a look at this and the other articles; it permits us to see those rows of CLRs in a wholly different light. Smyth's caveats are set out in a footnote to this article.[123]

I think it fair to say that one of the many remarkable things about these tables is that at least some of the figures accurately

Table 1: Explicit Agreement Ratios on the Latham Court 1935-40						
(Expressed as a percentage)						
	Dixon	**Evatt**	**Rich**	**McTiernan**	**Latham**	**Starke**
Dixon	-	64.9 (84)	55.6 (53)	48.8 (93)	1.6 (81)	0.0 (95)
Evatt	64.9 (84)	-	50.0 (40)	65.3 (70)	2.1 (64)	0.0 (91)
Rich	55.6 (53)	50.0 (40)	-	56.8 (51)	17.1 (50)	0.0 (45)
McTiernan	48.8 (93)	65.3 (70)	56.8 (51)	-	24.2 (79)	1.3 (85)
Latham	1.6 (81)	2.1 (64)	17.1 (50)	24.2 (79)	-	3.9 (65)
Starke	0.0 (95)	0.0 (91)	0.0 (45)	1.3 (85)	3.9 (65)	-
Note: figures in parentheses are the number of divided benches on which both judges sat.						

Table 2: Explicit Agreement Ratios on the Latham Court 1940-50						
(Expressed as a percentage)						
	Dixon	**McTiernan**	**Williams**	**Latham**	**Rich**	**Starke**
Dixon	-	50.0 (63)	36.6 (51)	17.9 (66)	30.2 (53)	2.0 (62)
McTiernan	50 (63)	-	10.3 (80)	53.2 (88)	11.0 (97)	1.2 (95)
Williams	36.6 (51)	10.3 (80)	-	20.7 (71)	35.9 (77)	4.1 (94)
Latham	17.9 (66)	53.2 (88)	20.7 (71)	-	18.8 (83)	2.8 (90)
Rich	30.2 (53)	11.0 (97)	35.9 (77)	18.8 (83)	-	4.0 (88)
Starke	2.0 (62)	1.2 (95)	4.1 (94)	2.8 (90)	4.0 (88)	-
Note: figures in parentheses are the number of divided benches on which both judges sat.						

reflect personal relationships. If this is the case as between Rich and Starke, old age appears to have made them positively chummy.

A summary

A liberal high churchman who chooses to live in Sydney can have diligence and humour, but he cannot live on the former alone. Prior to his appointment, Rich was not merely diligent; while he was no behemoth, he made substantial and original contributions to the law and beyond.

What happened? There is some material from which we may infer that Jack's death may have been a catalyst. Then there is the disarming frankness of his admission in *Hoyt's*. Finally, it is irrefutable that from at least the late 30s, there was either indolence or senescence.

The High Court reporter J D Merralls is surely correct when he says that 'Rich's standing as a judge suffered from his reputation for indolence, but his pithy reasons usually showed a sure grasp of legal principles. Their most serious failing as judgments in an appellate court lay in the lack of development of ideas.'[124]

But in the end, judges – even appellate judges – do not leave reasons and nothing more. Rich was a pleasure to appear before at a time when the bench was riddled with personal

rivalries. He decided matters on the facts before him and explained, through himself or others, how he got there. And would the nation really be served by one bench full of Dixons? Even Dixon would demur. In whose name he would demur, is something for another day.

Endnotes

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A really rotten judge: James Clark McReynolds

By Geoffrey Watson SC

Justice James Clark McReynolds must have been the most vile character to serve on the United States Supreme Court during the twentieth century, perhaps ever.

In 1939, while McReynolds was still sitting on the Supreme Court, *Time Magazine* described him as 'intolerably rude, anti-Semitic, savagely sarcastic, incredibly reactionary, Puritanical, prejudiced'. His fellow judges held similarly strong views. Justice Oliver Wendell Holmes Jr served alongside McReynolds for 18 years and described him as 'a savage, with all the irrational impulses of a savage'. Justice Louis Brandeis described him as 'an infantile moron'. Chief Justice Taft described him as 'selfish to the last degree … fuller of prejudice than any man I have ever known'. Justice Bill Douglas (a pretty nasty piece of work himself) invented a card game, which he named 'Son of a Bitch' after McReynolds. The British political economist Harold Laski said that the existence of 'McReynolds and the theory of a beneficent deity are incompatible'. While Laski may have gone too far, the other opinions are supportable.

McReynolds was a Southerner, born in 1862 in Kentucky. He was raised in a straight-laced Protestant household – no smoking, drinking or swearing. His autocratic father, a doctor, was locally known as 'the Pope', because he believed himself infallible. McReynolds graduated in 1882 as valedictorian in science from Vanderbilt University, Tennessee, and after only a further 14 months study, from the University of Virginia Law School in 1884.

For a short period McReynolds worked for Senator Jackson of Tennessee, and then spent a few years in private practice in Nashville during which time he made an unsuccessful run at politics on a right wing Democrat ticket associated with maintenance of the gold standard. In 1903 he was drafted into the Justice Department in Washington, successfully prosecuting monopolies, especially in the tobacco industry – a role which he seems to have injected a moral quality, believing monopolies 'essentially wicked'.

Apparently impressed with his work as a 'trust-buster', Woodrow Wilson appointed McReynolds attorney-general in his first government of 1913. Almost immediately the most dislikeable aspects of McReynolds's personality emerged, and his rudeness, blunt speech and arrogance disrupted the business of Cabinet, his own department and antagonised Congress. Wilson took advantage of an unfilled space on the Supreme Court bench, which had been created by the death of another Southerner, Justice Harold Lurton, to promote McReynolds out of his hair.

McReynolds sat as an associate justice of the Supreme Court for 26 years, from 1914 at the age of 56 until he retired (reluctantly) in 1941, aged 79.

McReynolds' performance as a judge was at its best undistinguished, and at worst seriously marred by racial, religious and political prejudices.

McReynolds's whole life was overwhelmed by an unusually widespread and even creative range of prejudices. He regarded smokers and smoking as 'filthy', and would not employ a smoker. In fact, he would not employ smokers, drinkers, Jews, or men who were married or engaged. He dismissed men with wristwatches, or who wore red ties, as 'effeminate'. A life-long bachelor and misogynist, McReynolds refused to employ women because 'they ultimately become possessive and wish to run the whole show'. He resented the appearance of female advocates, muttering audibly from the bench on one occasion 'I see the female is here again', and would usually leave the bench if a woman presented the argument. He especially despised women who used 'vulgar' red nail polish. He even created a new type of prejudice – McReynolds loathed pencils which left 'a weak-looking mark' because, he said, they 'are just like some people who are never quite able to accomplish what they set out to do'.

A key driver was McReynolds' deep-seated anti-Semitism. McReynolds refused to acknowledge the presence of the Jewish judges on the court. He served alongside Justice Louis Brandeis from 1916 to 1939 and Justice Benjamin Cardozo from 1932 to 1938 without acknowledging their existence. In 1922 McReynolds declined to attend a court ceremony which Brandeis would attend, writing to Chief Justice Taft 'As you know, I am not always to be found when there is a Hebrew abroad'. There is no photograph of the Supreme Court bench for 1924 because seniority would have required McReynolds to sit next to Brandeis, which McReynolds refused to do. During the swearing in of Cardozo in 1932 McReynolds sat, but read a newspaper during the proceedings, muttering audibly 'Another one'. McReynolds marked the appointment of Felix Frankfurter with 'My God, another Jew on the Court', and did not take his place at Frankfurter's robing ceremony. At one gathering of the members of the Supreme Court, McReynolds said aloud, in the hearing of Brandeis and Cardozo, that the only way to secure a federal appointment 'is to be the son of crook, a Jew, or both'. This would have been designed particularly to hurt Cardozo, whose father had stood down as a judge to avoid impeachment over a political corruption scandal. He could be petty – McReynolds declined to sign the court's customary valedictory letters on the retirements of Cardozo and Brandeis, and did not take his place on the bench during a ceremony to mark Cardozo's death in 1938.

The anti-Semitism interfered with McReynolds' judicial work. He refused to join in a judgment written by a Jewish judge even when he agreed with reasons, preferring to file a separate note agreeing with the orders. When McReynolds wrote a decision of his own, some have suggested that it would be prepared so to avoid favourable citation of any precedent decided by a Jewish judge from any jurisdiction.

McReynolds' prejudice against blacks was just as bad or worse.

He commonly, publicly, used the words 'nigger' and 'darky'. When McReynolds defended himself against an allegation of racism he demonstrated a disarming lack of insight by saying that he set out to protect 'the poorest darky in the Georgia backwoods as well as the man of wealth in a mansion on Fifth Avenue'. If he had to send a letter addressed to a black man, he insisted the word 'colored' be placed after the name, because this, he said, would assist the mailman.

It was in this corner of his judicial work where McReynolds' prejudices were most obvious. It seems that there is only one occasion in 26 years on the Supreme Court that McReynolds accepted an argument which would have resulted in an outcome favourable to a black litigant. This result cannot be supported by an innocent interpretation. On issues involving whites, McReynolds was supportive of civil liberties: *Carroll v United States* 267 US 132 (1925), *Casey v United States* 276 US 413 (1928); and freedom of speech: *Farrington v Tokushiga* 273 US 284 (1927), *Meyer v Nebraska* 262 US 390 (1923); and the education of white children: *Pierce v Society of Sisters* 268 US 510 (1924). But comparable rights did not accrue to the benefit of blacks. In this respect McReynolds often found himself in dissent, often in lone dissent. Examples demonstrate his perversity.

In *Aldridge v United States* 283 US 308 (1931), McReynolds dissented alone, unable to accept that race prejudice against a black accused – 'whatever that may be' – on the part of a juror in a murder trial warranted a review of the case. It is hard to imagine that McReynolds did not know what race prejudice was. In the appalling 'Scottsboro Case' – *Powell v Alabama* 287 US 45 (1932) – nine young, unemployed, illiterate black men were convicted of rape in a string of one day trials in Alabama in which they were unrepresented. The majority of the Supreme Court found the 'due process' clause as the basis for the right to the aid of counsel, but McReynolds dissented, unable to see that the constitutional question of due process arose. In *Moore v Dempsey* 261 US 86 (1923) five black men were convicted of the murder of a white man following a 45 minute trial during which their counsel never spoke to them, and while a large crowd audibly cried for their conviction outside the courtroom. The jury, from which any black man had improperly been excluded, brought in a verdict of guilty in five minutes, and death sentences were passed. The majority of the Supreme Court, not surprisingly, found the accused to have been denied due process, but McReynolds dissented, praising the role of counsel, although he noted that 'the trial was unusually short'. McReynolds found that the verdict could not be successfully impeached by affidavits sworn by the accused, whom he described as 'ignorant men whose lives were at stake' and thus, apparently, unreliable witnesses. In *Nixon v Condon* 286 US 73 (1923) he dissented upholding the validity of a Texas law denying franchise to black voters in a Democratic primary election on the basis of skin colour, because this was a private matter for the Democratic Party. In *Missouri ex rel; Gaines v Canada* 305 US 337 (1938) he dissented alone when upholding the University of Missouri's decision to deny admission to a black law student because mixing colours would 'damnify both races' – and, in doing so, questioned the applicant's sincerity in making the application, even although this was not in issue.

The US Supreme Court, 1930. Standing L to R: Justice Harlan F Stone, Justice George Sutherland, Justice Pierce Butler, Justice Owen Roberts. Seated, L to R: Justice James McReynolds, Justice Oliver Wendell Holmes J, Chief Justice Charles Evans Hughes, Justice Willis Van Devanter, Justice Louis Brandeis. Photo: Getty Images.

It was during argument in *Gaines v Canada* that McReynolds committed his most open declaration of hostility. While the distinguished lawyer and Harvard professor, Charles Hamilton Houston presented the applicant's argument, McReynolds twisted his chair away to face the curtain behind the bench. Houston – need it be said – was black.

There are more examples of his prejudices, and I do not wish to multiply them unnecessarily – except to refer to two, which now seem almost amusing. McReynolds despised Germans.

In *Berger v United States* 255 US 22 (1921) three defendants of German heritage were accused of espionage. The trial judge described the accused as having 'hearts reeking of disloyalty'. In a suit to have the trial judge disqualified McReynolds dissented alone, finding the trial judge did not fall into error in respect of dealing with (what McReynolds described as) 'German malevolents … who, unhappily had obtained citizenship here', because the trial judge's conduct only disclosed what was 'a deep detestation for all persons of German extraction' – McReynolds's point was that prejudice to a race as a whole could not constitute judicial bias in an individual case. This would be of limited comfort to the three Germans on trial. The second example is a rare case of McReynolds' enlightenment. In *Meyer v Nebraska* 262 US 390 (1923) he was able to rise above his prejudices to hold 'Mere knowledge of the German language cannot reasonably be regarded as harmful'. Many Germans would agree.

McReynolds's prejudices in political matters were equally ample. His social politics were conservative, and his economic politics right-wing, probably *laissez faire*. He came to deeply resent the politics of the New Deal. McReynolds was one of 'the Four Horsemen' – the conservative bloc of judges who consistently voted against the validity of New Deal measures. Their story is available elsewhere; it presently suffices to say that McReynolds voted against New Deal measures on every occasion and more often than any other judge. He has been described as the 'loudest, most cantankerous, sarcastic, aggressive, intemperate and reactionary' of the Four Horsemen.

McReynolds detested Roosevelt personally, describing him in private correspondence as 'utterly incompetent', 'a fool', 'a megalomaniac' and 'bad through and through'. He also suggested one New Deal programme was 'evidence of his mental infirmity and lack of stability'. At one dinner when Roosevelt entered the room and all guests stood McReynolds remained seated and (in a familiar gesture), turned his back on the president. From about 1937 he refused to attend White House receptions.

The best example of the kind of trenchant terms in which McReynolds expressed himself comes from the *Gold Clause Cases*: *Norman v Baltimore & Ohio Railroad Co* 294 US 240 (1935) which involved a test of the constitutional validity of a decision taking America off the gold standard. The argument ran that the measure denied due process by undermining contractual 'gold clauses' which provided that debts could be paid or claimed alternatively with paper money or gold. The issue was of genuine legal, political and economic consequence, and the result critical to the success of the New Deal.

By a majority of 5 to 4, the Supreme Court declared the legislation valid, the dissenters predictably comprising the Four Horsemen. McReynolds wrote the decision for the dissenters – in this instance giving real life and depth to the 'due process' clause. In accordance with the practice of the day, decisions were read from the bench, and McReynolds seems to have departed from the written text, using words so intemperate that the oral judgment was omitted from the law reports. *The Wall Street Journal*, however, recorded and reported the oral judgment. It is a cracker.

McReynolds compared the government with Nero, and described the legislation as a 'repudiation of national obligations' and 'abhorrent'. He claimed protections against 'arbitrary action have been swept away'. McReynolds feigned reticence – he said the government's actions were 'not a thing which I like to talk about, but there are some responsibilities which attach to a position upon this bench which one may not ignore'. Overcoming his reticence, McReynolds described the government's 'intent, I almost said wickedness' was to 'destroy private obligations' and declaimed 'The Constitution … that has meant so much, is gone … Horrible dishonesty! … Shame and humiliation are upon us'. He displayed little knowledge of the excesses of the Caesars when he said of the government 'This is Nero at his worst'.

Speaking generally, McReynolds's judicial work was of a low standard. His judgments were short – not necessarily a bad thing – but short because they were conclusory, unencumbered by reasoning or reference to authorities. He seems to have undertaken little or no research or reflection. His associate during the October 1936 term, John Frush Knox, kept a memoir in which Knox recounts the circumstances of the preparation and delivery in an admiralty case – *P J Carlin Construction Co v Heaney* 299 US 41 (1936). Following the oral argument Chief Justice Charles Evan Hughes allocated the decision to be written by McReynolds. According to Knox all that preparation of the judgment involved was McReynolds re-reading the written submissions for about an hour; slowly dictating his draft judgment to Knox for about 25 minutes; and revising the draft judgment once only before submitting it for delivery. Less than two hours work. Maybe this was a simple case, but in Knox's experience this kind of approach was typical.

Perhaps as a consequence, McReynolds was only allocated the task of writing judgments in routine and insignificant cases. The other judges appear to have held a poor opinion as to the quality of his work. Justice Brandeis wrote to Felix Frankfurter (then still at Harvard) complaining that McReynolds's

judgments were 'simply dreadful'. Justice Harlan Fiske Stone said 'McReynolds has set the law of admiralty back a full century'. His output was small. Even then, according to Knox, he appeared to resent being allocated the task of writing judgments. Chief Justice Taft complained that McReynolds was 'always trying to escape work'. Knox recounts in his memoir that McReynolds felt very strongly on an issue of the extent of presidential powers in foreign affairs in *United States v Curtis-Wright* 299 US 304 (1936) and was determined as the sole dissenter to write a detailed dissent. Although McReynolds's workload allowed him plenty of time to do so, when the judgment was due he took off on a duck hunting party. No judgment was prepared: he simply filed a one sentence unreasoned dissent from the orders.

To top it off, McReynolds attended to all of this with appalling rudeness. This extended to his judicial brethren (even non-Jewish brethren). McReynolds refused to acknowledge the existence of Justice John Clarke – because Clarke was 'too stupid'. Clarke's retirement letter to Taft made it clear that McReynolds's harassment had adversely affected his strength and health. He was especially cruel to justices Mahlon Pitney and Harlan Stone. His rudeness to counsel was famous. He heckled Felix Frankfurter during his presentation of oral argument in two cases in 1917. He might stand and leave the bench if unsatisfied with argument, or just turn his back on counsel. Knox's memoir of his time with McReynolds makes chilling reading in respect of the treatment of his legal and court officers, and especially toward his black domestic staff. Meanwhile, McReynolds entertained within his own class with a high reputation for 'Southern manners and gentility', and he was popular in a social set comprising mainly wealthy Washington widows.

McReynolds tried to hold on to his position, determined, he said, not to retire while the 'cripple' remained in the White House. After Roosevelt won the 1940 election, McReynolds gave in. He retired in 1941 aged 79 years. Perhaps as payback, the other judges failed to send him the customary valedictory letter. He lived in Washington until his death in 1946.

The esteem in which McReynolds was held by his colleagues might be measured by the fact that (contrary to usual practice) no Supreme Court judge, past or present, attended his funeral. Compare that with the six judges who attended the 1952 funeral of Harry Parker – a black court officer, and who, for many years, had suffered while he worked as a messenger for James Clark McReynolds.

Further reading

Lawrence, *Biased justice: James C McReynolds of the Supreme Court of the United States*, 30(3) *Journal of Supreme Court History* 244 – this is an excellent article, deeply researched and supported by detailed references.

Knox, *The Forgotten Memoir of John Knox*, 2002 – this is a marvellous book, set during the controversial 1936 term: the politics, the rudeness of McReynolds, the naïveté combine to make a great read.

A creature of a momentary panic

Tony Cunneen discusses the passage of the Judges' Retirement Act in NSW, 1917-18[1]

Introduction

Former chief justice, the Honourable Sir Gerard Brennan AC, KBE, in his address to *The Francis Forbes Society for Australian Legal History*, said that 'an appreciation of the law (is not) likely to be accurate without an understanding of the cultural and institutional forces which brought it into existence.'[2] A close examination of the passage of the *Judges' Retirement Act 1918* through the New South Wales Parliament in 1917 and 1918 provides a fascinating example of just how such forces have operated in the past. The bill graphically represents the interplay of political, personal and social issues on legislation, which, in this case, profoundly affected the careers of those in the legal profession. The passing of the bill went against English precedent and made more places available on the bench for lawyers who were Australian born and trained. It was the first time such an Act affecting sitting judges was passed in the British Empire.[3]

'Painful Scene in Court'

The first public mention of the proposal to set a compulsory age of retirement for judges in New South Wales occurred on Tuesday on 1 May 1917 when the *Sydney Morning Herald* reported a 'painful scene'[4] in Sydney's Banco Court. The defendant was one Hugh Beresford Conroy: a candidate in the then current federal parliamentary election, and a man with complicated domestic and business arrangements. His wife was the plaintiff. Conroy's application for an adjournment was not allowed by the chief judge in Equity, 74-year-old, English-born Mr Justice Archibald Simpson[5]. Counsel for the defense withdrew. Conroy said he would appear in person and applied immediately for Justice Simpson not to hear the case. When asked his reason Conroy told Justice Simpson:

> because you have reached a stage of life when it is impossible in the afternoon to remember what took place in the morning. It has gone past your mind. You are not fit to sit and conduct such cases as the present.

That comment was just the beginning of the extraordinary tactics Conroy employed in his own defence. He also claimed that he had been to visit the attorney general, David Robert Hall who 'was of the opinion that (Justice Simpson) had reached a stage when (he) should no longer sit on the bench.' Furthermore, Conroy claimed that Hall said that: 'A bill was being prepared fixing a Judge's retirement at the age of 70 years.' Conroy also claimed that Justice Simpson was 'unable to recognise matters of public interest' and that the New South Wales Bar agreed with this assessment. Conroy's manner was described as 'dramatic in style and almost threatening' by the *Sydney Morning Herald*.

Joseph Browne, a member of the New South Wales Legislative Council, was counsel for the plaintiff. He objected to the attack and said 'it was very painful to listen to such insulting remarks', although this was not the line he took when the bill was discussed in parliament. The exchanges between Conroy and Mr Justice Simpson continued with Conroy becoming increasingly agitated and eventually the *Sydney Morning Herald* reported that he 'made a remark' which caused

> 'considerable excitement . . . throughout the court. The tipstaff approached Mr Conroy and shouted "Silence!" Mr Conroy's excited condition indicated a possibility of something more forcible than his language. The constable attached to the court came into the room.'

The judge and his associate left the court and as they did so Conroy shouted at the top of his voice 'I address you so that you can hear me. I know that you are deaf.' Conroy was still passionately fired up after two brief adjournments. When Justice Simpson refused again to grant the application Conroy shouted: 'You've got a maggot in the brain' amongst other things, and made particular reference to Mr Justice Simpson's supposed deafness and mental acuity.

After the account of the court room scene the *Sydney Morning Herald* included a short disclaimer from the Attorney General Hall and the Acting Premier Fuller admitting contact with Conroy but stating that they did not support his attempt to remove Justice Simpson from the case.[6] Hall and Fuller did not deny the existence of the proposed legislation.

The Meagher Case and 'septic prejudice' on the bench

May 1917 saw another controversial intersection of judicial power and politics when Richard Meagher MLC made his fifth application to be restored as a solicitor of the New South Wales Supreme Court. Meagher had been involved in a protracted process to be reinstated after having been struck off because of his involvement in the celebrated Dean case[7]. On 28 May 1917, not long after Conroy's bizarre performance before Justice Simpson, Meagher's application was heard by the full court, consisting of the chief justice, Sir William Cullen, Mr Justice Pring and Mr Justice Gordon. The high profile of the case meant that 'large numbers of the legal profession' crowded the gallery. The Honourable John Jacob Gannon KC MLC and another well-known barrister, HE Manning, represented Meagher.

The application was made on the grounds of Meagher's conduct in recent years. The *Sydney Morning Herald* had two full columns devoted to the case, which was understandable

as Meagher was the lord mayor of Sydney and had previously been speaker in the Legislative Assembly – although he had lost his seat in the recent election and subsequently been appointed to the Legislative Council.[8] Supporting Meagher's application for readmission were affidavits from a range of barristers and politicians. Much emphasis was laid upon Meagher's political career as a reason for his readmission.

Chief Justice Sir William Cullen responded to the reference to political success in particular. He asked if 'success in politics' was 'solid and substantial' evidence of a changed character. Counsel said it was. Sir William Cullen replied:

> Then it is easier for a successful politician to obtain reinstatement than for an obscure and friendless solicitor?' Counsel said that it gave the person a chance to prove his rehabilitation then Sir William Cullen asked 'Is the Court to take the opinion of politicians as evidence guiding its own opinions?[9]

Counsel stated that he was only submitting it as evidence.

The Incorporated Law Institute was the defendant. Its counsel argued that a man 'must be judged on his whole life' and submitted that the affidavits concerning Meagher's political success should not sway the court. Sir William Cullen agreed. The application was refused. Within a few months Meagher was speaking to support a motion to limit setting the retirement age of the same judges who had so recently sat in judgment over him. Meagher could best be described as incandescent with rage against the chief justice. He made repeated inflammatory speeches on the topic in subsequent years, attained the support (by his own account) of a number of prominent citizens and produced, in 1920, a vitriolic account of his life in which he accused Chief Justice Cullen of all manner of transgressions, including 'gross bias' and 'despicable' and 'septic prejudice' regarding his application for readmission as solicitor.[10]

The newly elected New South Wales Nationalist Coalition Government of the day was also involved in a tense exchange with the New South Wales Bar Council in May 1917. The council opposed the speaker of the Legislative Assembly, John Jacob Cohen KC as an appointee to the bench immediately after the April elections. Attorney General Hall did not take this well and condemned the council as an 'irresponsible body.'[11] Interestingly enough and perhaps in the best tradition of politics there were firm denials in the press in May 1917 that Cohen was even being considered as a judge.[12]

Relations between judges and politicians were not always strained. They appeared together in many patriotic forums. In April 1917 there had been a farewell for Premier Holman before his departure overseas. Judge Backhouse spoke saying how much his respect for Holman as a lawyer was 'real and earnest' and that he had done good work in a variety of social fields. This comment was only one of many in which judges' views on a variety of judicial and social issues were reported. Judges were in the news throughout the year as they supported war-related causes or had their judgments extensively reported in the press. The *Sydney Morning Herald* regularly devoted a full closely typeset page reporting legal proceedings with extended accounts of statements, cross examinations and judges' comments.

Background to the Act - 'tension, bitterness (and) violence' in New South Wales

The Judges' Retirement Bill originated during an extraordinary time in state politics. The year, 1917, was marked by 'escalating industrial tension, bitterness in public life, and violence at levels rarely seen in modern Australian politics.'[13] The Labor party was still raw from the split over the issue of conscription in 1916. In August 1916, Premier Holman and Attorney General Hall had been among those who had been expelled from the Labor Party as a result of that split – taking all the Labor lawyers with them and Prime Minister William Morris Hughes, who was another Sydney barrister. In late 1917 there had been the protracted, intense industrial disputation known as 'The Great Strike'. All this occurred during one of the worst periods of the Great War. Twenty members of the legal profession lost their lives to the war in 1917 – nearly as many as the total number of deaths in the profession for the years of 1914, 1915 and 1916 combined. The battlefield casualties nearly included the state premier, William Holman.

Premier Holman was on a tour of England and the Western Front after the state election and visited the New South Wales units in the front line. General William Holmes was guiding him when they were subject to shellfire. Holmes joked that the enemy had spotted Holman so they moved. Within minutes another shell landed nearby and killed Holmes outright. Holman was badly bruised and shaken by the experience.[14] Amidst all this drama, for some of the murkiest reasons, on 23 October 1917 the Attorney General David Hall stood in the Legislative Assembly and introduced a bill 'to provide for the retirement of certain judges, and to provide for their pensions on retirement.'[15] The intention of the bill was that all judges should retire at 70 years of age.

'A government of Lawyers'

The Nationalist Government, which was voted into office in New South Wales in April 1917 and which proposed the bill for the Judges' Retirement Act, was understandably labelled

'a government of lawyers'[16]. The premier, William Arthur Holman, and his attorney general, David Robert Hall, were both Sydney barristers as were: George Warburton Fuller, the colonial secretary and acting premier from April to October, 1917; Augustus Frederick James, the minister for public instruction; John Garland KC, MLC, the minister of justice and solicitor-general; George Stephenson Beeby, the minister for labour and industry and John Daniel Fitzgerald, MLC, the vice-president of the Executive Council as well as minister for public health and local government. In all seven out of a ministry of twelve were listed as Sydney barristers. Broughton Barnabas O'Conor, also a Sydney barrister was chairman of committees. There were in total seven barristers in the Legislative Council and six solicitors[17] – 13 lawyers out of 71 members. In the Legislative Assembly, there were five solicitors and six barristers out of 90 members. [18] Yet, despite the preponderance of lawyers, this government passed legislation, which in effect, if not in intention, removed judges from office.

Support for the bill created a strange alliance – between deeply antagonistic political rivals. Among the senior members of the Nationalist Government side, led by Holman[19], were those who had been expelled from the Labor Party in 1916 and formed the coalition. Their former colleagues labelled them 'rats'.[20] Opposing the Nationalist coalition government on most issues were the committed members of the Labor party who had stayed faithful to its conference decisions and therefore remained within its organisation. But on the issue of judges' retirement ages these two opposing groups found common ground. There is some mystery as to why such bitter opponents should be in agreement over such a question. The congruence of aims between the two parliamentary groups against judges challenges the notion of an oligarchic alliance of judges, government and business ruling the state. Manning Clark referred to them as the 'comfortable classes'[21]as if they were homogenous a group acting in unison based on their privilege.

Why bring in the Judges' Retirement Act?

Considering the general congruence of values and actions concerning support for the war between the members of the Holman Nationalist Government and the judiciary it is difficult to understand why they should want to bring in the Judges' Retirement Bill. The Nationalists and many others saw the wartime situation as one in which patriotic concerns should override anything else. Industrial matters were considered of little consequence by many people in comparison to the historic mission against German militarism despite the genuine hardship caused by the losses in battle and the falling wages and increasing prices. Generally speaking a quick review of the decisions and public statement made by judges during the war indicates that they agreed with the ideals of the nationalist government.

Various reasons for the introduction of the bill in 1917 have been advanced. Judicial biographer, HTE Holt, writing in *A Court Rises* stated that the Act was rumoured to have been to remove Justice Heydon from the Industrial Court[22]. Andrew Frazer, in his biography of Justice Heydon acknowledges this suspicion but also mentions the references to Justice Simpson's deafness as the impetus for the proposal[23]. Labor Politician, HV Evatt in *Australian Labour Leader* wrote that the Act was passed to open up judicial positions and allow for the fulfillment of some politically based deals – specifically the appointment of Holman's long-term political enemy but Nationalist ally-of-convenience, Charles Wade KC as a judge on the Supreme Court. Wade KC later replaced Mr Justice Sly who, as a result of the Judges' Retirement Act, 'was forced off the bench in 1920 when he was at the very height of his powers.'[24]. There are some hints in the parliamentary debate to possible deals, but it is impossible to discern if these are genuine or simply part of the fabric of heated discussion in the New South Wales Legislative Assembly – known as 'The Bear Pit' for its rambunctious style.

While it may appear that there were many occasions when the judiciary enthusiastically supported government legislation, such as with the *War Precautions Act 1914*, JM Bennett notes that at the time in question there were persistent 'unfriendly relations between the government and the judiciary', which continued into the 1920s[25]. The Judges' Retirement Act can be seen as a feature of that tension. Bennett quotes Sir Thomas Hughes' characterisation of the Act as 'one of the crudest specimens of injustice that has been presented to. . . a creature of a momentary panic.'[26] The panic he had in mind may well have been the result of the incident involving Justice Archibald Simpson and Conroy in May. There is some evidence in the parliamentary debate to support any and all of these explanations as well as revealing much about the nature of judicial functions and pressures at the time. The bill came out of a very specific set of circumstances. Whatever the stated reasons for the bill, there were sufficient allusions and references to specific judges and matters to suggest that there were a variety of agendas influencing those members who supported the bill.

'Judges seem to have their peculiarities and strange ways'

Attorney General Robert Hall introduced the *Judges' Retirement Bill* on 23 October 1917 by stating that: 'There must come a

time in the life of every man when the passing of the years renders him unfit to continue the work in which he was engaged in earlier life.'[27] Hall was of course referring only to men. At the time women were precluded from any legal appointments in New South Wales.[28] Hall had little to offer as a justification of the bill. He said that when a man 'obtains a position on the bench . . . he has reached the end of his hopes and the end of his fears.' He then mentioned the principle which precluded a puisne judge from becoming a chief justice as being that 'when a man takes a judicial position he must never expect any advantage and never fear any disadvantages'.[29] Hall also addressed the possibility of allowing judges to remain on the bench after 70 years of age if they were certified to do so. He claimed that such a process would 'interfere with the entire independence of the judiciary.' The possibility that he was interfering in the independence of the judiciary by introducing the bill in the first place was not addressed in his speech. Hall admitted that the measure would mean that some judges 'who are so blessed that they go down into old age with an eye undimmed and a brain unclouded by the passing years' but he continued to say that the 'principle of allowing a man to decide for himself when he ought to resign is not a good one.'

Despite the bitterness of the split in the Labor Party in 1916 the Labor Opposition, led by John Storey was in furious agreement with the government on this proposal. Storey, the member for Balmain, was in favour of judges retiring at 70 years of age, but also worried about the possible additional costs extra pensions might bring. The issue of judicial pensions resonated throughout the debate. Storey also said that: 'Judges seem to have their peculiarities and strange ways. If one is to judge by the remarks made by some of them, they ought not to be allowed to reach the age of 70 before being asked to retire.' Furthermore he suggested that the only possible reason for introducing the bill while the country was at war was that of 'making room for a lot of barristers who (had) been working hard, and whose efforts (were) to be crowned with promotion.[30] He was supported in this belief by the controversial solicitor Thomas Ley, and other commentators[31]. HV Evatt was another one who believed that a major reason for the bill was to create space for men at the bar.

Following John Storey, the well-known Sydney barrister and newly elected member for the middle class seat of Gordon, Thomas Rainsford Bavin, rose to his feet. Bavin was just beginning a political career that would eventually see him made Premier. At the time he was, among other posts, an officer in the Navy Reserve and about to be put in charge of the Sydney office of naval intelligence[32]. He was also well connected to the judiciary through his involvement in a number of organisations and was 'strongly opposed' to the bill. Bavin stated that 'history disproves' the proposition that men are too old to perform judicial duties at 70 and referred to the certainty of forcibly retiring men who were 'thoroughly efficient in their duties.' He suggested that 'the test should be efficiency, not age . . .' He pointed out that it would affect 'some of the best judges in the state,' to which John Cochran, the Labor Member for the working class, harbourside electorate of Darling Harbour interjected, 'And some of the worst.' John Cochran, a catholic ex–labourer and Union official, was continuing the theme commenced by John Storey: that certain judges were the enemies of the working class.

Three score years and ten

Cochran then spoke for the bill and displayed antipathy for England and judges. He said that he did 'not have too great sympathy for those octogenarians who occupy seats on the bench,' nor did he have 'very much admiration for those old gentry in England who it (was) said have given their best services after having attained the age of 70 years.' As far as he was concerned the determination of 70 years for retirement was appropriate because it was 'the allotted span of three score years and ten' as taken from the Bible. He believed that the judges' decisions were 'notoriously out of joint with the times.' He was more sympathetic with those men who were 'victims of the spleen and irritability' associated with 'certain gentlemen on the bench.' He used as an example the case of one piece of 'storm-tossed human wreckage flung up on the shores of time by the waves of adversity' who had been sentenced to ten years jail for receiving stolen chocolate which had been stolen from a wharf.[33] His dislike of judges became more apparent the longer he spoke. According to him, Criminal Court judges inflicted 'injustices' on those who came within their 'clutches'. Furthermore, Chief Justice Sir William Cullen was drawing two salaries as he was also acting Governor at the same time as occupying the bench. At which point Temporary Chairman Colquhoun ruled he could not discuss the conduct of any judge. Cochran stopped any specific mention but stated that he refused to 'bow down and worship in the religious atmosphere which (surrounded) a judge and his position.' There was more in that vein. Basically he hoped to 'purge the judicial bench of gentlemen who should long since have retired.' His reference to a purge is a good characterisation of the motives of the Labor members in supporting the bill. The interesting aspect is that the attorney general, Robert Hall, joined his political enemy, Cochran in his opposition to Bavin. It is hard to believe that they shared exactly the same reasons

for their positions, unless Hall harboured some residual class loyalty from his years in the Labor Party.

Others who supported the bill did not match Cochran's bile. John McGirr, the Labor member for Yass, was one of those who took the chance offered by the discussion of the bill to lampoon judges. He had a novel suggestion for dealing with those judges 'whose faculties (were) failing before they reach 70 years.' His suggestion was that there should be a

> sliding scale, and that judges should go down the scale as they got older. For example, a Supreme Court judge whose brain was beginning to weaken at 60 years of age should be made a District Court judge; at the age of 64 he should be made a police magistrate; at 65 he should become a justice of the peace; and at 69 his services might be utilised as a policeman.' Furthermore, to correct any injustices already done, he suggested that 'men who have been condemned by judges over the age of 70 years . . . should be liberated and compensated.[34]

The Parliamentary Record does not mention any reaction to this imaginative suggestion.

Percival Brookfield was another Labor party member who had experienced the pressure of having to defend himself in front of a judge. He spoke for the bill and said that 'since the *War Precautions Act* has been in force it has been impossible for any man belonging to the Labor party to speak in the open without the dread of the Act falling upon him.'[35] Brookfield was a militant socialist who had been jailed under that same Act in 1916 for 'cursing the British Empire and calling William Morris Hughes a 'traitor, viper and skunk.'[36]

After Brookfield and Bavin engaged in what appears to have been some good hearted banter over whether or not a judge may recognise or enjoy listening a rendition of *The Red Flag* Brookfield was keen to point out that the class he represented came

> under the ban of the judges more frequently than do members of any other section of the community, and there is a general feeling that both judges and magistrates are allowed to remain on the bench until they become too old. The ideas of old men become warped and out of date, and very few men who reach the age of 70 are able to retain a youthful mind.' When challenged by the example of Jabez Wright, the 65-year-old Labor Member for Willyama, Brookfield had a ready answer that Wright 'was one of those few men who, though old in years, (had) kept his mind evergreen by living with the working-classes.

Whether or not Brookfield was being serious, he was clearly putting forward a vigorous assertion of his class interests. It is hard to escape the conclusion that amongst the Labor members the debate over the Judges' Retirement Bill was a good opportunity to settle some old scores, whether just or unjust. For once their prejudices coincided with the government, and they could achieve a desired outcome in removing the judges they disliked while lampooning the government at the same time. It must have been good sport for Labor. They did not let their opponents off the hook.

Labor's evergreen Jabez Wright was another who believed the bill was introduced because in his words there was 'an immense crop of barristers in Sydney who demand(ed) some recognition on the part of the 'Government, and that if rumour was not the 'lying jade she (was) supposed to be' Hall himself was 'seeking a position on the bench.' It was the 'crop of briefness barristers in Sydney, aspirants for the position of judges (who had) egged' Hall on to make room for some of them on the bench.' The bill was to 'enable some of the Government supporters to win judgeships.'[37] However, he also stated he was against the law because he believed that a judge should be retired when it was 'proved that he was incompetent', which put him in the same camp as Bavin and others. Wright ended by saying that he felt there were 'too many laws and too many lawyers. This government is a Government of lawyers.'[38] Brookfield took over from this somewhat confused rant by reminding people that Labor welcomed the bill but wanted the age to be 65. Perhaps Jabez Wright's mind was not quite as 'evergreen' as Cochran had suggested. Wright's reporting of the rumours had hit a nerve for some and again supports HV Evatt's belief that the bill was to make room for appointments such as that of Wade in fulfillment of a political deal between him and Holman in 1916 to form the Nationalist Government.[39]

The debate continued in much the same vein as described so far. There was minimal discussion of the realties of age, but repeated complaints about judges.[40] Valentine Johnstone, a solicitor's clerk and the Nationalist member for Bathurst hoped that the bill would get rid of 'undesirable' judges who were 'irritable, irascible, and showed bad temper (and) failed to display that calm judicial temperament which, in conjunction with the law, was one of the reasons which brought about their selection to occupy their . . . high position.' He believed it was 'better to risk displacing some mental prodigies (than to) risk piling up of bad judgments and bad precedents.'[41] Labor members such as FM Burke, member for Newtown were able to bring out a number of complaints which suggest that for him the bill was a rejection of the colonial order. His opinion was that Great Britain was lagging behind Australia as far as 'democratic ideas' were concerned. He said that 'when a man reaches the age of 70 he has lost all his democratic ideas, is conservative in his views, and ha s a tendency to look upon

younger members of the community with a very severe eye.'[42] It was clear that the Labor party hoped to get rid of those judges with whom they had had bad experiences, and replace them with others more likely to follow emerging principles of workers' rights and be not quite so aligned with the Imperial cause. Furthermore, they were not content with removing the judges, but wanted them to be without pension rights as well.

On 25 October at 2 am the House went into committee again to consider amendments, which would ensure the preservation of a full pension for any judges who may have been forcibly retired because of the act before their full entitlements were established. The judge specifically named in this regard was Justice Heydon. At the time he was one of the most high profile and perhaps controversial judges sitting in New South Wales – especially for Labor supporters. Jack Lang could not resist the opportunity to speak of what he saw as an 'extra pension' to Judge Heydon.' Lang continued 'Judge Heydon has been one of the bitterest and worst enemies-' but then Thomas Bavin raised the point that the attack was irrelevant and out of order[43]. The speaker of the House had already ruled not to mention any individual judges but Heydon was now out in the open. His name would be mentioned more than that of any other judge. Jack Lang called Heydon 'an enemy of the class' Labor represented. Furthermore he fulminated that 'this so-called National win-the-war Government (was) going to give a pension to the senior judge of the Industrial Arbitration Court, Mr Justice Heydon, for services rendered.' Bavin challenged these remarks, maintaining that Heydon's only enemies were those who attempted 'to destroy the industrial peace and prosperity' of the country. Here he was alluding to the treatment meted out by Heydon to those unions, which had been involved in the Great Strike, which had only just finished, and was a resounding defeat for the labour movement, largely due to Justice Heydon's strong action.[44] He had made some some bitter enemies as a result of his action.

Mr Stuart-Robertson, who favoured a tribunal to examine judges at 70 years of age, also supported Heydon as 'one of the very best lawyers in New South Wales' but mentioned the problem that 'some of his remarks from the bench seem to go beyond the actual meaning of the law he is dealing with.'[45] Justice Heydon did tend to make strong comments. In one judgment he invited a comparison between what he saw as intransigent union activism and the way 'they must have grumbled in the trenches. But the Germans got nothing out of it: no indeed, never!'[46] By late 1917 Justice Heydon was involved in all manner of political, social and judicial issues. As head of the Industrial Court he had the discretionary power to determine which cases he heard as well as their outcomes. He wielded these powers in accordance with his particular worldview of service, loyalty and the need for patriotic restraint. In the war years strikes were seen as treasonous and the responsibility of the appropriate union, whether or not the executive of the particular union had sanctioned the stoppage. Heydon had deregistered 26 unions by November 1917. No wonder the Labor members of parliament disliked his rulings. He was involved in all manner of controversial issues not just in court. In November 1917 he became embroiled in a dramatic public confrontation with Archbishop Mannix. The incident is worth reporting here as it is contemporaneous to the debate and involved another senior lawyer and politician, Sir Thomas Hughes.

Justice Heydon – 'A second or third class judge of some kind or another'

The campaign for the Second Conscription Referendum had taken place in the second half of 1917. Once again all levels of the New South Wales legal profession supported the cause of conscription to fight overseas. If anything they were more involved than during the campaign for the first Conscription Referendum in 1916. One of the key opponents of conscription was the feisty Irish Catholic Archbishop of Melbourne, Daniel Mannix. His views were not shared by the Sydney Catholic Establishment, of which two leading lights were Justice Heydon and solicitor and member of the Legislative Council, Sir Thomas Hughes.[47]

When a new Papal representative, Archbishop Cattaneo, arrived in Australia in early November 1917 Sir Tomas Hughes and Justice Heydon visited him at *Rockleigh Grange*[48] in North Sydney to have, in Hughes' words, 'a solid hour of hard talk' to ask Cattaneo to 'suggest to Mannix to moderate his ardour' in the anti-conscription cause[49]. Cattaneo, like his predecessor, did not intervene. Mannix persisted in promulgating his position regarding conscription so Heydon, with Hughes' approval wrote a letter to all the daily papers in Sydney. *The Telegraph* passed it on to *The Age* in Melbourne. Heydon did not hold back in accusing Mannix of 'faithless disloyalty and enormous folly'. Heydon wrote:

> In proclaiming his sympathy with Sinn Fein, in urging us to put Australia first and the Empire second, the Catholic Archbishop of Melbourne has shown himself to be not only disloyal as a man, but – I say it emphatically, archbishop though he may be, and simply layman though I be – untrue to the teachings of the church . . . .For a Catholic archbishop to lead his flock along the paths of sedition is to disobey the clearest teachings of the Catholic Church.

There was more in this vein, about the 'tyrannical invaders' of

Belgium and the abuse of freedom which allowed such ideas to be promulgated, but then there were even darker hints about 'the time chosen to inflict this stab in the back of the empire – this time of strain and difficulty, with the heavy clouds of disaster lowering around. . .'[50] Apart from Sir Thomas Hughes, Heydon was also supported by another leading Catholic jurist, Mr Justice Gavan Duffy of the High Court, whose sons had attended St Ignatius College, Riverview along with those of the Sir Thomas Hughes' family. Heydon's letter was controversial, but Mannix's response sent the argument into overdrive. Mannix was reported in *The Argus* of 21 November as saying that Heydon was a 'second or third class judge of some kind or another' and the Catholics whom Hughes and Heydon 'led' would comfortably 'fit into a lolly shop.'[51] The colourful hyperbole led a number of prominent Sydney lawyers, such as Richard Teece, to write letters to the *Sydney Morning Herald* defending Justice Heydon. Justice Heydon was certainly a central figure in New South Wales at the end of 1917. There were plenty of people who wanted to get rid of him

'A difficult and a delicate matter'[52]

The next time the bill was extensively discussed was in the Legislative Council 27 February 1918. It was introduced as a 'difficult and a delicate matter' in a long speech by the Honourable John Garland KC, the minister for justice and solicitor general. It was exceedingly strange to find him in agreement with Labor's Jack Lang of the Legislative Assembly. Garland KC mentioned that there were 'cases where men (had) lingered superfluous on the bench after their term of usefulness had expired.'[53] He cited as precedent the situation of stipendiary and police magistrates as well as members of the public service. He referred to 'the constant strain of mental concentration that constitutes the hard and exacting portion of the judicial work'. He spoke in general terms of the need 'to prevent a judge from being the judge (of the time to retire) in his own case.'[54] He did however introduce the idea that the bill should proceed with the proviso that any judges forced to retire because of the bill should 'be entitled to their full pension rights' as if they had been on the bench for the necessary number of years.[55] At the time Supreme Court judges retirement benefits were half their annual salary of five thousand pounds, and District Court judges three thousand pounds. One of the side effects of the bill was to accord Justice Heydon the same pension rights as a Supreme Court judge. Garland KC said of Heydon that 'his position of senior judge of the Industrial Arbitration court, (was) that of a District Court Judge, and strictly speaking the pension to which he would be entitled (was) probably only that of a District Court Judge.'[56]

Garland KC went on to say that Justice Heydon had done great 'yeoman service' and had performed 'excellent judicial work' in his position in the Arbitration Court. Garland KC argued that 'It was never intended that judges should hold office for life.' Rather the intention had been to prevent their arbitrary dismissal by the Crown. He was keen to address the issue that the proposed bill was a beach of contract with the judges. This issue reoccurred throughout the debate and in the reactions of the various people to it[57]. Garland KC believed that the proposed act would prevent the possibility of 'judicial scandal' in the future. Such scandal could cause the situation that 'while the public mind is heated in connection with that matter Government may take advantage of the circumstance and pass a much more drastic measure (and) infinitely worse' than the one being proposed[58]. He admitted that the bill meant that the state could lose the services of some 'competent' men and that it would be desirable for a way to be found to found that those in the 'full vigour of their intellect, may be retained by the State.' He also admitted that the bill entailed some 'hardship' and 'injustice' on the incumbent judges but he completed his speech by saying that on balance it was in the public interest to 'better the administration of justice and 'maintain, if not increase the high respect in which the judicial bench has always been regarded in this State.'

The influential Sydney Solicitor, Sir Thomas Hughes, then spoke. His close ties to the judiciary were indicated by his recent public alliance with Justice Heydon against Archbishop Mannix. Hughes spoke of 'an unfortunate incident in a court of justice' six months previous. No doubt he was referring to the squabble between Conroy and Judge Simpson in Banco Court in May 1917. Hughes said it was this incident which 'caused the government of the day to bring in a measure aimed at one man but which hits the wrong man.' He mentioned that this 'notorious' bill was not needed because the 'difficulty' had long since disappeared: because Justice Simpson had gone on leave from the bench in July then resigned in December 1917. Hughes stated that 'That incident gave rise to the bill, and in that sense the measure (was) really and truly the creature of a moment's agitation and not the product of calm and deliberate consideration as to what (was) best for the administration of justice.' He noted that the Britain avoided such bills but now the New South Wales government was 'introducing in a most insidious way political interference with the office of a judge.' To him the bill was clearly intended only to get rid of one man but would sweep up others. As 'many men have only attained their full ripeness of judgement when they were approaching the age of 70 years'.

Joseph Alexander Browne interjected that 'They were a long

time learning.' And that rather dismissive tone would continue with some of the members of the Legislative Council while they pushed the legislation. This was the same Joseph Browne who had stood in front of Justice Simpson in May 1917 and objected that it was 'painful' to hear Conroy's accusations about judicial deafness, maggots in the brain and suchlike. Browne spoke at length of the possibility of judges' deafness or 'mental feebleness' causing difficulties in complicated cases. Browne claimed that there had already been cases in which litigants had been injured by the poor quality of judges. It was not recorded whether or not he had Justice Simpson in mind at the time.

Sir Thomas Hughes persisted in his attack on the bill. He stated that 'there has been no attempt at legislation of this character to remove existing judges in any part of the British dominions.' For that reason alone the legislation should not pass.[59] To him the danger was that the state could get a 'venal bench. . . depending upon the favour of any government' and compared the current situation to the United States where 'judges (were) often the creatures of a political party.' The bill would set a precedent for 'political interference' in the bench. He too was in favour of a scheme which would allow certain judges to continue occupying the bench beyond the age of 70 and suggested the establishment of some 'neutral body' which would have the 'right to report on the fitness of any occupant of the bench' because the bill was a 'breach of contract between the individual judge and the government who appointed him.'[60]

One of the most effective and articulate opponents of the bill was the recently appointed member of the Legislative Council, Professor John Peden of Sydney University Law School.[61] He mounted a well-argued defence against the bill citing recent English commission, which had 'been sitting to inquire into delay in the King's Bench Division.'[62] The idea of setting a specific age for the retirement of judges had 'been a matter of intense interest in the profession in England' just before the outbreak of the war.[63] Peden reported that the British committee recommended that there should not be 'a hard-and-fast age limit, but an age limit subject the qualification that a judge should continue in office as requested to do so for a period determined by a non-political committee . . . constituted of the Lord Chancellor, the Lord Chief Justice, and ex-Lord Chancellors who were still doing judicial duties either in the Privy Council or the House of Lords.'[64] He suggested that in New South Wales the committee could consist of the chief justice, unless it was his own case, then it would be the senior puisne judge, the senior elected member of the Bar Council, or the attorney general, and the president of the Law Institute. This was an interesting and workable suggestion, in that the proposed committee would be not to get rid of people but to keep them on. The fact that it was not taken up supports the contention that the fundamental motivation behind the bill was to rid the bench of certain judges, not simply that there were concerns about age. The persistent, abusive interjections during the discussion indicate the deep antipathy some members felt towards judges.

There was some discussion over Peden's suggestion and one of the members who questioned the proposal was Richard Denis Meagher. He and others challenged the idea of judges or prospective judges being involved in the process of determining who should stay on the bench after the age of 70 years. Peden's proposal was that judges would automatically retire at a certain age unless some 'competent impartial body (was) prepared to take the responsibility of saying that the judge's mental and physical powers (were) so obviously unimpaired that his retirement under the Act would mean the loss of valuable service to the community.'[65] Meagher seemed to know that he had the numbers on his side as he engaged with the concept of who would be on the committee. Some suggested medical men. Meagher suggested that 'in the case of a deaf judge, one member of the commission should be an aurist.'

Peden did not respond to Meagher directly but continued the argument that the bill was a breach of contract with judges who had been given a life office. He noted that no parliament 'in the British Empire (had) interfered with the tenure of a judge.'[66] Peden repeatedly cited British precedent and reiterated his principle that because 'no case has been made that there are certain judges who should come off the bench (then) the bill should not apply to existing cases.'[67] But as the debate proceeded the comments gave indication that the politicians really wanted to get rid of at least some of the sitting judges. Garland KC, in response to Dr Nash's concern that good men would be lost from the bench, exclaimed: 'It is the only way you will get rid of them!'

Dr Nash was one of these with a lurid view of the situation and he considered the proposal to be 'more extreme perhaps than the Bolsheviks.'[68]

Peden could not change the bill. It proceeded as drafted and guaranteed that all sitting judges received their full pension entitlements on retirement whether they had qualified for them under the terms of the 1906 Judges' Act or not. Garland was not sympathetic to the idea of a committee to assess judges. Arguments against the bill such as that it was of breach of contract were also countered with Garland stating that 'every judge who accepts office under an Act of Parliament knows

that that Act of Parliament may be changed by the power that made it.'[69] There would be no further change to the bill other than those with respect to pensions.

Protracted discussion ranged over the same issues which had already been canvassed: breach of contract; citations of influential men such as Gladstone who had been effective beyond 70 years, with counter examples of men such as Henry Parkes who had declined in later life; comparisons with other areas such as coal contracts; bank retirement ages; the role of government and the responsibility to the community. There were some neat debating points and some convoluted and occasionally contradictory arguments but it is fair to say no one indicated that they had changed their opinion. It was a long debate and Peden's proposal to exclude sitting judges from the bill was defeated two to one.

A tribunal for judges?

Professor Peden tried to modify the bill again. He reiterated his argument that the New South Wales Parliament should follow the suggestion of the British royal commission to establish a tribunal 'to deal with the question whether a judge should or should not be asked to continue in office notwithstanding the fact that he had reached a certain age.'[70] There was a testy exchange with the barrister, John D Fitzgerald who was goaded into admitting that he did not consider all the existing judges competent to perform their judicial duties.[71] Peden persisted in trying to modify the bill and suggested inserting two sub clauses into the proposed act which would allow for the establishment of a tribunal consisting of the chief justice of the Supreme Court, or the senior puisne judge if it was the chief justice who was the subject, a practising barrister elected by the Bar Council of New South Wales and the president of the Incorporated Law Institute of New South Wales.'[72]

There was extended discussion of this proposal. The tenor of the government's comments suggested that the key issue for them was not just that judges should retire but they should not lose control of the process. Garland responded that he did not wish to abrogate the power over judges' tenure to a tribunal and that 'if the term of office of a judge is to be extended, it should be extended by the Government of the day, and no other body.'[73] He was supported by Richard Meagher who was no doubt still smarting over the full bench's recent refusal to readmit him as solicitor.[74] Meagher considered the idea of such a 'triumvirate' tribunal as anomalous in the new country where 'the coalminer of today is the Minister of tomorrow, and where the boilermaker of today is the Premier of tomorrow.'[75] Such egalitarian ideals and statements suggest that one of the background causes of the bill was to recognise the changing nature of the newly independent Australia and remove those judges seen as representative of the previous colonial system. Meagher also made the point that such a tribunal could cause great humiliation to those judges who were not invited to extend their time beyond the statutory 70 years. It was during the discussion on the composition of the tribunal that Meagher revealed his animus towards judges when he interjected that members of the tribunal should include 'the Inspector-General of the insane!'[76]

The next question the Legislative Council dealt with was that of judicial pensions.[77] The new bill retired some judges before they were entitled to their full pension. Justice Heydon would suffer in particular. Peden proposed that the bill be modified so that any sitting judge should be entitled to the full pension regardless of his length of time on the bench. In the process, Justice Heydon was accorded the same pension as that of a Supreme Court judge. There had been some confusion about his status at the time. There was some debate over the cost of the amendment but with all people in general agreement the report was adopted. The question resolved in the affirmative. The bill was read a third time. But then it had to go back to the Legislative Assembly and face the parliamentary Labor Party representatives there, who could now have a real go at opposing it. Judges' pensions were a topic sure to fire up men such as Jack Lang.

When debate on the amended bill commenced in the lower house, John Storey, the leader of the Opposition mocked it as 'The Judges' Protection Act' His colleague Brookfield wanted the whole bill debated again and suggested the retirement age as 60 until the chairman ruled against the discussion. The amendment was agreed to. And so the bill was finally passed. Other parliaments gradually followed suit.[78]

Judges 'rejoin ordinary mortals'

There were three judges who would be immediately affected by the Act: Judges Docker, and Fitzharding, on the District Court, and Justice Heydon on the Industrial Court. Justice Heydon stated that he 'felt extremely indignant and had hard thoughts of those who designed it.'[79] Judge Fitzhardinge had similar feelings. Other lawyers supported it. TS Crawford QC was a crown prosecutor from 1917, the year in which the bill was enacted. He wrote on the death of Judge Bevan that he (Bevan)

> did not belong to the judicial cult which regarded their presence as essential to the maintenance of justice itself. As a homely man I place him on the bridge connecting the lifelong judges with those who knew that, on attaining seventy years, they rejoin ordinary mortals.[80]

Wilfred Shepard writing in the *History of the New South Wales Bar* echoes this opinion of the some early judges as having a tendency towards hubris. He wrote that the judges in the early years of the twentieth century

> though undoubtedly able, formed two distinct types which either lightened or burdened the labours of counsel. On the one hand were the martinets, survivors of an even stricter age, who believed that cases should be conducted in an atmosphere of severity and strictness.' Justice GB Simpson, (no relation to Justice Archibald Simpson) 'not only needlessly asked counsel their names, but also how to spell them. Pring. J was as scrupulously strict as he was fair. On the other hand were those who inclined to a more moderate and less formal control of their courts. Gordon, J., was a distinguished example.[81]

Such commentary suggests that while the class represented so enthusiastically by people such as Jack Lang had cause to be concerned about their treatment by the judiciary, so did practising lawyers.

Over subsequent years a number of politicians who had been in parliament when the *Judges' Retirement Act* was being discussed were themselves appointed to the bench. The Speaker of the Legislative Assembly, John Jacob Cohen, was appointed a judge in the District Court n 1919. Wade was appointed to the Supreme Court in 1920, but died soon after. (Sir) George Beeby was appointed to the Profiteering Prevention Court in 1921 then went on to a successful career in the Industrial Court.

Conclusion: government versus the Judiciary

The passage of Judges' Retirement Act provides was a clear example of a government exerting its power over the judiciary. The bill arose from a variety of political imperatives and personal agendas and was the product of a unique time. The passing of the act may also be seen as one step in the process of moving away from a domination of the Australian judiciary by English precedent. In this case, Australia, specifically New South Wales, set the precedent for the British Empire. This situation indicates a small part of the evolution of Australia's relationship to the 'Mother country'. The implementation of the Act accelerated the process by which judges who had been born and edcuated in England were replaced by those from Australian backgrounds.The majority of the advocates of the bill were themselves lawyers who were passionate in their support of the Imperial cause in the war. But their unwillingness to accept English precedent indicates their desire to move from being a derivative of that country to an equal member of the Empire family.

Endnotes

1. Sir Thomas Hughes *NSWPD* Vol 70, p.2975.
2. Sir Gerard Brennan Former chief justice High Court, Speech to Francis Forbes Society for Legal History Essay Competition Awards Ceremony 25 February 2009 available on http://www.forbessociety.org.au/documents/brennan.pdf
3. New Zealand had passed a law limiting the age of judges but it did not apply to those already on the bench.
4. *Sydney Morning Herald,* 2 May 1917, p.11.
5. Justice Simpson had been on the Supreme Court bench since 1896 and had been Vice-Chancellor of the University of Sydney 1902-1904. He lived in Hunters Hill and had already lost one son in the war, killed in the fighting at Lone Pine on Gallipoli.
6. The incident was widely reported around the country including *The Argus* in Melbourne, the *Adelaide Advertiser* and the *Hobart Mercury*. Conroy did not appear in court the following day and Justice Simpson found for the plaintiff, Conroy's wife.
7. The Dean Case involved an instance where lawyers, including Meagher, defended a man they knew to be guilty. It is described in a number of places, including Cyril Pearl, *Wild Men of Sydney,* 1958 WH Allen London, pp.84-109 and the web site for the Francis Forbes Society for Legal History: http://www.forbessociety.org.au/
8. Meagher's appointment can be seen as a reward for his loyalty to Premier Holman during the Labor Party split over conscription in 1916.
9. *Sydney Morning Herald,* 29 May 1917, p.12.
10. Richard Denis Meagher, Speech in Banco Court 7 November 1919 in The Hon RD Meagher *A Twenty Five Years Battle* William Brooks & Co. Sydney, p.43. See also the front piece of this publication.
11. HTE Holt, p.166.
12. *Sydney Morning Herald,* 19 May 1917 'Mr Cohen not resigning', p.13.
13. Joan Belmont, ibid., p.51.
14. Holmes was closely connected with the New South Wales legal profession. He had been a regular correspondent with Justice Ferguson and had been the commanding officer of both of Ferguson's sons – Arthur who had been killed in action in 1916 and Keith. Keith had been severely wounded in action in 1917 in surprisingly similar circumstances to Holman's close shave. Keith Ferguson had been coming back from a battlefield tour with the same General Holmes who lost his life when he had been with the premier.
15. NSWPD Vol 70, p.1952.
16. NSWPD Vol 70, p.2040.
17. Although one, Richard Denis Meagher was disbarred at the time.
18. There had been a number of high profile lawyers in previous parliaments. Pilcher KC had been a member but had died only recently. So too had Bernard Ringrose Wise who had been a member of the Legislative Assembly and minister for justice, attorney general and acting premier. He had died in 1916. His replacement had been a long standing friend and another barrister: Thomas Rainsford Bavin. In the middle of 1917, Professor John Peden of the Sydney University Law School was appointed a lifetime member of the Legislative Council.
19. Premier Holman was overseas for the second half of 1917.
20. In all, 16 men had been expelled including the three barristers in the Ministry – Holman, Hall and Fitzgerald. The other expelled barrister was the Prime Minister William Morris Hughes. The disbarred solicitor Richard Denis Meagher was with them. Not for nothing was the Labor Party of the time pilloried for 'blowing its own brains out.'

21. Manning Clark, *A History of Australia* Vol VI *The Old Dead Tree and the Young Tree Green* Melbourne University Press. 1987. pp.47-80
22. HTE Holt *A Court Rises.*
23. Andrew Frazer 'Charles Gilbert Heydon' in Greg Patmore, (ed) *Laying the Foundations of Industrial Justice*. n 102.
24. HV Evatt *Labour Leader*
25. JM Bennett A *History of the Supreme Court of New South Wales,* pp.54-55.
26. NSWPD Vol 70, p.2975.
27. NSWPD Vol 70, p.2029.
28. Hall had attempted to remedy that deficiency in 1916. He would be successful in 1918 with the passing of *The Women's Legal Status Act 1918.*
29. NSWPD Vol 70, p.2030.
30. NSWPD Vol 70, p.2031.
31. Thomas Ley had a lurid career, eventually found guilty of murder and ended his days in an asylum for the criminally insane. *Australian Dictionary of Biography.*
32. Frank Cain. *The Origins of Political Surveillance*, 1983 Angus &Robertson. Sydney, p.32.
33. NSWPD Vol 70, p.2034.
34. NSWPD Vol 70, p.2037.
35. NSWPD Vol 70, p.2036.
36. *Australian Dictionary of Biography*. Brookfield, Percival Stanley. 'On 22 March 1921 Brookfield was shot on Riverton railway station, South Australia, while trying to disarm Koorman Tomayoff, a deranged Russian who had already wounded two people; he died that day in Adelaide Hospital and was buried in Broken Hill cemetery, where a memorial headstone was unveiled in 1922. The courageous manner of his death was sufficient answer to those who had attributed his opposition to conscription to cowardice'
37. NSWPD Vol 70, p.2039.
38. NSWPD Vol 70, p.2040.
39. HV Evatt *Australian Labour Leader* pp.420, 462, 485. Evatt was critical that the bill forced the retirement of very capable men such as Mr Justice Sly.
40. This was in keeping with criticism in the press. In an extensive article titled 'The Tyranny of Authority' by a writer using the name 'Lex' in The *Sydney Morning Herald* 10 July 1916 there was considerable criticism of judges in court, saying amongst other things that 'Judges are themselves to blame for countenancing an all too frequent practice of considering the irrelevant.'
41. NSWPD Vol 70, p.2041.
42. NSWPD Vol 70, p.2042.
43. NSWPD Vol 70, p.2134.
44. NSWPD Vol 70, p.2134.
45. NSWPD Vol 70, p.2134.
46. *In re The Australian Society of Engineers and Others* (NSW Court of Industrial Arbitration, Heydon J. 21 May 1918. Private papers of the Heydon family held in Hunters Hill Historical Society Archive.
47. Sir Thomas Hughes's son, Captain Roger Hughes RAAMC had been killed in action in December 1916, and his cousin Lieutenant Brendan Lane-Mullins was killed in June 1917.
48. Now part of the Australian Catholic University.
49. B A Santamaria Daniel Mannix: A biography, pp.84-85.
50. B A Santamaria Daniel Mannix: A biography, pp. 85.
51. Ernest Scott , p.422.
52. NSWPD Vol 70, p.2971.
53. NSWPD Vol 70, p.2971.
54. NSWPD Vol 70, p.2972.
55. NSWPD Vol 70, p.2973.
56. NSWPD Speech by The Hon John Garland, pp.2973-2974.
57. HTE Holt reports that Judge Grantley Hyde Fitzhardinge, who was over 70 years when the Act was passed considered it a scandalous breach of contract and mentioned this opinion in court, comparing it to the German's breach of the 'scrap of paper', p.125.
58. NSWPD Vol 70, pp.2974-5.
59. NSWPD Vol 70, pp.2976.
60. NSWPD Vol 70, pp.2976.
61. Later Sir John Peden. He worked in collaboration with Thomas (later Sir) Bavin in the Lower House.
62. NSWPD Vol 70, p.2984.
63. NSWPD Vol 70, p.2985.
64. NSWPD Vol 70, p.2986.
65. NSWPD Vol 70, p.2988.
66. NSWPD Vol 70, p.2989.
67. NSWPD Vol 70, p.2991.
68. NSWPD Vol 70, p.2994.
69. NSWPD Vol 70, p.3220.
70. NSWPD Vol 70, p.3231.
71. NSWPD Vol 70, p.3232.
72. NSWPD Vol 70, p.3232-3.
73. NSWPD Vol 70, p.3233.
74. Richard Meagher had been one of those expelled from the Labor Party in 1916 and who subsequently lost his seat in the Legislative Assembly. Premier Holman immediately appointed him to the Legislative Council. Such events made the government appear to be rewarding past favours and contributed to belief that the Judges Retirement Act was intended to provide opportunities for further rewards for loyalty.
75. NSWPD Vol 70, p.3234.
76. NSWPD Vol 70, p.3235.
77. The 1906 Act had modified the pension provisions of judges from the previous system where any judge who was appointed, even if only for six months qualified for a pension of seven-tenths of his salary. The 1906 Act changed this provision quite significantly limiting the pension entitlements judges could receive if they did not serve fifteen years on the bench.
78. In Queensland, *The Judges Retirement Act* (1921) removed a number of over-age judges.
79. HTE Holt, p.139.
80. HTE Holt, p.163.
81. Wilfred Shepard 'The Influence of the Bar in the Twentieth Century' in JM Bennett A *History of the Supreme Court of New South Wales* 266n.

The author teaches English and History and is the Senior Studies Co-ordinator at St Pius X College at Chatswood. He has published two books, *Suburban Boys at War* and *Beecroft and Cheltenham in World War I*, in addition to numerous articles. This article extends the research presented in two working papers on the legal profession in World War One, which may be accessed on the website for the Forbes Society for Australian Legal History at http://www.forbessociety.org.au/. The research is ongoing. There is certainly much more material available than has been currently accessed. People with information or interest concerning this topic are keenly invited to contact the author at: acunneen@bigpond.net.au. His previous article in *Bar News* was on Supreme Court judges in World War I.

Acknowledgement: The author would like to express his gratitude to the Forbes Society for Australian Legal History for supporting this research.

Preparing and arguing an appeal

By the Hon Michael McHugh AC QC

John W Davis is generally regarded as the best appellate advocate that the United States legal profession has produced. Judges of the stature of Chief Justice Taft and Learned Hand said that he was the most persuasive advocate they had ever heard. Such was his reputation that in December 1953, when he was aged 80, South Carolina briefed him to defend their segregation laws in the famous case of *Brown v Board of Education of Topeka* 347 US 483 (1954) in the Supreme Court. He lost that case. But the probability is high that, if the case had been argued nearly 30 years earlier in 1924, the year he was the Democratic Party's candidate for vice president of the United States, the result would have been different. The difference between the outcome in 1954 and the probable outcome in 1924 was the result of changing circumstances, particularly the recognition that the segregation laws were unjust and could not be tolerated in a free society. The difference in the actual and supposed outcome of *Brown* is a reminder that human beings decide cases, not computers, and that judicial decisions to a significant extent reflect the prevailing social attitudes, values and understandings of their time.

It is impossible to stereotype the way judges decide cases, although Judge Richard Posner has made a good attempt at it in his book, *How Judges Think*. But the judges who sit in appellate courts almost always have 'form' as evidenced by their previous judgments. Some will be conservative, some will be radical and some will be unpredictable in their approach to deciding cases. When the composition of the bench is known, as it always will be for the oral argument, it is important to tailor the argument, so far as it can respectably be done, to fit in with the perceived approaches of at least a majority of the judges. As Justice Sackville has pointed out, the multi-membered nature of appellate courts ('Appellate advocacy', (1996) 15 *Australian Bar Review* 99):

> …means that the members of the court to be persuaded will not necessarily be, and often are, not, of one mind. Part of the advocate's art is to understand, so far as he or she can, the temperament and judicial personality of each member of the court. This task is often more challenging than where the court consists of a single judge. Arguments that are received with scepticism or downright hostility by one member of the court may be attractive (or even, by their very response, become attractive) to another.

John W Davis understood better than most advocates that appeals are not decided by the mechanical application of fixed rules and that decisions are often the product in whole or in part of the way the judges think about the appeal process and approach the particular case before them. In a famous 'Lecture on Advocacy', he pointed out that, if fish could be induced to give their views on the most effective methods of fishing, no one would listen to a fisherman's account of the best way of catching a fish. So he thought that the best way to learn about appellate advocacy is to learn how judges think cases should be argued. With that in mind, as a former appellate judge, I shall put forward some views about appeals for your consideration and, I hope, enlightenment.

Preparation

It is pointless lodging an appeal unless you know what you want to do and why. No appeal is likely to succeed unless you have done extensive preparation before filing the grounds of appeal. You must master the transcript of the trial or other hearing and the judgment which will be the subject of appeal. You should make a note of every relevant fact favourable or unfavourable to your side. Bear in mind that to succeed, you must persuade the court that those facts that are, or appear to be, against you are not decisive. You will have to deal with them in your written submissions and at the hearing of the appeal. So make a note of them as well as facts that favour you.

You should also ensure that your research has led you to every statutory provision, case law or secondary materials that are relevant to the appeal. Unless you are a legal genius, you will have to do more than one bout of research, as you think through the law and the facts. If you think you will be relying on a case you find, check its subsequent history immediately. Don't wait until your memory has faded and you have forgotten it. Find out whether it has been followed, criticised, distinguished or overruled?

Nature of the appeal

An appeal is not a common law right: *Commissioner For Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225. The availability of an appeal depends on statute or rules of court. Many rights of appeal are limited by reference to subject matter, the amount involved or in some cases by the identity of the appellant. For example, in criminal cases, the Crown may have no right or only a limited right of appeal. Again many appeals may only be brought by the leave or special leave of the court. This is the case in respect of interlocutory appeals, that is to say, appeals against orders that do not dispose of the case.

In general terms, appeals fall into three categories. First, there is an appeal in the strict sense. In that class of appeal, the case is decided in accordance with the law and the facts that existed when the original judgment was given: *Victorian*

Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73 at 109, 110-111. Second, there is an appeal by way of re-hearing. Most appeals to intermediate courts of appeal fall into this category. In this class of appeal, the court determines the rights and liabilities of the parties in accordance with the law as it exists at the time of the appeal: *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194 at 203. However, the appeal is not a retrial of the issues between the parties, as if the case was being heard the first time. Even in this class of appeal, the appellant must demonstrate error: *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194 at 203-204. Usually in this class of case, the court has a discretionary power to hear further evidence, but exercises the power sparingly. The third class of appeal is a hearing *de novo*. In reality, this is not an appeal but an original hearing. The plaintiff, claimant or prosecutor will have to prove its case again. Appeals to the District Court from a magistrate's decision in criminal cases and many appeals to courts from the decisions of administrative tribunals or administrators are examples of this class of case.

Standard of review

Before lodging an appeal, it is imperative that you understand the standard of review exerciseable by the appellate court because the standard of review will be decisive as to whether the appeal will succeed. Sometimes, a statute or rules of court will specify the standard of review but usually it depends on principles worked out in decided cases.

If the case involves a point of law, then the appellate court can do what the trial judge should have done. If the case involves a question of fact, the standard of review is more complex. A finding of primary fact based on credibility of witnesses will be reviewed only where the finding is demonstrably improbable or contrary to other established facts or documents. A finding of fact based on inference is open to review on the basis that the appeal court is in as good a position as the trial judge to make the finding. A discretionary judgment, however, is only appellable in accordance with the principles in *House v The King* (1936) 55 CLR 499 at 505. That is to say, the appellant must establish error by showing that the court exercising the discretion has acted upon a wrong principle or given weight to irrelevant matters or failed to give weight or sufficient weight to relevant consideration or made a mistake as to the facts or that the result is so unreasonable or plainly unjust that the appellate court can infer that there has been a failure properly to exercise the discretion. In cases where the finding will affect the character or reputation of a person, the finding of fact will be reviewable only in accordance with the principles expounded in *Briginshaw v Briginshaw* (1938) 60 CLR 338.

Final or intermediate court of appeal

In practice, the right of appeal to an intermediate court of appeal is invariably much wider than the right of appeal to a final court such as the High Court of Australia. Furthermore, the approach of the court will be different depending upon whether it is the High Court or an intermediate appellate court.

The High Court is concerned with legal principle and what the law should be. Law making is a significant part of its function. Questions of policy therefore play an important part in many decisions of the High Court. Its primary function is not the correction of error but the formulation of principles which will have application beyond the instant case. The implications for legal doctrine of accepting or rejecting the appeal are therefore matters of significant importance in the High Court. The occasions on which the High Court will reverse factual findings in the courts below are comparatively rare. For the most part, the court will not grant special leave to appeal where the appeal will require the High Court to determine questions of fact. Even in cases where the High Court is asked to make findings of fact for the purposes of applying a legal rule or principle, it will usually refuse to do so where the intermediate court of appeal has upheld the factual findings of the trial judge (the concurrent finding rule).

The primary function of an intermediate court of appeal, however, is the correction of error. Its law making function is merely an incident of that primary function. Hence in an intermediate court of appeal, factual findings are usually open to review in theory. In practice, however, those courts are reluctant to interfere with findings of fact based on credibility. Moreover, for an appeal – even one by way of re-hearing – to succeed, the appellant must demonstrate error. In *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194, the High Court said that, even in that class of case, statutory powers of appeal are construed on the basis that, unless the statute indicates otherwise, the power is to be exercised for the correction of error. Once error is demonstrated, however, the intermediate court of appeal will decide the case on the law and the facts existing at the time of the appeal and, subject to the findings of the trial judge on credibility of witnesses, on its own assessment of the facts.

New game

The findings of the trial judge are not provisional until they are affirmed by the appellate court. They are the reality with which you must deal. You have to accept them or attack them. Until error is demonstrated, those findings bind the parties. The primary focus of the appeal therefore is different from the focus of the trial court. The appellate court searches for error and will not make its own findings – whether of fact or law – until the appellant has persuaded the court that the trial judge or, in the case of the High Court – the intermediate court of appeal, has erred. The playing field in the appeal is therefore smaller than it was at the trial. Unfortunately, this is a lesson that many trial lawyers who conduct appeals fail to understand. As Mr DF Jackson QC has pointed out in a paper on Appellate Advocacy, these advocates 'are not *really* prepared to give full value to the fact that the slate is *not* clean.' (Emphasis in original). (8 *Australian Bar Review* 245) Many points open at the trial will no longer be open to debate. The appeal is not the place to re-fight all the lost battles. Nor is it the place to debate every area which might have some connection with the issues in the appeal. To do so inevitably results in that party's argument lacking force and coherence.

Notice of appeal

The cardinal rule for drafting a notice of appeal is to be selective. If the appeal notice contains too many grounds, the best points are likely to be hidden in a thicket of weak points. The notice of appeal should identify only those errors of ultimate fact or law which affected the result, and the fewer the better. As Justice Branson has explained (*Sydneywide Distributors Pty Ltd & Anor v Red Bull Australia Pty Ltd & Anor* (2002) 55 IPR 354 at 355-356):

> Not every grievance entertained by a party, or its legal advisors, in respect of the factual findings or legal reasoning of the primary judge will constitute a ground of appeal. Findings as to subordinate or basic facts will rarely, if ever, found a ground of appeal. Even were the Full Court to be persuaded that different factual findings of this kind should have been made, this would not of itself lead to the judgment, or part of the judgment, being set-aside or varied. This result would be achieved, if at all, only if the Full Court were persuaded that an ultimate fact in issue has been wrongly determined. The same applies with respect to steps in the primary judge's process of legal reasoning. Although alleged errors with respect to findings as to subordinate or basic facts, and as to steps in the process of legal reasoning leading to an ultimate conclusion of law, may be relied upon to support a ground of appeal, they do not themselves constitute a ground of appeal.

In drafting a notice of appeal, the first question is, what is the nature of the error? Is it an error of fact or law or discretion? If the only error is one of fact, you have to carefully consider whether it is one which the court of appeal is likely to reverse. As I have indicated, the prospect of reversal of a finding of fact which depends on the trial judge's assessment of the credibility of witnesses is poor. Hard as it may be for your client to accept advice that the appeal cannot succeed because the findings were based on credibility, it is advice that must be given in the client's interests. If the supposed error is one of law, the prospects of success in the appeal are enhanced. The appellate court is in the same position as the trial judge to determine that issue of law. Misapplication of legal principle and incorrect interpretation of statutory provision are usually the most fertile source of legal error. But they are not the only source of such error. The trial judge may have incorrectly formulated a legal proposition, he or she may have erred in accepting or rejecting evidence or in jury trials in giving directions to the jury. If the error is one of the exercise of discretion, the difficulty of attacking the exercise is high. An appellate court will not interfere with an exercise of discretion unless the appellant can establish one of the grounds specified in *House v The King* (1936) 55 CLR 499 at 505.

One matter that must not be overlooked is whether the error that you now rely on was raised at the trial. An appellate court will allow a point to be raised even though it was not raised at the trial. But it will do so only if it is persuaded that evidence could not '*have been given which by any possibility could have prevented the point from succeeding*' *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438. A final matter which should not be overlooked in determining whether to appeal is whether the error affected the result. Unless it did, the appeal will be denied on the ground that there has been no miscarriage of justice.

It goes without saying that, whatever the form of error, each ground of appeal should be stated concisely.

Orders sought

The orders sought in the notice of appeal should be the subject of careful thought and should be drafted with precision. It is surprising how often the orders sought in a notice of appeal do not reflect what the successful party is seeking. Are you seeking the entry of a verdict and judgment, a new trial, a declaration of right or liability, a mandatory order, a reference to a referee or expert or a variation of the orders made in the court below? In framing the orders sought, you should also remember that intermediate courts of appeal often have wide powers to end the case without a further hearing. Whether

they will do so usually depends on the presence of credibility issues. The court is most unlikely to determine the case itself if it must determine issues of credibility.

The written submissions

In the modern era, written submissions have become as important, if not more important, than oral argument. In the United States, where oral argument is frequently limited to 30 minutes on each side in an appeal, the written argument is the primary tool of persuasion. That point has not yet been reached in Australia or the United Kingdom, but more and more in those jurisdictions, courts increasingly rely on the written submissions of the parties. Written submissions make the first impression on the appeal court – each judge will read them before the hearing commences. They give the court an overview of your whole case quicker than is possible in an oral argument; they will frequently be referred to when the judges are writing reasons to make sure they have not missed any argument; and, in my experience, they are the last thing that a judge looks at before finalising the judgment.

If you wish to avoid irritating the judges, it is imperative that you read the relevant rules of court and practice notes concerning written submissions and comply with the directions contained in them. Make sure that the chronology you file is detailed and refers to all relevant matters and the evidence including exhibits that relates to them. Do not attempt to avoid page limitations by using very small print or the device of attaching annexures to the submissions. And emphatically don't seek to file additional submissions after the Appealed Index has been settled or after the hearing of the appeal unless the rules of court or an order of the court permits it. The judges will not read them, and I have seen a deputy-registrar tear submissions out of an Appeal Book because they did not appear in the settled Appeal Index.

Books on legal writing

Unlike the United States, the tradition of Australian law is oral. Many counsel – including leading counsel – have had trouble adjusting to the demands that written submissions make on legal practitioners. If you have not already done so, it is a good idea to study the United States books on legal writing, particularly books on writing in the appeal setting. Among the books I would recommend are:

Wiener, *Effective Appellate Advocacy*

Wiener, *Briefing and Arguing Federal Appeals*

Stern, *Appellate Practice in the United States*

Aldisert, *Winning on Appeal*

Content

Good written submissions will be brief, clear and accurate. They will expound a theory of the case that is based on the evidence, that seems to be fair and just, that is not inconsistent with accepted law, that is logical and accords with common sense and that explains away any unfavourable facts or countervailing legal arguments. You should always attempt to identify the assumptions the judges may make about the case – and your case in particular – so that you can exploit or rebut those assumptions in your submissions. Remember also that you are in the explanation business. So acquaint the appellate judges with information and arguments – much of which will be new to them – by a step by step process. The greatest sin for a writer is to have the reader feel lost so that he or she must go back and re-read material to understand what you are saying.

Your written submissions should:

- state the issues for decision at the beginning of the written submissions. It is often helpful to set them out under the heading: Question/s Presented;
- state your answers to those issues with a short summary of your reasons for the answers before setting out the argument, so that the court can understand your case in a few sentences; and
- present an argument broken down with point headings.

Importantly, you should never write or dictate your submissions without making an outline of its contents. Without an outline, unless your mind has the recall and clarity of a Bertrand Russell – who is said to have dictated his books straight out of his head – your submissions will probably lack coherence, particularly if they are of the maximum permitted length. You are likely to avoid a good deal of re-writing if you make an outline. The outline may change as your writing progresses, but it should be amended and serve as your guide to a coherent document.

It is important that you identify precisely the error which you want to reverse, preferably by a verbatim quote or, if it is too long, by a short summary and always by reference to an appeal book page. It is surprising how often counsel assume that it is sufficient to rely on a statement that the court below erred on a particular point without showing the court exactly what the judge said. Too often, appellate judges are forced to say, 'Where do we find that?'

You should always state your legal or factual proposition before going to the argument in support of it. You should always avoid the court thinking, where is this going or to what issue does this go? If it is a legal proposition, tell the court

what it is before you seek to make it good by reference to the interpretation of a statute or decided cases or legal articles. If it is a factual proposition, tell the court what it is before you go to the evidence that shows the proposition is right. And make sure you deal with all cases that arguably support the other side. The best way to deal with unfavourable cases is to argue that the facts of your case are so different that the reasoning in the unfavourable precedent does not apply. You should attack the correctness of an unfavourable precedent only as a last resort. Even the most radical judges will overrule a precedent only as a last resort unless it is demonstrably wrong. In most cases, if you have to attack the correctness of a precedent, see if you can show that circumstances have changed since the case was decided and would now be decided differently or that its holding has been undermined by later decisions or legislation. Otherwise, you will be forced to criticise its reasoning, which should always be avoided, if possible. Make sure also that you answer the arguments put forward by your opponent. You cannot rely on the inherent strength of your own case.

It is important that the written submissions do not overstate your case. If they do, they:

- will be a red rag to the court;
- will be a source of many early questions at the hearing which may be and usually are hostile;
- will produce questions that interrupt the flow of your argument;and
- may result in your better points being lost in the discussion of your overstated case.

Instead of overstating the case, it is far better to recognise its weaknesses. It is sure to have some. The court will appreciate your candour in recognising and dealing with them in your written argument. Chief Justice Gleeson has correctly said ((1998) 17 *Australian Bar Review* 9):

> Clients are usually ill served by those whose passionate commitment to their cause blinds them to its weaknesses and sometimes even its strengths.

Your argument should invariably follow a logical order. Your submissions should begin with a general statement of those facts necessary to understand what the case is about. In the United States, this is usually done under the heading: Statement of the Case. It is a heading I often used in writing judgments, and I have noticed that McColl JA also uses that heading. However, those facts, statutory provisions and legal principles dealing with a particular point should be dealt with in the discussion of that point, not in the opening section. Importantly, don't set out statutory provisions or legal principles in the early part of the submissions and then deal with an issue to which they relate many pages later. Appellate judges are busy people, and they do not like to waste time having to turn back to look at statutory provisions or legal principles which are not firmly in their minds when they come to your argument.

You should always argue the best points first. If you begin with weak points, the judges will be wondering whether the appeal is a waste of time. That is not a state of mind that is receptive to allowing an appeal. Each point in the argument should be the subject of a heading in capitals, and an independent and free standing ground for finding in your favour. The heading should be a general proposition. The argument in support of each heading should be followed by a series of logical subheadings and sub-subheadings that support the general proposition. Thus, in a defamation action where the judge has found that the publication was made on an occasion of qualified privilege and the appellant has failed to prove that the publication was actuated by malice, the points and sub-points in support of the appellant's argument might follow this format:

First point

The District Court erred in finding that the occasion was one of qualified privilege because the appellant had not proved malice.

Then set out the finding and the Appeal Book reference.

First sub- point

Malice is established in a defamation action and defeats a defence of qualified privilege if the defendant was actuated by an improper motive in making the publication.

Then set out and discuss the authorities to persuade the court that this proposition is correct.

The next sub-point should show the court where the trial judge erred.

Second sub-point

The judge's reasoning shows that he/she mistakenly equated malice with ill will when he/she said, 'The plaintiff's failure to establish ill will on the part of the defendant means the claim of malice fails.'

Then set out or summarise the relevant passage in its context and cite the Appeal Book pages.

Logically, the next sub-point should prove the defendant's motive.

Third sub-point

The defendant's motive in publishing the defamatory material was that he feared the plaintiff would get the contract for which the defendant had tendered.

Then summarise and discuss the evidence showing that the defendant made the statement defamatory of the plaintiff because he was motivated by the fear that he would not get the contract for which he tendered. If the judge has rejected the evidence of a witness or failed to draw a relevant inference that you rely on in respect of this sub-point, it will often be necessary to make another sub-point, e.g.,

The judge erred in rejecting the evidence of Ms Black.

Whether or not you have to interrupt the flow of your argument to persuade the appellate court that a particular finding of fact should be reversed, the argument must show that the defendant's motive constituted malice in this branch of the law.

Fourth sub-point

The defendant's motive was an improper motive for the purpose of the law of qualified privilege.

Then set out and cite identical or analogous factual findings in other cases. This is most effectively done by blending the reasoning and facts of the illustrative case/s with the facts of your case. If there are no such cases, it will probably be necessary to discuss the rationale of malice in the law of qualified privilege to show why the factual findings for which you contend are within the rationale. Alternatively, you might show why it is consistent with good legal policy to bring your factual contention under the rubric of malice.

Remember point headings and sub-headings are most effective when they identify the legal propositions for which you contend. They should also identify and incorporate the determinative facts that are essential to your case. They should always be forceful, argumentative propositions that advance your argument. You should avoid topic headings. In the above example, headings such as Malice, Motive, Improper Motive tell the court little and do nothing to advance your argument. It is much more persuasive to have forceful, argumentative headings.

Observe the rules of good writing

You should write in the active voice, as often as you can; passive voice often leads to ambiguities as to who did what. The active voice is more forceful and allows for more concise writing. You can usually eliminate two or three words in a sentence if you change from the passive to the active voice. Writing is most effective when the subject, verb and object of a sentence are close together. Prefer verbs to nouns, particularly weak nouns. Verbs are more forceful. Use concrete nouns – e.g., Holden instead of car, vehicle or conveyance. Avoid nominalisations – verbs turned into nouns. It is much more forceful and shorter to write, 'She resigned' instead of 'She submitted her resignation.'

You should use every day words, but avoid slang and jargon. You should keep the sentences short but vary their length. Try to put qualifications, exceptions or modifications in a separate, following sentence rather than loading up a sentence with qualifications or exceptions. Put main ideas in main clauses and subordinate ideas in subordinate clauses. When dealing with an opponent's argument, it helps to weaken it by putting it in a subordinate clause and your rebuttal in the main clause. You might say, for example, 'Although the defendant says that Dr X said the defendant's opinion was in accord with professional practice, Dr X said that only a minority of doctors would have given such an opinion and that she herself would not have done so.'

You should also aim to give context to a point or idea before setting out its detail. New information is best put at the end of a sentence after a transitional, contextual introduction at the beginning of the sentence. Try to avoid using adjectives and adverbs, so far as you can. Avoid prepositional phrases introduced by 'of', 'to' and 'after' or 'in relation to'. Adjectives, adverbs and prepositional phrases clutter your sentences with unnecessary words and rob them of vitality. You should seek to avoid clutter by eliminating every needless word. And always avoid using barbarous legalisms such as 'thereof', 'hereinbefore' and the word 'said' when used as an identifier.

Organise your paragraphs so that the first sentence introduces a new point, usually a legal or factual proposition and make sure that the rest of the paragraph develops that point.

Finally, check all your references, legal and factual, and the wording of quotations.

Study the standard texts on good writing:

Strunk and White, *The Elements of Style*

Kane, *The New Oxford Guide to Writing*

Zinsser, *On Writing Well*

Williams, *Style Toward Clarity and Grace* (which I think is the best of all).

Special leave applications

The written argument is more important in a special leave application in the High Court than is the oral argument. In over 90 per cent of cases, the written argument in the special leave application is decisive of the grant of an appeal.

As I said in *Milat v The Queen* [2004] HCA 17 at [29]:

> … the written submissions are the primary vehicle for persuading the court that there is a point worthy of a special leave grant. The 20 minutes allotted for oral discussion are not a substitute or supplement for the written argument. The principal function of the oral argument is to enable the Justices to test the arguments of the parties by a Socratic dialogue, to ensure the parties deal with the key points of each other's case where their written submissions do not do so and to enable parties to emphasise particular points in the written submissions if they wish. Oral argument is not granted to enable a party to introduce new arguments.

In applying for the grant of special leave, an applicant must bear in mind that the primary function of the High Court in hearing appeals is to lay down principles of law that will be of general benefit to the community and which can apply to many cases beyond the case that is the subject of appeal. The High Court's primary function does not concern the correction of error. Consequently, something more than error must be shown to attract the grant of special leave. Grounds that may attract a grant include:

- The case involves questions of public importance because of the issues at stake or their general application
- The case involves a constitutional issue or an issue under federal law; federal law issues frequently have significance for the whole of the Australian community
- The case is one where there are divergent judgments in the various States on the issue
- The case involves a miscarriage of justice in the sense that there has not really been a trial according to law
- The case is important to the parties and there has been a division of opinion in the courts below on the law or its application

Factors that may tell against the grant of special leave are:

- The decision below is not attended by sufficient doubt
- There have been unanimous findings against the applicant at the trial and intermediate appellate level
- The amount involved is small and the cost of an appeal will be a burden on the losing party
- The case is not a suitable vehicle for an appeal because the court will have to determine issues of fact before it reaches what appears to be an important point of law or because a Notice of Contention filed by the respondent may be upheld with the result that the point, said to warrant the grant of leave, may never have to be determined.

The oral argument of the appeal

Much of what I have said about the written submissions applies to the oral argument on appeal. It is especially important that you have thoroughly read every page in the Appeal Book and can quickly take the court to the relevant pages when asked about a matter. You should begin your argument with a statement of the issues. Then state the answer to those issues in summary form. Sometimes, instead of beginning with the issues, the case will lend itself to a humorous, moving or exhilarating introduction which is very effective. Walter Sofronoff QC began his successful argument for the Wik people in *Wik Peoples v Queensland* (1996) 187 CLR 1 by painting a moving word picture. He described the Wik people going about their traditional lifestyle in 1915 and 1919 oblivious to the fact that 800 miles away on the same days in those years, events were occurring at the Land Titles Office in Brisbane that concerned their land. At the Titles Office, European people were registering leases that Queensland later claimed dispossessed the Wik people of the land they had lived on and used for hunting and fishing since time immemorial and despite the fact that there was minimal, if any, subsequent 'activity on the part of the pastoral lessees in exercise of their leashold rights.'(ibid at 218).

As you develop your argument, make sure you distinguish between good and weak points. Either abandon the weak points or inform the court that you rely on your written submissions in respect of those points.

Try to be as brief as you can. But if necessary, do not hesitate to re-state a submission if you think the court has not grasped its import. Counsel will often say, 'I'm not sure that I put that point clearly enough. What I am saying is…'

Matters to avoid include:

- Critical or sarcastic statements concerning the trial judge or judges in the intermediate appellate court
- Displays of anger or irritation because of questions from the bench
- Reading to the court long passages from the evidence, the judgments in the court below and the precedent cases.
- Reading out the facts of precedent cases

- Leaning on the lectern instead of standing up straight
- Moving about while addressing the court

Instead of reading out long passages from the evidence or judgment, give the court page references, let the court read the relevant passage and then make any comments you wish concerning that passage. It is often sufficient to simply refer the court to those parts of your written submissions commenting on the passage in question.

Questions from the bench should be welcomed because it gives you the opportunity to deal with issues that may be troubling the judges. Socratic dialogue is at the heart of the appeal process. As Tom Hughes, QC said, when arguing the *Hospital Products Case*, ((1984) 156 CLR 41), submissions are best tested 'in the crucible of oral discussion'. Questions from the bench should not be regarded as necessarily hostile or supportive, and they should always be answered courteously and thoroughly. Before the hearing, you should spend a good deal of time preparing your answers to the questions you anticipate that you will get from the bench. It will pay dividends because it gives the court confidence that you are a counsel who has given careful thought to the case and its problems and that your solution to those problems is probably the best solution. You must expect as a minimum questions concerning the other side's case. Solicitors and counsel should work together to anticipate and work out answers to difficulties and potential objections to your argument. Whenever possible, you should try to turn hostile questions to your advantage by using your answer to them as a platform for further elaborating your argument.

Occasionally, but less frequently than in earlier times, your answers to questions may be sought for the purpose of undermining the apparent view of another member of the bench. This is a situation that will call for considerable skill and tact on your part because your answer – whatever it is – may cause you to lose the vote of one or more of the judges. Fortunately, the relationships between and the manners of appellate judges seem much better than they were in earlier times. It is unlikely that we will see again judicial conduct such as Starke J wrote about in *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39 at 62:

> This is an appeal from the Chief Justice, which was argued by this court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties.

If you are for the respondent, you must grapple with the appellant's case as quickly as you can. Sir Anthony Mason has said ((1984) 58 ALJ 537 at 543):

> It is vital to make those points which damage that part of the appellant's case which seems to have attracted the court, and it is important to make those points without delay. There is an element of anti-climax in beginning with inconsequential matters and it may convey the impression that there is no real answer on the critical issues.

There is nothing more anti-climactic in an appeal, after a persuasive argument by the appellant, than counsel for the respondent rising to his or her feet and saying something like, 'I want to correct the date that appears in footnote 12, the reference in footnote 42 and the quotation in footnote 73' and then go on to make the corrections. I have seen such occurrences on many occasions. Justice Kirby, who used to sit next to me in the High Court, would turn to me and we would shrug our shoulders in bewilderment at the lost opportunity to make an immediate impression on the minds of the judges.

Federal Magistrates Court: ten years old

By Kate Williams and Andrew Bell SC

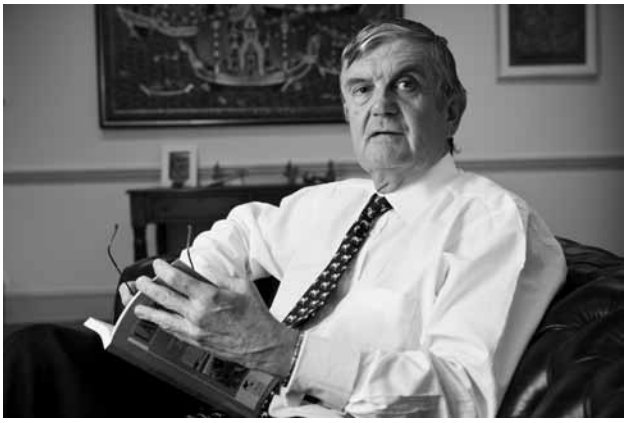
The Federal Magistrates Court of Australia was established by the *Federal Magistrates Act 1999* (Cth). The Act commenced on 23 December 1999 and the court was originally constituted by 10 federal magistrates, who commenced sitting in July 2000.

In his *State of the Judicature* speech on 14 October 2001, the Hon Murray Gleeson AC QC said:

> One of the most significant recent developments has been the establishment of the Federal Magistrates Court, which first sat in July 2000. Before then, there was no federal magistracy. Summary matters in federal jurisdiction were dealt with by State magistrates invested with federal jurisdiction. And, to a substantial extent, that continues to be the case in relation to criminal matters.
>
> The Federal magistracy was set up to provide a simple and accessible service to litigants, and to ease the workload of the Family Court and the Federal Court. ... The court's workload has expanded rapidly. In places where it sits regularly (capital cities and major regional centres) it receives between a quarter and a third of all family law applications, and most of the work of federal courts in bankruptcy and unlawful discrimination. ... It may be expected that the jurisdiction of the court will continue to expand.

The Federal Magistrates Court is now the largest federal court. There are now 63 federal magistrates based in Sydney, Parramatta, Newcastle, Canberra, Melbourne, Adelaide, Brisbane, Townsville, Darwin and Launceston, with the most recent appointments, including Mr Joe Harman to the Parramatta Registry. The federal magistrates also hear cases on circuit in rural and regional areas outside these locations. In New South Wales, circuits are conducted in Albury, Armidale, Bega, Broken Hill, Coffs Harbour, Dubbo, Lismore, Orange, Port Macquarie, Tamworth, Wagga Wagga, Wauchope and Wollongong.[1]

According to Chief Federal Magistrate John Pascoe AO CVO, the federal magistrates are from diverse backgrounds, being drawn from the bar, solicitors, and legal academics, noting that a wide variety of backgrounds within the court – not just in terms of legal experience – reflects the diversity of the community that it serves. This philosophy is evident in the chief federal magistrate's own diverse experience and service to the community. Prior to being appointed in 2004 to succeed Diana Bryant, now chief judge of the Family Court, his Honour had practised as a solicitor in private practice and had also worked at the top level of large organisations in industry and in the public sector. He has occupied positions in various charitable organisations in the past and is presently a member of the Board of the International Award Association, which operates the Duke of Edinburgh Award. He was appointed



Chief Magistrate John Pascoe AO CVO

commander of the Royal Victorian Order (CVO) in Her Majesty the Queen's 2010 New Year's Honours List for his service to the Duke of Edinburgh Award.

Federal magistrates are encouraged to engage in a range of activities outside the court, to the extent that they are not inconsistent with the office of federal magistrate. For example, federal magistrates in the Defence Force have presided from time to time over boards of inquiry. Federal Magistrate Michael Burnett has recently been appointed deputy judge advocate for the Air Force. Federal Magistrate Rolf Driver is a deputy president of the Copyright Tribunal.

The chief federal magistrate is credited with establishing a culture within the court of open communication and co-operation, respect for the litigants served by the court and an emphasis on the court's fundamental role as being one of service to the public. He also actively encourages continuing judicial education, and federal magistrates participate in judicial education programs together with judges of the Federal Court, particularly in specialist panel areas such as admiralty and copyright. The court's jurisdiction includes:

- family law and child support maintenance
- consumer protection and trade practices
- human rights and equal opportunity
- administrative law
- bankruptcy
- industrial law
- control orders
- privacy
- migration
- admiralty law
- copyright

The court's jurisdiction in family law matters is co-extensive and concurrent with the jurisdiction of the Family Court,

except in relation to overseas adoptions. A monetary limit of $750,000 applies to the court's trade practices jurisdiction, although cases exceeding that limit may be referred to the court from the Federal Court. In its 2008-2009 Annual Report, the Federal Magistrates Court suggested that consideration be given to removing or increasing the $750,000 limit. The court also mooted a possible expansion of its intellectual property jurisdiction to include trademarks and designs.[2]

The work of the court is principally in the area of family law, which accounted for 92.39 per cent of applications filed in the year ending 30 June 2009.[3] Of the remaining 7.61 per cent of applications, 72.17 per cent were bankruptcy matters, 19.69 per cent were migration matters, 3.9 per cent were industrial law matters and the balance were administrative law, admiralty law, copyright, human rights law and trade practices matters.[4]

The court has established the following specialist panels in Sydney, Melbourne and Brisbane:

- commercial – including bankruptcy, copyright and trade practices
- migration and administrative law
- unlawful discrimination
- national security
- industrial law
- admiralty law
- child support[5]

Since July 2009, the court has been comprised of two divisions – the General Division and the Fair Work Division – and proceedings in the court must be instituted, heard and determined in one of those divisions.[6]

According to Chief Federal Magistrate John Pascoe AO CVO, barristers represent litigants in a high proportion of general federal law (that is, non-family law) cases in the Federal Magistrates Court. The seniority of counsel varies according to the complexity of the case, but his Honour emphasises that the court welcomes and encourages junior barristers to appear because the court is a relatively congenial environment in which young barristers can gain valuable experience.

Federal Magistrate Sylvia Emmett says that barristers appearing in the court typically provide diligent and competent assistance. Barristers are particularly skilled in dealing with new issues or evidence as matters unfold during the course of a hearing, enabling the hearing to be concluded without an adjournment or undue delay, and are conscious of their duty to assist the court and to facilitate cases being disposed of efficiently.

The court manages cases using an individual docket system.

One of its performance measures is that 90 per cent of cases should be disposed of within six months of filing. In the year ending 30 June 2009, 83.6 per cent of applications filed were disposed of within six months and 94.9 per cent were disposed of within 12 months.[7] To some extent, these statistics reflect the following:

- 52.59 per cent of all matters commenced in the court during that year were applications for divorce. Many such applications are uncontested and are determined by registrars of the court and registrars of the Family Court acting under delegation;[8]
- a considerable amount of the court's bankruptcy work is performed by registrars of the Federal Court, acting under delegation.[9]

However, the case disposal rate also reflects the court's emphasis on removing unnecessary formality, timely disposal of proceedings, managing cases tightly and encouraging the use of alternative dispute resolution. These objects are enshrined in the Federal Magistrates Act. Section 3 lists the objects of the Act as being to create the Federal Magistrates Court under Chapter III of the Constitution and, in addition:

> (a) to enable the Federal Magistrates Court to operate as informally as possible in the exercise of judicial power; and
>
> (b) to enable the Federal Magistrates Court to use streamlined procedures; and
>
> (c) to encourage the use of a range of appropriate dispute resolution processes.'

Section 42 of the Act provides:

> In proceedings before it, the Federal Magistrates Court must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted.

The court has developed procedures to achieve these objects, including appointing a hearing date at the first directions hearing, where appropriate, with a view to encouraging the parties to focus on the real issues and explore settlement options at an early stage. The Act also provides for federal magistrates to impose limits on the length of written and oral submissions[10] and time limits on oral evidence.[11] However, Federal Magistrate Emmett says that these limits are rarely imposed in practice because counsel appearing tend to be conscious of their responsibility to run cases efficiently. The court regularly reviews its case management to ensure best practice.

Appeals from decisions of the court lie to the Family Court in relation to family law matters and otherwise to the Federal Court.[12]

During 2008 to 2009, there were 204 appeals filed in the Family Court and 588 appeals filed in the Federal Court from decisions of federal magistrates. Approximately 85 per cent of appeals to the Federal Court were dismissed.

An appeal to the Family Court is heard by a full court, unless the chief judge determines that it is appropriate to be heard by a single judge. An appeal to the Federal Court is heard by a single judge, unless a judge determines that it is appropriate to be heard by a full court. In both cases, there is no appeal to the full court from a determination of a single judge exercising appellate jurisdiction. Appeals are by way of re-hearing.

In recent times there has been some uncertainty about the future of the Federal Magistrates Court. On 5 May 2009 the Commonwealth attorney-general announced that the government would restructure the federal courts system by:

- 'merging' the Federal Magistrates Court into the Family Court and the Federal Court;
- consolidating all family law matters under the Family Court; and
- consolidating all general federal law matters under the Federal Court

with a view to creating a 'one-stop shop' in family and other federal law matters.[13]

This announcement followed consultation on the report released by the Attorney-General's Department in August 2008 entitled *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (the report).

The report recommended:[14]

> that existing Federal Magistrates be offered commissions to the General Division of the Family Court, which would become a lower tier of that Court. Existing Family Court Judges would constitute an upper tier of the Family Court.

and

> that a new division be created in the Federal Court and non-family law Federal Magistrates be offered commissions to this division.

However, the government has revised its approach and the 'merger' will only proceed in respect of the Federal Magistrates Court and the Family Court. On 24 May 2010, the Commonwealth attorney-general announced that federal magistrates who undertake mainly family law work will be offered commissions to a new tier of the Family Court – to be known as the General Division – which will hear all but the most complex family law cases. An 'Appellate and Superior Division', comprising existing judges of the Family Court, will hear complex first instance cases, child suppport cases and appeals. The Federal Magistrates Court will continue to hear general federal law matters. Some federal magistrates may be offered dual commissions to the lower division of the Military Court of Australia, the establishment of which was also announced on 24 May 2010.

The federal magistrates who have served in office during the ten years since the establishment of the Federal Magistrates Court, have made a valuable contribution to the federal justice system by providing a more efficient and less costly means for litigants to resolve less complex disputes, and will continue to do so under the new structure.

Endnotes

1. 2008-09 Annual Report, p 5.
2. Ibid., pp 26 and 32.
3. Ibid., p 16.
4. Ibid., pp 16 and 23.
5. Ibid., p 17.
6. *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth), Schedule 17, Part 2, which inserted Section 10A in the *Federal Magistrates Act* 1999 (Cth).
7. 2008-09 Annual Report, p 15.
8. Ibid., pp 16 and 21.
9. Ibid., p 25.
10. *Federal Magistrates Act* 1999 (Cth), ss 55 and 56.
11. *Federal Magistrates Act* 1999 (Cth), s 62.
12. *Family Court of Australia Act 1976* (Cth), s 94AAA; *Federal Court of Australia Act 1976* (Cth), s 24(1)(d).
13. Media Release dated 5 May 2009.
14. *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance*, pp 7-8.
15. Ibid., p 8; see also pp 26-27.

Life on the bench in PNG

By Justice Graham Ellis

Kokoda District Court House. Photo: Sandra Jackson / Fairfaxphotos

After appearing in a case in Port Moresby in 1985, I found myself travelling there over the next few years to assist with seminars to train local lawyers. In 1989, when a judge who had been stabbed a few months before decided not to renew his contract, I was approached by the chief justice to fill that vacancy. Upon arrival in January 1990, at a time when the law and order situation was so serious that 9pm to 6am curfews were imposed in major towns, I found I was based in Rabaul, with responsibility for the New Guinea Islands region. As a result, I spent the first three weeks in the month sitting as a judge of the National Court (the senior trial court) in either Manus, Kavieng, Rabaul, Kimbe or Buka in the Bougainville region. The last week in the month was normally spent in Port Moresby, sitting as one of three (or sometimes five) judges of the Supreme Court (the senior appellate court).

Sitting in the Bougainville region during what became known as the Bougainville crisis involved a number of challenging tasks, including deciding cases involving some members of the armed forces while other members of the armed forces were 'test-firing' their weapons into the ground behind me to give me a hint how to decide the case.

August 1991 saw the eradication of criminal list backlogs from the entire New Guinea Islands region. A system was implemented in Rabaul whereby anyone committed for trial by the District Court would appear in the National Court the following Monday. If the case involved a plea, it was finalised straightaway. If the matter was proceeding to trial, a trial date was allocated and the trial was conducted within the following month. It was a surprise to find that, under such a system, the law and order problem virtually disappeared and Rabaul at that time became the only major town which did not have a 9pm to 6am curfew.

Dealing with criminal gangs led to some interesting moments although some light relief was provided when a gang leader charged with one count of wilful murder, four counts of armed robbery and six counts of pack rape was given a life sentence for rape. Not realising I had imposed the first ever life sentence for rape in the history of PNG, I found the national newspaper's weekend edition had a prominent headline 'First life sentence for rapist' and, not having a photograph of the accused, they put my photo underneath the headline!

...members of the armed forces were 'test-firing' their weapons into the ground behind me to give me a hint how to decide the case.

September 1991 brought its share of excitement when I was appointed to chair a Leadership Tribunal when the then deputy prime minister was charged with 86 charges of corruption. To cut a long story short, the outcome was that the positions of deputy prime minister and governor-general both became vacant.

Late in 2008, following two years of negotiations between governments, I found my self back in PNG working in the

Office of Solicitor General. There were three problems I was requested to address: the standard of the local lawyers in the office, corrupt settlements (which a commission of inquiry revealed to have involved hundreds of millions of Kina over the previous three to five years) and a backlog of about 10,000 cases involving claims against the state. When I arrived, in November 2008, the solicitor general and his deputy had been terminated based on their involvement with what was said to have been a corrupt settlement. In February 2009, when they were re-appointed, I found myself instructed to work from home and by June I was flying home to Australia as the attorney-general did not want me there any more. I should add that in May this year that corrupt settlement was approved for payment and, shortly after that, the prime minister recently demanded and received the resignation of the attorney-general who approved that settlement. However, my return to Australia was short-lived.

In September 2009 the chief justice of Papua New Guinea (please pronounce it Pa-pua and not Pap-ua), Sir Salamo Injia, asked me to return to the bench almost 20 years after I was first sworn in. The position in PNG is that a newly appointed judge is sworn in by the governor-general and the welcome ceremony is conducted later. On 26 February 2010, five months after I arrived, I was officially welcomed. It was interesting to listen to the welcome speech of the attorney-general who caused me to be sent home eight months before.

Upon arrival in September 2009 I was sent to places where there were backlogs: Wewak in October, Kavieng in November and Porgera in December. The current position is that there are about 20 judges. Only three of us are non-citizens and the other two have worked in PNG for many years. About half the judges are based in provincial locations. Judges would prefer to serve in Waigani, the government centre in Port Moresby. No-one wanted to serve in Enga Province which had attracted a reputation as being the 'wild west' of PNG. When the chief justice indicated he was thinking of sending me to Enga I beat him to it by volunteering to go there.

Accordingly, since February this year I have been based in Wabag. Getting to Wabag involves a one hour flight from Port Moresby to Mount Hagen then driving, with a police escort vehicle, for two to three hours west along a deteriorating road to Wabag. Since there are limited places to shop in Wabag, it is necessary to make the occasional shopping trip to Mount Hagen on Saturday mornings. An added difficulty is that the power blackouts are frequent and sometimes lengthy. At home, blackouts means the food in the refrigerator is likely to spoil. At work, blackouts mean that the recording equipment will not work so I have to revert to the system which applied

Ellis J (left) with Kariko J, Sawong J, Kawi J

when I was here 20 years ago and write everything by hand so that a transcript can be typed in the event of an appeal.

There should be about 20 staff at the National Court in Wabag. There are about 15. About 10 of them are security guards. In the registry there are two people doing the work of five. The current court building replaced a building that was burnt down. Wherever I go in Wabag I am supposed to be accompanied by a police escort vehicle. For the first two months I thought the police escort vehicle was a covert operation but then I found out that the police escort vehicle was off the road, being repaired! It transpired that, instead of the message being the resident judge is important because he has a police escort and that Wabag is dangerous because the resident judge needs a police escort, the message became that the resident judge is not scared of the criminals and he does not need a police escort because Wabag is now safe.

A police mobile squad, the local equivalent of a SWAT team, is based in Wabag. Sometimes we call them in to 'keep the peace' while a dangerous criminal is being tried. Other times their appearance without notice, patrolling in their blue camouflage uniform and carrying assault rifles outside the court, suggests a dangerous criminal is being tried. In addition to the court security staff, the mobile squad and my police escort, I have two security guards at home.

The judge based in Wabag, the capital of Enga Province, also looks after the Porgera circuit. I can clearly recall reading an article in the SMH's *Weekend Magazine* a year or two ago about Porgera and feeling sorry for the poor judge who had to sort that mess out. Little did I realise that would be me! Porgera,

now a gold-mining town, is a three hour drive west of Wabag. In both locations, the criminal list is dominated by murder charges with an occasional aggravated rape. That reflects that the law and order situation had become so difficult that the police were concentrating on murder to the exclusion of other offences. You do not want me to give examples of the kind of conduct revealed by the evidence in murder trials. Perhaps it is sufficient to indicate that there was one accused who had seven charges pending: five charges of wilful murder, one charge of attempted and one charge of wilful damage arising from when he shot at the local police station with his M16.

The accused is usually charged with either wilful murder (killing with intent to kill), murder (killing with intention to cause grievous bodily harm or killing in the course of committing another crime) and manslaughter (unintentional killing). The maximum penalty for manslaughter and murder is life imprisonment: for wilful murder it is the death penalty. There have been a number of people sentenced to death since the death penalty was re-introduced in 1991. However, that penalty has yet to be carried out and after close to 20 years it must be questioned whether it ever will be.

Civil cases vary. There are a lot of claims for damages arising from police raids (police officers go into a village, burn houses, shoot pigs and destroy crops)...

There is a guideline Supreme Court judgment for sentencing in cases of manslaughter, murder and wilful murder which gives four categories for each offence. The suggested starting point for a category 1 manslaughter case is imprisonment for between 8 and 12 years. Easily the most common kind of case in that category would be what is known locally as a 'spleen death': a husband kicks his wife, she has an enlarged spleen due to malaria, her spleen is ruptured and she bleeds to death. At the other end of the scale is category four wilful murder. You can guess what the suggested penalty is for such a case. I almost had such a case recently. At close to midnight I found a Supreme Court case which suggested that the offender fell within category 3, not category 4. The next day, when I announced the sentence of life imprisonment, the offender dropped to his knees and said a quick prayer then said 'Thank you' to me before departing for the cells.

Reducing backlogs means list a criminal trial every day. I have had two weeks with a wilful murder trial every day. As there are no juries in PNG, it is necessary to conduct the trial, reach a verdict and, if the verdict is guilty, consider what sentence should be imposed. Having done this job before, albeit 20 years ago, I am usually able to deliver a same day oral judgment or, since I do my own typing, a next day written judgment. The normal sittings hours are 9.30 to 12 noon, with no morning tea adjournment, and 1.30pm to 4.00pm, with no afternoon tea adjournment. I use the time between 9.00am and 9.30am and between 1.00pm and 1.30pm to hear pleas of guilty and to deliver judgments. As a result, I tend to average up to two cases per day, given the occasional case where the prosecution does not proceed, such as a rape case where the complainant has since married the accused!

Government office hours in PNG are 7.45am to 4.06pm (please don't ask me why 4.06pm). My day usually starts at 6.00am with admin work between 7.30am and 9.00am. I usually go home shortly after 4.00pm (so my driver can take my housekeeper home) and then start typing up my summary of the day's evidence in order to be able to finalise the judgments ready for delivery the next morning. The day usually ends between 10.00pm and midnight, depending on such things as whether there is a blackout. There is not a vacant moment in any day for those three weeks of National Court sittings.

At the completion of those three weeks, there is 6.00am start for a drive to Mount Hagen to catch a plane to Port Moresby. That hour on the plane is my R&R. Upon arrival in Port Moresby I collect my appeal books for 'Supreme Court week'. My record was to have sat on 10 Supreme Court appeals in five days last November but, when I was sent to Kokopo recently, there were 21 appeals listed over four days. When stacked on the floor, the appeal books came just above my knee. They were delivered at 6.00pm Sunday night and the cases started at 9.30 the next morning. I managed to sit on 20 of those 21 appeals. Only one of those appeals did not proceed and I was pleased to be able to deliver an oral judgment in each of the remaining 19 appeals, thereby keeping my record of no reserved judgments intact.

When I arrived in Wabag, there were 202 cases in the civil list and I had only been given three weeks in April for civil sittings. The question was how to address that backlog. I decided to 'shake the list and see what falls out' by giving the prosecutor and the defence lawyer a day off to prepare for criminal matters and conducting a call-over of the entire civil list on one day: 17 February 2010. That revealed about 20 matters which had either been settled or were discontinued. A 'Summary Determination List' on 19 March removed another

'Those who say they are innocent, please raise your hand'. Eighty-three men in a cell built for 40. Photo: Graham Ellis

20 or so. More than 40 cases were heard and finalised in April. As there are 40 pending appeals from the District Court, they have been listed for between 9.00am and 9.30am and 1.00pm to 1.30pm in June, two in the morning and two in the afternoon, so as not to interrupt the flow of criminal cases. Hence, the good news is that by 30 June only about 80 of the 202 civil cases will remain. The bad news is that 30 or so cases have been commenced this year so the list will only be down to about 110 by the end of June when I take three weeks' break. Since 30 of those 110 cases arise from motor vehicle accidents, and half of the plaintiffs are passengers from the same bus accident, those matters have been listed for a week in August. Thus, by 31 August the list should be back down to a more acceptable 80 cases.

Civil cases vary. There are a lot of claims for damages arising from police raids (police officers go into a village, burn houses, shoot pigs and destroy crops), a number of claims by owners or former owners of customary land and a variety of other disputes.

So far as the criminal list backlogs are concerned, as a result of three weeks spent in Porgera in May, there are no cases pending in Porgera with the result that anyone committed to stand trial in the National Court from now on will have his or her case heard the next time a judge is in town. In Wabag, the criminal list backlog should be eliminated by the end of June. The position then will be that anyone who is committed for trial by a magistrate in the District Court will appear in the National Court on the first Tuesday in the following month. If the case is a plea it will be finalised straightaway, otherwise it will be allocated a trial date at that first call-over and the trial will be held within the next four months.

As was the case when I was based in Rabaul, the elimination of criminal list backlogs in Wabag and Porgera has had a favourable effect on the law and order situation. People no longer bring their bush knives into town, there have been no fights in Wabag town this year and no drunken people on the streets of Wabag. Accordingly, the work here is rewarding despite being demanding, difficult and not without danger.

In contrast to the heat of Port Moresby, Wabag is a much cooler climate, being more than 2,000 metres above seal level, and

Porgera is close to 3,000 metres above sea level. The biggest contrast, however, is when I return to Australia, normally every fourth weekend, to remind my wonderful wife and adorable son what I look like. Living and working in a developing country makes me appreciate many things Australians take for granted. Happily, there is a direct flight from Port Moresby to Sydney so I can leave Port Moresby at 2.00pm on Friday and be back by 1.00pm Monday.

The first thing I noticed in the women's section was a remandee, who was obviously suffering from a mental disability, chopping firewood with an axe. Checking the court files revealed that she was awaiting trial for murdering her husband with …

The workload is the mental equivalent of running a marathon since, in addition to the trial and appeal workloads, I have two additional tasks. First, my judicial administration duties. Judges in PNG are expected to contribute to what is known as judicial administration. Not long after I arrived, the chief justice appointed me to chair the Ethics Committee. Our primary task is to prepare a Code of Conduct. Recently, I have been given the task of establishing and chairing an Audit Committee.

Secondly, I should not overlook what might be called my human rights duties. The PNG Constitution has, since Independence in 1975, contained extensive human rights provisions. For example, section 37(17) provides that: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' More importantly, section 57 provides that those human rights (called basic rights) shall be protected by the Supreme Court or the National Court either 'on its own initiative' or on application by any person who has an interest in the protection and enforcement of those rights.

Add to that the requirement for prison visits and you have a recipe for excitement. One of the reasons I was assigned to Enga is that there is no prison in Enga Province! I was given the task of correcting that situation on the understanding that I would only be required to achieve miracles immediately and the impossibilities may take a little longer.

My approach in PNG has always been to inspect where remandees and convicted persons will be held before either denying bail or sentencing anyone to imprisonment in that locality. For that reason, I went to inspect the prison in Baisu, near Mount Hagen, where the prisoners from Enga Province are housed. At Baisu, prisoners are a three of four hour drive by truck from Wabag and seven or eight hours from Porgera. That makes it difficult for families to visit them and for their lawyer to meet with remandees to prepare their defence.

The first thing I noticed in the women's section was a remandee, who was obviously suffering from a mental disability, chopping firewood with an axe. Checking the court files revealed that she was awaiting trial for murdering her husband with …! I conducted a fitness hearing as soon as possible. The decision became easier when the remandee said she wanted to be released so she could live with her husband. She has now been moved from prison to a suitable hospital environment.

However, the greatest surprise was when I found 83 remandees housed in a cell built for 40. When I asked them to assume their sleeping positions they could not lie down without someone's head being on someone else's legs. There was only one toilet for those 83 men and it did not flush. There was a drum of water near the Asian-style, hole in the ground toilet with a metre long piece of hose nearby. It was used to suck water from the drum to flush the toilet and, when not used, it was left on the toilet floor. It did not take long to decide whether those conditions breached the requirement to treat those remandees 'with humanity and with respect for the inherent dignity of the human person'. I was able to take photos and publish a 20 page next working day judgment which hit the front page of the national newspapers for a number of days. Rather than exercise my Constitutional powers to order certain people to do certain things, I chose to do no more than request a number of things. Not surprisingly, the relevant people responded better to requests than to orders, with one notable exception.

That judgment also outlined the situation in the police cells in Wabag which had been condemned by the Department of Health more than a year earlier. Additionally, I was able to point out that there was, in Enga Province at Mukurumanda, a prison with no prisoners! Housing for the guards had been completed but not the cell blocks. Luckily, I noticed a nearby building which was suitable for housing as many as 80 prisoners.

As a result, by the end of the calendar month there was an interim remand facility established and operational at Mukurumanda and a Steering Committee established to fast track the completion of that prison facility in Enga Province. Regrettably, the Police commissioner did not respond to my requests. Rather than get upset, make orders and threaten to have him arrested (which another judge was already doing at the time), I spoke with the court staff and we began cleaning

the police cells. Since our cleaner at the court is Seventh Day Adventist, we could not do it on Saturday, so we began to clean the police cells every second Sunday. Ten members of the court staff and two police officers assisted me. Consistent with the proposition that cleanliness is next to Godliness, cell cleaners were able to go to church on Sunday morning and clean the police cells on Sunday afternoon.

You would not believe the shock wave that went through the country when it transpired that a Supreme Court judge was cleaning toilets. There followed a rush of activity to not only fix up the police cells straightaway but also construct new police cells as soon as possible. I should add that the dozen people who joined me in the cell-cleaning exercise may have been influenced by the fact that everyone who assisted has had their name placed in a barrel and, when the new police cells are completed, some lucky person will win a pig.

You need to know that pigs are highly valued in Enga Province and are often seen as a measure of wealth and status. On one occasion I was having difficulty understanding the evidence in a murder case arising from an argument over a pig until I realised that the pig was sleeping inside the house. He (or she) was, to use a local term, a 'house pig'. On another occasion, in Kavieng, when the evidence involved a number of references to Ramone, I asked whether Ramone was going to be called to give evidence only to find that Ramone was not the name of a person: it was the name of a bus!

Another memory from Kavieng was when I thought I would reduce the backlog by conducting a joint trial for six people each charged with the murder of a man believed to be engaged in sorcery. When the prosecutor indicated that there were another six people charged with the same murder, I found myself running a murder trial with twelve accused. Since they would not all fit in the dock, and as there were two rows of seating for the public in the back of the court, I decided the front row would be for the accused and the back row for the spectators. In order to rearrange the seating I said: 'anyone who is involved in the death of (name), please raise your hand'. I have yet to tell the prosecutor, who was facing me, that there were thirteen hands raised!

I have appreciated letters and e-mails from colleagues at the bench and bar. However, please excuse any delay in replying. A letter from a judge took three weeks to arrive because it was sent to Port Moresby. (It would have been longer if it had been sent to Wabag.) I was not able to reply to an e-mail from a silk for a number of days due to electricity blackouts followed by the telephone lines being out. My new found skills include walking around the house in the dark and keeping food where the ants can't find it. Other challenges include feeding a party of seven on circuit to Porgera when their travelling allowance cheques have not arrived before we leave Wabag, a task made more difficult by the fact that there is no bank in Porgera!

For those who may be tempted by a gruelling workload I should disclose the remuneration package. I am told there is a pay rise on the way but I have yet to see it. When I arrived, the salary was around K140,000 ($A56,000) per annum. Deducting a third for tax gives about $A38,000 per annum. There is an additional annual amount equivalent to $A12,000 for security but I can assure you that is fully expended. Hence, many juniors at the Sydney Bar would earn my annual salary in two weeks, there would be silks who earn that amount in a week and I suspect David Jackson QC would earn that in a day of special leave applications in the High Court. I'm not complaining at having put off my retirement in order to help restore law and order in a remote part of PNG. I don't just get to talk about the rule of law: I get to do something about it. The only 'minus' is living away from my family. I am indeed fortunate to have their support for my work here. You may be assured that it does the reputation of the NSW Bar no harm to have one of its members serving here.

On one occasion I was having difficulty understanding the evidence in a murder case arising from an argument over a pig until I realised that the pig was sleeping inside the house. He (or she) was, to use a local term, a 'house pig'.

While there is no doubt that there are people in PNG who engage in criminal and corrupt conduct, they represent perhaps only one per cent of the population although they attract 99 per cent of the publicity in Australia. The vast majority of the people of PNG are delightful people and their support for my work is most encouraging. I am pleased to be able to count many of them as my friends. However, to use the oft-quoted tourist promotion slogan from a number of years ago, it is true to say: 'PNG – land of the unexpected'!

Rules that ought not to be applied – the ultimate iconoclasm

The 2010 Sir Maurice Byers Address was delivered by David Bennett AC QC

Sir Maurice Byers was one of the most brilliant lawyers and advocates that Australia has seen. I put it that way to emphasise that he was both a brilliant lawyer and a brilliant advocate for these two qualities do not always co-exist. His advocacy was such that Justice Bruce Macfarlan once referred to the fact that he always had to be on his guard against Sir Maurice's plausibility. His legal brilliance was demonstrated by his lateral thinking in being able to develop and promote new legal ideas which achieved acceptance in the High Court. The two greatest examples of this skill occurred during his final period at the private bar after his term as solicitor-general of Australia. They are *Australian Capital Television PL v The Commonwealth* (1992) 177 CLR 106 and *Kable v DPP* (1995-6) 189 CLR 51. In both cases, orthodox legal doctrine would have told a lawyer that the client's cause was hopeless. Who would have thought of implied constitutional principles giving rise to freedom of political communication or a prohibition on a state legislature empowering its own courts to make decisions concerning the continued detention of prisoners who might constitute a risk to society. In each case, Sir Maurice created and developed in argument a new legal doctrine and in each case he was successful. The ability to develop such arguments could be described as iconoclastic.

It is therefore appropriate that I devote this Sir Maurice Byers lecture to the ultimate iconoclasm – a questioning of the basic syllogism which underlies every case and motion in every court throughout Australia every day.

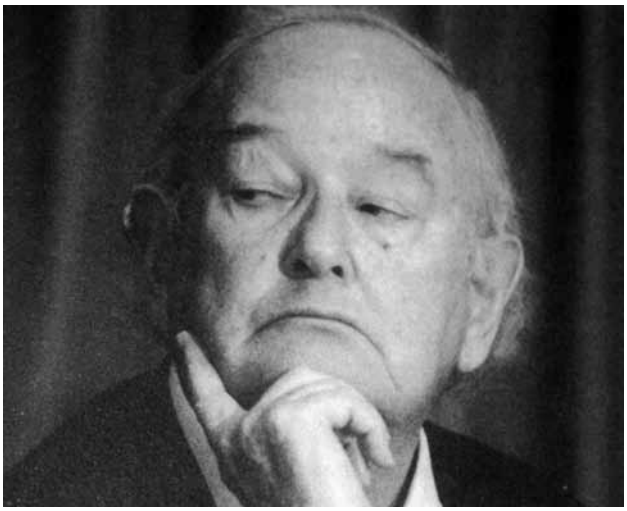
I would love to have discussed this address with Sir Maurice. I can only console myself by saying that, had he been alive, there would probably not have been a Sir Maurice Byers lecture to give.

Before I go further, I interpolate that I discussed this oration with a Federal Court judge who shall be nameless. She advised me that I should explain the words 'iconoclastic' and 'syllogism'. I do not consider this to be necessary but I will do so. Iconoclasm, literally the breaking of idols, is challenging established beliefs. A syllogism is a logical process such as 'all dogs have four legs' (the major premise); 'Fido is a dog' (the minor premise); therefore Fido has four legs. The syllogism with which I am concerned is as follows:

Major premise: If fact A (or a specific combination of facts) is shown to the relevant standard, the court shall do X (or may do Y).

Minor premise: Fact A (or the specific combination of facts) is shown to the relevant standard.

Conclusion: Therefore the court must do X (or may do Y).



The problem with this syllogism and the theme of this oration may be expressed in a number of ways. Three ways of expressing it are as follows:

1. Every generalisation of law has exceptions. The syllogism fails to recognise the possibility of an exception to the major premise where the principle is clearly inappropriate.
2. Every generalisation of law has an ultimate purpose. The syllogism fails to recognise that the application of the generalisation may be anomalous where a particular instance (or the presence of a particular additional factor) gives rise to a situation where application of the rule would be antithetical to (or at least neutral in relation to) that purpose or undesirable for some other reason; or, more briefly,
3. A law which is generally just may have specific unjust applications.

The principal problem I address in this oration is how to deal with the just law which has an unjust application.

Law students are frequently directed to the famous example developed by Professor HLA Hart – the case of the truck in the park. A hypothetical park by-law provides that no-one shall bring a truck into the park. The RSL wishes to erect in the park a memorial to military truck drivers killed in wartime. It proposes that this memorial take the form of an old military truck on a pedestal with an appropriate inscription. Does the by-law preclude this proposal?

A simpler example is that of a person who parks at a bus stop during a bus strike.

In each case the purpose of the law is not advanced by applying it to the specific case. The purpose of keeping the park quiet,

safe and emission-free is not advanced by prohibiting the proposed memorial. The purpose of enabling buses to pick up and drop passengers without holding up traffic is not advanced by prohibiting parking at bus stops on a day when no buses are operating.

An example of the presence of an additional factor which may outweigh the law's purpose is that of a person who exceeds the speed limit on an empty but straight and wide road while driving a critically ill person (or a woman about to give birth) to a hospital.

Analogous problems can arise outside the law where subordinates are required to comply with norms without the benefit of exceptions or discretion. Last year a lost bushwalker telephoned an emergency service on a mobile phone but was told that he could not be helped because he was unable to provide a street address for his whereabouts, this being a requirement with which the telephonist had been instructed to comply. Tragically he died, a victim of normative rigidity. In the United States a woman passing through airport security with a young daughter was asked by her child why they had to remove their shoes. She replied that it was in case they had hidden bombs in them. Because she used the word 'bomb' within hearing of a security guard, she was arrested, refused boarding rights and placed on a 'no-fly' list.

The problem is particularly acute in competitive sport where rules are rigidly applied. Some years ago, Ian Thorpe accidentally fell into the water before a race. He was disqualified because of the mindless application of a rule designed to prevent swimmers from 'jumping the gun'.

In each of these cases, a norm was applied literally in circumstances where that application failed to fulfil the purpose of the norm.

These aberrations are often sought to be justified on the basis that the subordinate is incapable of exercising a discretionary judgment. It may be that emergency telephone operators, security guards and swimming umpires are less capable of this task than judges but is anyone really so lacking in common sense as to be incapable of realising that a request for a street address is irrelevant to a lost bushwalker, that there are innocent and non-innocent uses of the word 'bomb' near security barriers or that there is a distinction between falling in the water and jumping the starting gun. Much of the blame must lie on the instruction-giver or norm-creator who does not trust the subordinate decision-maker and who therefore fails to nominate exceptions and requires a rigid application of the norm.

I will deal first with the arguments for universal enforcement of the general principle in such cases and then with the various devices available to the law for dealing with the problem. I will then indicate my view as to the solutions.

The major argument in favour of a rigid approach is certainty. The law needs to be predictable and to be capable of straightforward application. Any principle which authorised judges to depart from legal principles or statutes in any case where the underlying purpose was not served by the particular application of it would lead to excessive subjectivity in decision-making and would make the purpose rather than the legal formulation the governing rule. A law which provided that one could park at bus stops whenever that conduct was not going to impede buses using the space would have a large uncertain field of operation. What if buses are scheduled to arrive once an hour and one parks for ten minutes immediately after the departure of a bus? What if there is a 20 minute stop-work meeting of bus drivers? What if the Transport Workers' Union decrees that its members should not stop buses at a particular bus stop.

Secondly, a law or principle may overshoot, undershoot or do both. The hypothetical park by-law overshoots in relation to the RSL's memorial but undershoots in relation to a person who brings a smoky and noisy bulldozer or crane into the park. If the by-law were to provide that no-one may bring smoky or noisy things into the park, there would be many borderline cases with resulting uncertainty, loss of predictability and cost. If one is to permit courts to override the law where it overshoots, should one apply a corresponding principle where it undershoots? This would be even more productive of uncertainty. There was an attempt in this direction in ancient Chinese Law, which had a code formulating various specific offences which carried specific penalties. There was then a prohibition on 'doing what ought not to be done' with a very wide range of penalties. Such a law is the reductio ad absurdam of a law designed to achieve perfect justice without any concern for certainty or predictability. A cynic might place a law prohibiting 'offensive behaviour' in this category. The High Court took an analogous approach to a law forbidding the use of insulting words in *Coleman v Power* (2004) 220 CLR 1.

Thirdly the uncertainty is even greater where it is the presence of an additional factor which leads to the anomaly. We can all relate to the example of the speeding driver on his or her way to a hospital. It is hard, however, to contemplate with equanimity a statute or rule of law which provided that any law could be disregarded if some additional factor made it unjust or undesirable for the law to apply in a particular case. One can well imagine the arguments on both sides which

would be put in a euthanasia prosecution if such a provision were to exist.

I turn to the possible mechanisms for dealing with the problem.

The first is to draft legislation (and, where appropriate, to develop common law principles) which incorporate the exceptional cases.

This gives rise to the issue whether one does so by general legislation making the purpose paramount or by specific legislation enumerating all desirable exceptions to a statutory provision.

Both have their disadvantages.

General purposive legislation (such as 'no-one shall bring a smoky or noisy thing into the park' or 'no-one shall park at a bus stop where such parking is likely to impede a bus picking up or dropping passengers there') has many of the vices associated with uncertainty. I do not include in those vices the inconvenience to the police officer or director of public prosecutions who needs to apply his or her brain to the decision to prosecute. For the reasons I have given, such laws are inimical to certainty even if they operate more fairly in the anomalous cases.

The enumeration of all desirable exceptions is likely to be beyond the wit of even the most imaginative parliamentary draftsperson. What drafter of a park by-law is likely to think of the example of the RSL memorial. Legislation such as that to which we are accustomed in the areas of income tax, company law and workers' compensation is frequently criticised for its complexity yet it is that very complexity which enables it to operate fairly and efficiently. The most that can be said is that the enumeration of exceptions is a convenient way of dealing with the problem but that it has limitations because it is rarely possible to predict in advance all possible desirable exceptions to a rule. One notes how frequently legislation of this type is amended. This should not necessarily prevent the listing of major foreseeable exceptions. An amendment to the Motor Traffic Regulations permitting one to park at bus stops during bus strikes would be an improvement, even if it did not cover every possible situation where such parking ought to be permitted.

In the common law context, two matters militate against general or specific exceptions. General ones are likely to confer greater discretions on future courts and to reduce certainty. Specific ones require social prediction by courts which are unsuited to that task and are contrary to received doctrine about the distinction between ratio decidendi and obiter dicta as well as the separation of powers itself.

A second and related solution is to authorise regulations or ministerial proclamations creating exceptions to a statutory rule. This merely changes the identity of the decision-maker. The major practical difference is that regulations are simpler to create, amend and repeal than parliamentary legislation and that ministerial proclamations are even more flexible. The same problems about generality and specificity apply.

The third solution has merely to be stated to be rejected. It is to have a general statutory provision (perhaps in an interpretation act) enacting that no statute is to apply where the specific application would fail to achieve its purpose. This would have the effect of reducing all statutory law to subjective determination by courts based on personally developed and excessively general norms. The conferral of this type of power on judges is one of the major vices relied upon by opponents of bills of rights. Certainty and predictability would be the casualties. There would also be an issue in many cases as to whether one looked to the immediate purpose or the ultimate purpose. For example is the purpose of the hypothetical park by-law to make the park safe, quiet and emission-free or to increase the enjoyment of users of the park. These purposes might lead to different results if the memorial was considered by many to be particularly ugly.

Fourthly, in the criminal area (which encompasses the examples I have given thus far), there are in existence a range of filters already available to prevent unreasonable applications of the law. These are:

- The ability to decide not to prosecute
- The prosecutorial discretion to offer no evidence
- The power of a court to stay proceedings as an abuse of process (although to date this power has not, to my knowledge, been used in the present type of case)
- The power of a court under s 19B of the *Crimes Act 1914* (Cth) and corresponding state legislation (including s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) to find the offence proved but, without proceeding to conviction, to dismiss the charge
- The application of these four filters mutatis mutandis to an appeal; and, ultimately
- The vice-regal power of pardon

In practice, one of these, particularly the first, is likely to preclude the imposition of any punishment upon the RSL for erecting its memorial or upon a driver for parking at a bus stop during a bus strike or for speeding on the way to hospital in an emergency.

These filters are highly desirable. Indeed, provisions such as s 19B may be characterised as a significant Australian contribution to criminal jurisprudence. When one describes these provisions to United States or United Kingdom lawyers, one is frequently greeted with disbelief, and even with the occasional suggestion that they are contrary to the rule of law. They are not a total panacea. If anything, they constitute a recognition of the problem I have described. They do not contribute to certainty since their application can rarely be accurately predicted. One must also remember that a decision never to prosecute in certain types of case can itself be an instrument of oppression – for example if it is applied generally to police officers.

A similar approach is taken in procedural law. Virtually all rules of court throughout Australia contain provisions authorising the court not only to extend or abridge any time limit but also to dispense with any of the rules themselves.

A fifth solution lies in the law of construction of statutes.

In *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113, McHugh J said:

> Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose.

This goes further than any previous case on purposive construction and it remains to be seen how durable the passage will be in the future. It provides ready solutions to the truck in the park problem – one could construe 'bring' to mean 'drive' or one could say that a defunct and immobile truck is not 'a truck'. It is harder to apply it to parking at a bus stop during a bus strike.

There is a useful example of the difficulty with this solution in the English case of *Whiteley v Chappell* (1868) LR 4 QB 147. Section 3 of the statute 20 & 21 Vic. c.105 (dealing with the election of guardians of the poor) provided that:

> If any person, pending or after the election of any guardian ... shall wilfully, fraudulently and with intent to affect the result of such election ... (im)personate any person entitled to vote at such election ...

he commits an offence.

W pretended to be an elector who he knew had recently died and thereby exercised a vote. The divisional court (reversing the trial judge) held that he was not guilty because a dead person is not 'a person entitled to vote'.

The case is frequently used by United States academics as an example of the undesirability of the English literalistic approach to construction as opposed to their own purposive approach. In fact the issue is not so simple. A literal approach could lead to the opposite result if one were to read the prohibition as applying to a person who both pretended to be another person and pretended that that person was entitled to vote. A purposive approach might fix upon the purpose of preventing other electors suffering inconvenience from this early form of identity theft. This would not apply to the impersonation of a dead person although a broader purposive approach (assuming that the purpose was to prevent electoral fraud) would result in conviction. The facts of the case thus illustrate that literalism does not necessarily lead to certainty as, indeed, a purposive approach does not necessarily lead to the most desirable result. All that one can say with certainty is that there will always be a measure of uncertainty as to whether one applies a literal or a purposive test, at least until the dictum of McHugh J is universally accepted or rejected.

What, then, should be done? The battle-lines between certainty and fairness will remain so long as we have legal systems. Laws need to be expressed in general terms and virtually all generalisations have exceptions. The optimal solution lies in the middle. We cannot solve the problem for every case but we can do a number of things. These include:

- Encouraging parliamentary drafters to think laterally and to include more exceptions in their drafting
- Determining how far McHugh J's dictum should be enshrined
- Emphasising (and confirming the availability of) provisions such as s 19B in cases of legislative anomaly

In particular, I commend to the state government the amendment of the Motor Traffic Regulations to permit parking at bus stops during bus strikes.

The failure to recognise the need for exceptions also bedevils the fields of morality and human rights. The generalisation that it is wrong for a prospective employer to discriminate on the ground of the prospective employee's religion is clearly a sound principle of human rights. It is not, however, a universal truth. Clearly if a religious institution is employing a minister of religion, it is entitled to insist that the person belong to the particular religion. In the field of gender discrimination, clearly a producer of a play or film can insist that Attila the

Hun be played by a man or that Marie Antoinette be played by a woman. This type of exception is normally recognised by statutes but rarely by bills of rights. The point is that a wise and just general principle has exceptions. Supporters of capital punishment may wish to impose it for a variety of crimes; opponents of capital punishment usually do not wish not to have it imposed at all. Why can neither group recognise that there are cases where it should not be considered (perhaps the Bali nine) and cases where it may be justified (such as Hitler or the Bali bombers). Too often today both groups describe someone who favours their principle but is prepared to recognise an exception as a hypocrite. The most obvious example is abortion. Many proponents of a woman's right to choose refuse to recognise an exception for the horror known as partial birth abortion at 8 ½ months. Many 'right-to-lifers' refuse to recognise an exception to their anti-abortion stance in the case of a morning-after pill. In each case, the power of their arguments would be strengthened not weakened by the recognition of an obvious exception.

I should disclose that, since writing my first draft of this oration, I became aware of the work of the United States legal philosopher Frederick Schauer. Much of what I have said is similar to the views expressed in his 1992 book *Playing by the Rules*. His examples are different to mine – indeed his principal example is a rule forbidding dogs in a restaurant and the issue whether that rule should apply to a taxidermically stuffed dead dog on the one hand or to a live cat on the other. In self-defence I merely plead that we came to our conclusions independently.

I summarise my conclusion by saying that all generalisations, including this one, have exceptions and that loyalty to the generalisation should not prevent recognition of the exception. If I had to summarise it in two words, those words would be 'exceptions rule'.

American Bar Association (Section of International Law) Conference

On 9 & 10 February 2010, the American Bar Association (Section of International Law) held a conference in Sydney on 'Cross Border Collaboration, Consequences and Conflict: The Internationalisation of Domestic Law and its Consequences'.

One of the many highlights of the conference was a discussion between US Supreme Court Associate Justice Antonin Scalia and the Honourable Michael Kirby AC CMG, former justice of the High Court of Australia. The issue considered was the extent to which international law may assist or inform national courts in determining constitutional questions and human rights issues. Not surprisingly, the speakers were at polar ends of the debate as Justice Scalia adheres to the originalist theory of constitutional interpretation, while Michael Kirby takes the view that the Australian Constitution is a 'living force' which quite rightly may be coloured by legal developments and attitudes abroad.[1] However, Michael Kirby did manage to find some common ground, observing that both he and Justice Scalia are great supporters of the British tradition of dissent. He later invited Justice Scalia to attend joint therapy sessions with him to address that tendency.

On the second day of the conference, various judges and counsel from the United States and Australia participated in a moot court entitled 'The Art of Persuading Judges' at the University of Sydney Law School. The moot was highly entertaining, yet with the selection of Justin Gleeson SC and Andrew Bell SC as the Australian sparring partners, the organisers' intention to demonstrate a contrast between the renowned flamboyancy of the US bar and the more subdued approach of the Antipodeans, was somewhat frustrated.

Justice Scalia, when asked at the conclusion of the moot what the most common and annoying mistake made by counsel is, replied that that the failure of counsel to answer a question from the bench by way of 'yes' or 'no', followed by an explanation for that response, is aggravating. He said that many counsel regard questions from the bench as an inconvenient intrusion of their time when, in reality, answering a question is the only occasion that counsel can be certain they are not wasting their time.[2]

By Jenny Chambers

Endnotes

1. See the opening remarks of the Honourable Michael Kirby AC CMG, former justice of the High Court of Australia, reproduced on the following page.
2. In the US Supreme Court each party is allocated thirty minutes for oral argument.

The internationalisation of domestic law & its consequences

By the Hon Michael Kirby AC CMG

This paper was delivered during a 'public conversation' between the Hon Justice Antonin Scalia, associate justice of the Supreme Court of the United States and the Hon Michael Kirby AC CMG, during the American Bar Association's Section of International Law conference, held in the Banco Court, Queens Square on 9 February 2010.

The American Revolution and its consequences

The establishment of the colony of New South Wales was itself a direct outcome of the American Revolution of 1776. The effects of that momentous event were felt on the far side of the world. When they lost the American settlements, the British authorities needed somewhere to transport their convicted felons. Various options were considered: West Africa (too many mosquitoes) and South America (too dangerous). The reports of the great navigator, Captain James Cook, were then remembered and so the Australian penal colony began. With the convicts and soldiers came the common law of England. This courtroom, like courtrooms throughout the United States, follows the common law tradition. By that tradition, the judges, developing and adapting earlier precedents, have a large part to play in the declaration and evolution of the common law and basic legal doctrine.

We are surrounded here in the Banco Court by the portraits of the successive chief justices of New South Wales. They date back to the early colony. The first of them is that of Sir Francis Forbes. He had been born in 1784 in Bermuda, just eight years after the events of 1776. He was educated in England and returned to the Americas in 1816 as chief justice of Newfoundland. In 1822, he was appointed the first chief justice of the new Supreme Court of New South Wales, which was to replace the early tribunals of convict days. This Supreme Court began operations in 1823 with the Charter of Justice. Forbes was an outstanding chief justice. He served until 1837. He was strong and independent and a fine example to his successors.

The British learned from the loss of their American colonies. Thereafter, as in Australia, they encouraged notions of self-government in settler communities. They fostered and defended independent courts. Australia's legal history was one of evolution, not revolution. Our courts were supervised by the Privy Council. This supervision linked us to one of the great world legal systems. Reading decisions in appeals from colonies all over the world, Australian lawyers became (as Commonwealth lawyers generally are) knowledgeable about comparative law. Our minds did not dwell exclusively in our own country. We became aware of the worldwide system of law of the empire and Commonwealth, with later acquaintance with the decisions of courts of the United States and other lands. By the revolution, the United States cut itself off from this global interaction.

I have always thought that this severance was a reason for the comparative isolation of American legal thinking. Save for occasional references to Blackstone's *Commentaries on the Laws of England* and English judicial decisions, particularly before the 19th century, the United States lawyer was typically kept busy by examining the decisions in the many jurisdictions back home. In Australia, our legal imagination was constantly stimulated by reading the reasons of judges in other common law countries. This is an approach that comes naturally to us. It extends to every branch of the law.

In the new global report series, *The Law Reports of the Commonwealth* (published by LexisNexis, London), the case reports contain constitutional and other decisions written in the English language in the fifty-three nations of the Commonwealth. There one can find important decisions on each member nation's constitutional doctrines. We do not hesitate to reach for insights and analogies written in the courts of other Commonwealth nations. Thus, a recent volume includes a report on the sensitive issue of apostasy in Malaysia[1]; court jurisdiction in Ghana[2]; and the law of mandatory punishment for rape in Botswana[3]. All of these contain references to court decisions in Britain and other countries of the Commonwealth as well as to decisions in the United States, invoked for use by analogy and logical reasoning.

It is important to start our dialogue today by calling attention to this difference in attitude to global legal culture. When judges and lawyers within our legal culture read Justice Scalia's dismissal of the discussion of foreign legal authorities as 'meaningless dicta' and his observations that the court 'should not impose foreign moods, fads or fashions on Americans'[4], their first response is usually one of puzzled astonishment. Yet Justice Scalia's approach is by no means confined in the United States to his opinions. That is why we are here to explore the questions of principle raised by his observations.

Help from American human rights experience

Australia is currently considering whether it will end its isolation, as virtually the only developed western country not to have a general human rights instrument. The issue, subject to a national consultation, is whether Australia should introduce

a charter of rights and responsibilities (the 'charter'), such as has now occurred in the State of Victoria and the Australian Capital Territory. A federal commission of enquiry (chaired by Professor Frank Brennan) recommended that this should be done. One question posed for us in this session is whether the United States judicial experience with the Bill of Rights affords any guidance for Australia in this local dialogue.

The immediate answer is that guidance there would be, but it would be limited. In the United States, both federal and state bills of rights have a constitutional provenance. This means that United States case law and experience will be of little immediate relevance to the Australian proposal:

United States Supreme Court Associate Justice Antonin Scalia testifies before the House Judiciary Committee's Commercial and Administrative Law Subcommittee in May 2010. Photo: Chip Somedevilla / Getty Images

The Australian Government has made it clear that no constitutional bill of rights is on the agenda. The terms of reference of the Brennan enquiry excluded that possibility, unsurprisingly, therefore, the Brennan committee made no recommendation on it. The prospect of Australian judges striking down legislation on the basis of a human rights instrument can thus be put out of consideration. In this country, it is not going to happen any time soon; and

The option which is advanced by the Brennan enquiry is, effectively, that lately adopted in the ACT and Victoria. In turn, it is copied there from the legislation adopted in the United Kingdom[5] and in New Zealand[6]. This involved a much more limited participation by the courts in upholding human rights standards.

Nevertheless this charter model still involves a number of useful consequences:

- it gives ordinary citizens an opportunity to approach the independent courts to consider and decide human rights grievances;
- potentially, it activates the democratic process by calling infractions to the notice of the legislature;
- it enlivens specific political debate over proposals for laws 'notwithstanding' their departure from charter standards. This is what has happened recently in Victoria in a proposed new 'stop and search' power for police. The minister had to certify derogation from the requirements of the charter. Naturally, this action enlivened a vigorous political debate, as it was intended to do;
- it envisages that courts would be enjoined to interpret legislation in line with the provisions of the charter. If compatible interpretation were not possible because of

intractable language of the challenged law, the most that the courts could do would be to provide a declaration to that effect. The expectation then would be that the legislature would give consideration to the suggested disharmony between the law or practice complained of and the charter provision; and

- it might require a certificate from the relevant minister when proposing legislation to parliament which involves departure from the standards of the charter.

All of this is a much softer option than constitutional invalidation of laws as in the United States. Yet it is still useful.

Justice Scalia, as a champion of electoral democracy, would doubtless support these proposals. The powers they give judges are restricted and closely confined. Their object is to stimulate political attention to uncomfortable challenges to complacent legislative power. As I read Justice Scalia's opinions, they are directed to returning judges to modest functions and self-conceptions in human rights litigation. The Brennan proposals offer no more than that. They promote democratic solutions to problems rather than judicial ones. This, too, is a purpose of the proposals.

If the Brennan proposals are rejected, despite their undoubted modesty, this will leave Australia completely out of step with the rest of the world. I have never read Justice Scalia to express regret over the existence of the Bill of Rights in the United States Constitution. He has never proposed its repeal. But as he has repeatedly said, it is not a full human rights charter. It is (with Magna Carta and the English Bill of Rights of 1688 and the French Declaration of the Rights of Man and of the Citizen of 1789) the oldest such measure in the world. The American Bill of Rights has been operating continuously since 1791. It is confined to particular aspects of civil and political rights and then only to limited attributes. There is no present prospect that this confined measure will be adopted in Australia. It follows that American case law and experience on their constitutional provisions are of limited relevance to us.

In three particular respects, however, the United States judicial decisions may be of relevance to our Australian debates:

- First, the fact that American judges have been engaged with such basic concepts of rights for 220 years shows that it is neither alien to the judiciary of our shared legal tradition, nor likely to be beyond the capacity of Australian judges, confronted with the provisions of a charter, limited as I have explained. There may, of course, be criticisms of particular decisions under the US Bill of Rights. Some decisions have attracted virtually universal condemnation[7]. Other decisions have attracted mixed reviews[8]. But United States lawyers usually see the Bill of Rights as an integral part of their constitutional freedoms. They recognise that it places necessary checks on unbridled popular democracy. Normally, they find it hard to imagine a civilised legal system that lacks such checks;
- The existence of such measures also has a silent operation that can be easily overlooked. It was mentioned at a recent seminar on statutory interpretation held in Melbourne, addressed by parliamentary counsel of Victoria (Ms Gemma Varley). She emphasised the fact that the enactment of the charter had introduced official practices in Victoria that are defensive of fundamental rights, without any involvement of the courts. Laws are now drafted in that state to comply with the charter and to call possible derogations to notice; and
- Most importantly, the existence of a charter assists in the education of the community, including school children, so that they come to know that they *have* civic rights and responsibilities, something that can be achieved in the United States by reference to the Bill of Rights. A recent Australian text on comparative human rights law identifies the problem. Dr Paula Gerber of Monash Law School conducted research to compare the knowledge of young people in Victoria and Massachusetts about basic civil rights. The existence of the Bill of Rights was evident in the responses to the survey by the Massachusetts' students. They proved generally familiar with rights discourse in terms of the somewhat dated list contained in their national and state Constitutions. On the other hand, Australian school children emerged as much less familiar with the conceptions of fundamental rights and with the content of such rights for their citizenship. Dr Gerber pronounced her findings 'depressing'[9]. In this respect, the American experience is a source of important instruction.

If the Brennan proposals are rejected, despite their undoubted modesty, this will leave Australia completely out of step with the rest of the world.

Use of foreign precedents

The next, and more controversial question presented for debate, is whether 'international precedent and experience'

Supreme Court Chief Justice Nominee John Roberts answers questions during his confirmation hearings in 2005. Photo: Chip Somedevilla / Getty Images

may inform decisions of judges in national courts, especially on constitutional questions and human rights issues. It is important to note here the distinction between the role of such material as 'precedent' and its role as background material on the 'experience' of foreign countries.

When asked during his confirmation proceedings about the use of foreign jurisprudence in Supreme Court opinions, Chief Justice Roberts gave what, at the time, I thought to be a very intelligent answer, deflecting the controversy. Such materials should not be cited, he said, as 'precedent'. This appeared to satisfy his questioners.

Yet no-one that I know believes that international law or trans-national decisions should be used as a 'precedent', in the sense of binding decisional authority. No national court, least of all a final national court, is bound by the decisions of foreign judges. In Australia, the abolition of the last appeals to the Judicial Committee of the Privy Council in 1986 meant that, here too, Australian courts have the last say[10]. But can such decisions, and the reasoning contained within them, be cited in domestic judicial opinions? Can they be even looked at? This is where I part company from Justice Scalia. He is totally opposed to the citation of such opinions. He made this absolutely clear in his reasoning in *Atkins v Virginia*[11], *Lawrence v Texas*[12] and *Roper v Simmons*[13]. In *Roper*, he said:

> '[T]he basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.'

If anything, in *Lawrence*, Justice Scalia was even more emphatic[14]. He dismissed the majority's discussion of foreign legal developments and authority in that constitutional challenge to criminal laws addressed to the criminal liability of homosexuals. He described the foreign judicial opinions as 'meaningless dicta'. He ruled that the court 'should not impose foreign moods, fads or fashions on Americans'[15]. This became one theme of Lord Bingham's Hamlyn Lectures in England in 2009 ('Foreign Moods, Fads or Fashions', ms, pp.4-5).

Justice Scalia deploys a number of arguments to support this view. They include:

1. that a national constitution is a special national law, reflecting national history, culture and values. It should not be influenced by the opinions of foreign judges who will generally be unaware of, and insensitive to, national considerations;
2. such opinions are counter-majoritarian in nature. They are written by judges who are in no way part of the national judiciary. They are not accountable to the national electorate for their offices. Reaching for their opinions aggrandises local judges and may push them into undemocratic and alien directions;
3. international law and human rights principles are generally expressed in very broad and vague terms, potentially meaning all things to all people. They lack the clarity and specificity of national legal developments. They should not pollute the local stream of binding national law;
4. in choosing foreign authority, judges can generally find something to support every proposition. They can be too easily tempted to look for views that confirm their own prejudices rather than disciplining their minds in a properly lawyerly way; and
5. above all, for Justice Scalia, such citation is totally contrary to the basic principles of constitutional elaboration that he favours. This is 'originalist'. Only by going back to the meaning of the national constitution at the time of its making can a single, objective and principled interpretation be adopted by the judiciary.

There are many difficulties with these propositions, although they do indicate the care that is needed in any use of foreign authority in national constitutional decisions:

1. In today's world, national constitutions speak to other nations about one's own local values[16]. The United States Constitution, in particular, has been profoundly influential in the constitutional development of other countries, including Australia. There is now a global constitutional discourse, including amongst judges. Why should they have to reinvent every doctrinal wheel when they can

have access to the thinking and reasoning of very clever judges in other lands to help, by analogy, in their own judicial reasoning?

2. Democracy is truly a precious feature of modern constitutions, including those of the United States and Australia. But understanding democracy's demands can be made easier by reading what foreign courts have said in analogous circumstances. Naturally, it is essential to make all due allowance for any differences of text and history. In any case, there are many fictions about electoral democracy. The notion that the legislature fixes everything up in a democratic polity is contrary to Justice Scalia's correct assertion that constitution and constitutional bills of rights exist to put restraints on populist democracy. As Justice Breyer has said, citations of Blackstone and of modern academic scholars have no democratic provenance. But they are common, including in the opinions of Justice Scalia[17]; and

3. It would be wrong for any judge simply to read foreign judicial opinions of those of like opinion to the judge's own. An honest judge will consider, and acknowledge, contrary opinions and any material differences. For example, United States Supreme Court opinions on the validity of the disqualification of prisoners to vote in federal elections could, with respect, be greatly assisted by reading, and reflecting upon, the principles that have existed behind contemporary judicial opinions in Canada, the United Kingdom, Europe and Australia on the limits of the legislature's power to deprive citizens of the right to vote in a democratic polity[18]. At the very least, a reflection on more modern, overseas thinking on that issue would allow the local judge to tick the boxes of consideration and to reflect on any need to reconsider past judicial approaches, where such recommendation was open to the judge. Not all wisdom is home-grown. Occasionally, we can all learn from others.

The fundamental objection of Justice Scalia's approach is addressed to his 'originalist' approach to constitutional interpretation. He must sometimes feel disconsolate that his approach has not attracted the warm embrace of his colleagues. I understand that feeling. Like him, I was often in dissent. Sometimes, like him, I despaired of my colleagues' opinions. However, on this point, there are many reasons why the 'originalist' approach does not work and why the majority's rejection of it is correct:

1. The writers of the American Constitution themselves did not intend later generations to be confined to the implementation of their intentions in 1791. In Australia, the drafters of our constitution also made this abundantly plain. Throughout the Australian convention debates, our founders recognised the need for language that would adapt to the changing requirements of the new federal nation. One of our founders, Andrew Inglis Clark, made this clear in expressing the 'living tree' notion of the Constitution in one of the first texts that followed its adoption[19]. If Justice Scalia is truly adhering to the 'originalist' intention of the founders, this will take him to an approach that itself recognises the need for change, modernisation and adaptation. Ironically, his own theory affords a *renvoi* to the living tree doctrine;

2. Any other approach would be unworkable and unjust. It would mean, in the American cases, that judges were forever chained to the opinions (often ignorant or misinformed) of an earlier age: a time proximate to witchcraft trials, notions of hobgoblins and the reality of slaves; a time long before cyberspace, fast air travel, instantaneous telecommunications, nuclear fission and other modern developments to all of which American inventiveness has contributed greatly; and

3. The 'originalist' view is also inconsistent with the very purpose and function of a national constitution. Of its nature, such a document is to be a law that adjusts to serve successive generations and to respond to entirely new and uncontemplated governmental and social problems in an appropriately flexible way. The United States and Australian Constitutions contemplate a core of democratic governance. But they also envisage a proper role for bodies that are inherently elitist and specialised: the military forces; the public service and the judicature. It is in the nature of the functions of these parts of the governmental structure that they will respect the democratic institutions, whilst at the same time performing their own proper roles.

In *Grainpool of Western Australia v The Commonwealth*[20], I tried to express these ideas in terms that I rather adhere to:

> [T]hose who were present at the conventions which framed the Constitution are long since dead. They did not intend, nor did they enjoy the power, to impose their wishes and understandings of the text upon contemporary Australians for whom the Constitution must, to the full extent that the text allows, meet the diverse needs of modern government. Once the Constitution was made and brought into law, it took upon itself the character proper to an instrument for the governance of a new federal nation. A constitution is always a special law. It is quite different in function and character from an ordinary statute. It must be construed accordingly. Its purpose requires that the heads of lawmaking powers should be given an ample

> construction because their object is to afford indefinitely, and from age to age, authority to the Federal Parliament to make laws responding to different times and changing needs.

My satisfaction with these words (one of the comforts of retired judges) was diminished somewhat in 2003 when I read the way in which Justice Kennedy expressed his opinion in one of the decisions that Justice Scalia least likes. Writing for the court in *Lawrence*, Justice Kennedy wrote thus[21]:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty and its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Whilst we are on *Lawrence*, I will say something because of Justice Scalia's repeated reference to anti-sodomy laws; the decision in *Lawrence* and his special *bête noir*, same-sex marriage.

This day, the second Tuesday in February, is the very day that my partner, Johan van Vloten, and I met 41 years ago. Forty-one years of loving, faithful companionship and support. For this, Johan deserves the Victoria Cross; not discrimination or a second-class legal status. There is strong evidence that such long-term relationships (normally sustained in the case of other citizens by marriage) are good for those blessed with them. They are good for their mental and physical health. They are also good for society. For the life of me I cannot see how such relationships damage the marriage of heterosexual couples or the unions of unmarried heterosexual couples. No Australian lawyer has been able to explain to me how this could possibly be so. If there is any American lawyer present here who can offer an explanation, I would welcome it because I regard it as an unconvincing and ignorant falsehood. It is based on infantile notions that nothing in society can ever change. And that some cohorts of citizens must forever be denied equal civic rights. This is a notion that I could never accept: as a judge, as a citizen or as a rational human being.

Some Australians were surprised by the recent decision of the United States Supreme Court, intruding into the procedural ruling of the Federal District Court in California, hearing the challenge to the overturning (by Proposition 8) of the state judicial decision in California mandating equality in access to marriage in that state. In a 5-4 decision, the Supreme Court forbade the telecasting of the federal trial hearing. That decision seemed strangely inconsistent with American First Amendment values and with appellate restraint in disturbing procedural rulings made by trial courts. However, that is entirely an American issue. Before the ban descended, enough was broadcast to record the concession, reportedly given to the Californian Court by leading counsel for the supporters of Proposition 8. When asked by the judge whether he could identify any way in which the opening up of marriage to same-sex couples could possibly damage the marriages presently conducted in California, counsel properly conceded that he could not[22]. And, according to reports, in a very American way, once the ban took effect, it was circumvented by actors repeating the transcript of argument before the court so that, in all its tedious detail, it came to the attention of those who wanted to see and hear it.

Globalism and legal ideas

In Australia, it has been accepted that citation of foreign judicial opinions, including in constitutional cases, do not constitute 'precedents'. They are not binding. At most, they are as helpful to the working judge as the ideas they contain appear to be.

Our chairman, Chief Justice Gleeson, did not hesitate, where he thought it relevant, to cite trans-national and international jurisprudence to explain his thinking on particular points, whether of private law[23], and in constitutional adjudications[24].

In the United States, learned judges have expressed similar views from time to time. Whilst serving on the Federal Court of Appeals, Judge Sonia Sotomayor was explicit about the proper use of such materials[25]:

> Ideas have no boundaries ... International law and foreign law will be very important in the discussion of how we think about the unsettled issues in our own legal system.
>
> [To discourage the use of foreign or international law would] be asking American judges to close their minds to good ideas.
>
> [In cases such as *Roper* and *Lawrence*, the Supreme Court was using foreign or international law] to help us understand what the concepts meant to other countries and ... whether our understanding of our own constitutional rights fell into the mainstream of human thinking.

These were temperate, modest and sensible observations which, in Australia, would, in my view, be uncontroversial. Controversies remain[26]. But we are too deeply imbued with comparative law training and experience, from our earliest days of lawyering, to close our minds to useful thoughts from abroad. Why, in the age of the Internet (an American invention) should the law be cast out from the Garden when

every other learned profession in the world daily draw on ideas from other lands? As Lord Bingham remarked in his Hamlyn Lectures 2009:[27]

> In no other field of intellectual endeavour – be it science, medicine, philosophy, literature, architecture, art, music, engineering or sociology – would ideas or insights be rejected simply because they were of foreign origin. If, as most of us would probably like to think, the law is a human science reflecting the product of intellectual endeavour century after century, it would be strange if in this field alone practitioners and academics were obliged to ignore developments elsewhere, or at least to regard them of no practical consequence. Such an approach can only impoverish our law; it cannot enrich it.

The proposition that such sources must be ignored is therefore simply not tenable. It is important that lawyers should explain why this is so, particularly to the American people and to their elected representatives.

In *Fairchild v Glenhaven Funeral Services Pty Ltd*[28], Lord Bingham, in the House of Lords, summarised what he saw as the correct approach to distilling transnational authority in matters of private law:

> Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.

Finally, it cannot be a tenable position to say, as Justice Scalia did in his conversation with Justice Breyer, that it was alright for Justice Breyer to inform himself on international legal developments but he should just 'keep it out of [his] opinions'[29]. This is not an acceptable intellectual position. As a law professor, Justice Scalia would have failed students for omitting to acknowledge sources important for the development of their reasoning. Decorating opinions with immaterial citations to give them the appearance of 'lawyering' is unjustifiable. But acknowledging useful ideas written by others is an honest judge's intellectual duty.

Sadly, as the confirmation hearing involving Justice Sotomayor demonstrated, the fuss that is presently created in the United States over citations of overseas legal decisions will tend to silence the acknowledgment of international sources. This is already evident in the Supreme Court of the United States since its decision in *Roper* in 2005. The fuss just does not seem to be worth the trouble. It is also evident in other federal courts, in the same way as judicial writing for law reviews fell off after the confirmation hearings involving Judge Bork. This demonstrates the price that judges pay not for having opinions, but for expressing them candidly.

I agree with Justice Scalia that the decline in the citations of United States courts by foreign constitutional courts, since this controversy arose, is not a significant matter. Judges do not write their opinions to win foreign or academic applause. More relevant is the risk of cutting off the United States judiciary from the mainstream of global constitutionalism.

The United States of America has, for 60 years and more, been an important inspiration and example to the emerging new world order. The American Bar Association (ABA) has shown that United States lawyers are not cut off from this engagement. In the 1990s, the ABA established the CEELI programme, to bring notions of the rule of law and basic civil rights to the newly emerging democracies of Central and Eastern Europe. In January 2010, I attended a conference in Chiang Mai, Thailand, organised by the ABA. At that conference, legal experts from the United States and Australia engaged with representatives of civil society in Asia to explore the ways in which American and other human rights concepts can play a beneficial role in the development of the new Human Rights Commission of the Association of South East Asian Nations (ASEAN). Today the section on international law of the ABA has organised this conference on cross-border collaboration, convergence and conflict in Sydney, Australia. These are most useful initiatives that expand the global dialogue amongst lawyers.

Many lawyers of the United States of America realise the growing integration of legal ideas in the world today, including ideas of human rights to which Eleanor Roosevelt contributed so notably in chairing the commission that produced the Universal Declaration of Human Rights in 1948. The judiciary of the United States should not be cut off from these global developments. The developments are compatible with the geo-political interests of the United States and the legal notions that lie at the heart of American law and constitutionalism. They are inherent in the global idea of constitutionalism that is an important legacy of the recent American contributions to world peace and security.

This is why an Australian lawyer will reject the 'original intention' notion of constitutional interpretation advocated by Justice Scalia and why Australian law will not deny, but will

acknowledge, the utility of international and trans-national law. It is not 'precedent'. But, by analogy, it may sometimes be useful to our reasoning and helpful to our law.

Earlier generations have sometimes been blinded to the truth. Later generations of judges and lawyers may invoke the law of other lands in the universal search for greater freedom.

Like Lord Bingham, I will leave the last words to Amartya Sen:

> Even though contemporary attacks on intellectual globalisation tend to come not only from traditional isolationists, but also from modern separatists, we have to recognise that our global civilisation is a world heritage – not just a collection of disparate local cultures'.[30]

Endnotes

1. *Joy v Federal Territory Islamic Council* [2009] 1 LRC 1 (Fed Court Malaysia).
2. *Republic v High Court of Accra; Ex parte Commission on Human Rights* [2009] 1 LRC 44 (SC Ghana).
3. *State v Matlho* [2009] 1 LRC 133 (CA Botswana).
4. *Lawrence v Texas* 539 US 558 at 598 (2003) citing *Foster v Florida* 537 US 990 (2009). See Lord Bingham, Hamlyn Lectures 2009, 'Foreign Moods, Fads or Fashions' (Tspt. Lecture 2, ms, p.4).
5. *Human Rights Act 1998* (UK).
6. *Bill of Rights Act 1990* (NZ).
7. Eg, *Korematsu v United States* 323 US 214 (1944), which Justice Scalia has himself condemned.
8. Such as *Lawrence v Texas* (above) and various abortion decisions starting with *Roe v Wade* 410 US 113 (1973).
9. Paula Gerber, From Convention to Classroom: *The Long Road to Human Rights Education: Measuring States' Compliance with International Law Obligations Mandating Human Rights Education* (VDM Velag, Germany, 2008). See review (2009) 83 Australian Law Journal 849 at 850.
10. *Australia Acts 1986* (UK and Aust).
11. 536 US 304, 347-48 (2002).
12. 539 US 558-586 (2003).
13. 543 US 551 (2005).
14. 539 US 558 (2003).
15. Lawrence 539 US 558 at 598 (2003), citing *Foster v Florida* 537 US 990 (2002).
16. *Newcrest (WA) Pty Ltd v The Commonwealth* (1997) 190 CLR 513.
17. The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Steven Breyer, 3 Int'l J Const L 519 (2005).
18. *Sauvé v Canada* [1993] 2 SCR 438; *Hirst v United Kingdom [No.2]* (2005) 42 EHRR 41; *Roach v Electoral Commissioner* (2007) 233 CLR 162. Cf. Ewald, ''Civil Death', The Ideological Paradox of Criminal Disenfranchisement Law in the United States', *Wisconsin Law Review* 1045 (2002).
19. A I Clark, *Studies in Australian Constitutional Law* (2001 reprint 1997).
20. (2000) 202 CLR 479 at 522-523 [111], (citation omitted).
21. 539 US 558 at 578-79 (2003).
22. Theodore Olson, 'Conservatives Should Celebrate Same-sex Union, Not Lament It', *Sydney Morning Herald*, 16 January 2010, 13.
23. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 686-691 (holding that local government authorities could not sue for defamation; referring to English and South African decisions and the European Convention on Human Rights).
24. *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 177 [13]-[19] (referring to Canadian and European authorities on disenfranchisement of prisoners from voting where these were held 'consistent with our constitutional concept').
25. Collin Levy, 'Sotomayor and International Law', *Wall Street Journal*, 14 July 2009, citing the judge's speech to the American Civil Liberties Union of Puerto Rico in April 2009.
26. See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589, 593, 595; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-25 (per Heydon J, dissenting).
27. Hamlyn Lectures, Lecture 1, 2009, p.7.
28. [2002] UKHL 22; [2003] 1 AC 32.
29. Scalia and Breyer discussion, above n 17 at 534.
30. A Sen, 'The Diaspora and the World' in *The Argumentative Indian* (Penguin Books, 2006), p.85, cited by Lord Bingham in Hamlyn Lectures 2009 (Lecture 3 'Nonsense on International Stilts?'), ms, p.33.

Rake – ABC Television 2010

By Richard Beasley

Peter Duncan discusses a scene on set with Hugo Weaving. Photo: courtesy of ABCTV.

A rake, as all would know, is a garden implement capable of a number of uses. Deriving from the Restoration period, the term can also mean a 'dissipated or immoral man of fashion', a 'promiscuous fellow dedicated to riotous living', or simply an all out bastard who ends up 'insane or in debtors prison'.

Later this year, *Rake* is also the title of an eight part television series likely to be of interest to all, and particularly to the legal profession and members of the bar.

Whatever relevance the title may have to the subject of the series, that interest will be sparked for lawyers as the 'rake' in question, and star of the show, is Cleaver Greene – philanderer, serial adulterer, addicted gambler *and* member of the New South Wales Bar.

Rake stars Richard Roxburgh (*Blue Murder, Moulin Rouge, Mission Impossible 2*) in the lead role of barrister Cleaver Greene, and four of the eight episodes are written by Peter Duncan (*Children of the Revolution, A Little Bit of Soul, Unfinished Sky*).

Scrutinising the law on the small screen is not new to Duncan. A former paralegal at Allen's prior to running away to film school, he has previously examined the legal world on television, writing the screenplay and directing the telemovie *Hell has Harbour Views*. Described by the ABC as a story about 'a man who finds his conscience in a law firm', that same organisation cunningly broadcast this telemovie up against the 2005 Men's Australian Open Tennis final. This not only meant that some potential viewers missed it, but also led to some confusing reviews[1].

With *Rake*, Peter Duncan is hoping for timeslots not clashing with the 2010 Football World Cup, but from what he has told *Bar News* about the nature of the main character, and the subject matter of his cases, *Rake* might not be scheduled during family viewing time.

When interviewed for *Bar News*, Duncan explained that lead character Cleaver Greene, while a very clever criminal barrister, is someone who has made a complete mess of his personal life. Cleaver may have a 'great love of life and love', but it's his consummated desire for his best friend's wife – together with an addiction to gambling and generally 'high' living – that causes him to have even more problems than his criminal clients.

Cleaver Greene may not be the most romantic of names, but he is, Duncan told me, a lover of people – the downtrodden, the accused, and the forgotten. He adores his 15-year-old son from his first marriage. And he's still in love with every woman he's ever been involved with – his first wife, his best friend's wife, old girlfriends, etc. He still loves his best friend, although understandably their relationship in the series is somewhat strained. Duncan hopes that *Rake* not only explores the sometimes strange world of a criminal barrister and the Justice system, but also the 'bizarre complexities of modern life'.

Well known barrister and author Charles Waterstreet is the 'script consultant' for *Rake* – understandably provoking some curiosity as to whether the inspiration for the main character may have come from a real life member of the bar. Viewers however may well be disappointed if they are expecting to recognise any particular barrister in *Rake*. 'Charles has obviously had an influence on the series as our script consultant,' Duncan explained, 'but those influences are really to do with plot tweaks and practical matters. Cleaver Greene is a work of fiction.'

I once heard Waterstreet give a talk on his wonderful memoir *Precious Bodily Fluids*, during the course of which he took a call on his mobile phone, and then announced to the audience that yet another 'very, very, *very* innocent client' had just been acquitted by a jury. The viewing public will have to watch *Rake* and make up its own mind as to whether Cleaver Greene is a 'very, very, *very* fictitious character'.

I also asked Duncan what we could expect from the story lines for *Rake.*

'Cleaver's cases, like him, are very colourful,' he said. 'He has no doubt as to the guilt of each of his clients. It's really about how he plays the game, how he tests the system – often brilliantly – to get his clients acquitted that is the heart of the series. That, together with the complete catastrophe he makes of his personal life. He uses his wit and wisdom to full effect in his professional capacity, but often only his wit with his personal life.'

This it seems is where at least part of the title *Rake* came from. 'I actually do mean it as an analogy with the garden tool as much as a reference to a type of man,' Duncan said. 'The series is about how well Cleaver as a barrister is able to rake through the detritus and problems of his clients' lives – people who are otherwise forgotten or abandoned – while at the same time creating a total mess of his own life.'

What specifically though are the kinds of cases Cleaver is briefed in?

'Problems with high-ranking members of the New South Wales government. Bestiality. Cannibalism. Bigamy. Inciting racial hatred. …,' Duncan told me.

At first I assumed that this was just the one episode, but Duncan later corrected my misapprehension, and told me that these topics account for five of the eight episodes – two of which are directed by Duncan (who is also a co-producer of the series with Roxburgh, and Ian Collie of Essential Media (*DIY Law, Hell Has Harbour Views*), and six by other directors including Rachel Ward (*Beautiful Kate*) and Jessica Hobbs (*Curtin, Love my Way*).

Richard Roxburgh

If there is a real inspiration to *Rake* it's not any particular New South Wales barrister. It's the 1990's Granada television series *Cracker*. 'Nobody thought *Cracker* would work. The main character is on one view fairly repulsive. He's an alcoholic, chain-smoking, foul-mouthed adulterer. Not the sort of character they thought people would want to watch a series about. And nobody thought that people would want to watch a show starring Robbie Coltrane. But Jimmy McGovern's scripts, Coltrane and 'Fitz' were all brilliant – he's a brilliant criminologist. It was a groundbreaking series, and if *Rake* has an inspiration, it's *Cracker*.'

Anyone who has seen Peter Duncan's previous films knows that he's a great talent, capable of handling serious subject matter with deft comic touches. The scripts are co-written by Andrew Knight (*Seachange, After the Deluge*), and it has a terrific cast. Apart from Roxburgh in the lead role, Hugo Weaving plays an economist who moonlights as a cannibal in episode one, Noah Taylor (*Shine, Almost Famous*) is a street crim, Lisa McCune swaps her *Sea Patrol* gear to jury tamper in another episode, and Geoff Morrell (*Grass Roots, Curtin*) is the constantly stressed NSW attorney general. *Bar News* Editor Andrew Bell SC is even expected to play the small role of a prominent prosecutor's junior (contingent upon his fee fitting within ABC budgetary constraints).

Rake is certain to be compelling viewing, not to mention a hoot.

Endnote

1. 'The opening scene was weak, but the third set was magnificent', *The Age*, 31/1/05.

Chief Justice Patrick Keane

On Monday 29 March 2010, a ceremony was held in the Federal Court's refurbished No 1 Court to welcome formally to Sydney the Honourable Patrick Keane following his swearing in as the Federal Court's third chief justice earlier that month.

Justice Arthur Emmett, speaking on behalf of the judges of the Sydney Registry of the court, made the following brief remarks:

> Chief Justice, today marks the first time that you have sat in Sydney, the seat of the court's largest registry. In the absence of Justice Moore, Sydney Senior Judge, may I, on behalf of the Sydney judges, welcome you publicly and express our immense pleasure at your appointment. As our third Chief Justice, you have inherited the Federal Court's tradition, established by Sir Nigel Bowen, and maintained by Michael Black, dispensing justice in deciding cases innovatively, efficiently and courteously. You may be assured of the support of your Sydney judges in maintaining and furthering that tradition in the exercise of the extensive and varied jurisdiction that is vested in the court. We look forward to exercising that jurisdiction under your leadership.

Mr Bathurst QC, on behalf of the NSW Bar, observed that the new chief justice was ranked amongst the finest solicitors-general over the 15 year period in which he held the office of solicitor general for Queensland which was:

> all the more remarkable, as you combined that role with the most successful private practice of the Queensland Bar. As Solicitor-General, you appeared with distinction in most of the major Constitutional cases of the decade, significant cases in administrative law, such as *Ainsworth v the Criminal Justice Commission*, and major commercial cases, both in Queensland and the High Court. As a judge of appeal in Queensland, your Honour followed that court's tradition of intellectual quality and clarity established by judges such as Justice Bruce McPherson, one of the finest Australian judges not to have been appointed to the High Court.
>
> The breadth and depth of experience acquired by your Honour in these capacities makes you an ideal person to be appointed to this very important office which you now hold. Unfortunately, your Honour did not appear very much in Sydney. It was far more common for you to fly over this city, en route to Canberra, than to come and terrify the Bar in this state by your forensic ability and intellectual skill. We hope you rectify this as Chief Justice.
>
> If this magnificent courtroom and the highly-intelligent, diligent, and, dare I say, convivial Federal Court judges sitting in this state, coupled with the attractions of Sydney, are not enough to tempt you, can I just remind you that the Bar in this state has been invaded in recent years by Queenslanders. You will certainly find many friends here. On behalf of all members of the Bar of New South Wales, can I again extend my warmest congratulations and best wishes on your appointment.

The brief address delivered by Keane CJ appears below.

Colleagues, ladies and gentlemen, Mr Bathurst, Ms Macken, I am very grateful for, and much encouraged by this welcome from the two branches of the legal profession in New South Wales. It's been as warm as the welcome I have received from my colleagues in Sydney. It is a particular pleasure for me today to see at the bar table my old sparring partner, Mr Bennett, queen's counsel for the solicitor-general for the Commonwealth, and Mr Sexton SC, the solicitor-general for the State of New South Wales.

It's a happy coincidence that the portrait of Sir Nigel Bowen, which is seen to my right, has recently been returned to this courtroom after its refurbishment, because it gives me the opportunity to pay tribute, albeit an inadequate one, to him, as the court's first chief justice. Sir Nigel Bowen was a great lawyer and advocate. The summaries of his arguments in the High Court, which appear in the *Commonwealth Law Reports*, still bear close study. The compelling elegance of his arguments stands in stark and instructive contrast with so much of the cluttered and convoluted advocacy that was then in vogue. But it was as the first chief justice of the court

that Sir Nigel made his greatest contribution to the law in our national life.

Sir Nigel Bowen's stated vision, as mentioned by Justice Emmett in his remarks, when Sir Nigel oversaw the establishment of this court, was that it should be a court of excellence, innovation and courtesy. Now, more than three decades later, no one would, I think, doubt that Sir Nigel's ambition has been achieved, at least to this time. What might be thought, however, is that there was little that was especially visionary in his stated ambition for the court; but that would be wrong.

To those who think that it is trite that a court should, as a matter of deliberate policy, strive for excellence, I would say that 35 years ago the authority of the courts derived very much from the fact that they were an organ of government, and governmental authority was then attended by a universal expectation of obedience. Government, even in Australia, was still conceived of as something which those in power did to those who were not. That is certainly no longer the case. The authority of the courts is now, more than ever, seen by our well-educated and rights-conscious community, to rest upon the quality of the reasoning on which the judgments of the courts are based. Excellence is now essential to the maintenance of the authority of the courts.

Sir Nigel saw that this was indeed the future, and 35 years ago, innovation – that is to say, openness to different ways of doing things – was not regarded as the virtue that it is today. New South Wales, at that time, had only just made the great leap forward to 1873 in terms of the adoption of the Judicature Act reforms, and some lawyers and judges in New South Wales thought that this was an act of dangerous radicalism. Some still do. Today, we recognise that new ways of doing things, such as active, and, perhaps it might seem at times, unduly aggressive case management are not only capable of improving the processes of the administration of justice, but are actually essential to enable them to cope with the needs of the community and to ensure access to justice and to prevent the courts becoming the playthings of the rich.

But it was in relation to the idea that a court should actively strive to be courteous that Sir Nigel's vision was truly somewhat different. In New South Wales, as in my own state, a judge who behaved as a hectoring bully was not regarded as particularly unusual. The tone on the bench often seemed to be set by angry old men.

As a young barrister, I had the great good fortune to appear before Sir Nigel on several occasions, mostly, I must say, in Brisbane. He was a pleasure to appear before, but he was no pushover. He simply believed that the advocates contributed more to the just determination of the case if they were not harried and hectored, and were allowed to develop their arguments in their own way in order to show their merit. That approach did not commend itself to all of Sir Nigel's contemporaries. Many of them were very great lawyers and judges in their own way, but they could not be accused of being a pleasure to appear before.

Of course, it is possible to stretch the friendship. Courtesy on the part of the court assumes an irreducible minimum of professionalism on the part of both branches of the profession, particularly the bar, but there is, I think, every reason for confidence in the high professionalism of the solicitors and barristers of New South Wales. To the extent that this court has lived up to Sir Nigel's vision – and I believe that it has – that has been, in very large part, due to the high standard of the assistance always afforded to the court by the solicitors and barristers of New South Wales.

I am confident that the profession in New South Wales and the judges of this court will not slacken in their combined efforts to ensure the continued success of Sir Nigel Bowen's vision for this court as one of excellence, innovation and courtesy. I am very grateful to you all for this morning's expression of the dedication of the legal profession in this state to that task.

Commodore Slattery

On 15 March 2010 the Hon Justice Michael John Slattery was appointed deputy judge advocate general – navy and promoted to the rank of commodore. A ceremony was held at Fleet Headquarters, which was attended by his Honour's family and friends, as well as distinguished legal officers of the Navy Reserve Legal Panel. The following is an edited extract from a speech delivered at the ceremony.

The Hon Justice Michael Slattery joined the Royal Australian Navy and the RANR Legal Panel as a lieutenant in February 1990, just over 20 years ago. Later in the year his naval career commenced when he joined HMAS *Creswell* for the RANR Orientation Course. His commanding officer at the time commented that, 'Slattery is a well-motivated officer who, with more exposure to the RANR, will prove to be an asset to the service.'

L to R: Commodore The Honourable Terrence Cole, the Honourable Sir Laurence Street, former chief justice of NSW and founder of the Reserve Legal Panel, Commodore Michael Slattery and Captain The Honourable Murray Tobias.

Michael's early career as a legal officer in the naval reserve included experience in discipline law, acting as defence counsel and prosecutor in courts-martial and defence force magistrate trials. He also advised on a range of matters across the commercial, administrative and operations law fields, and appeared at boards of inquiry. In August 1994, the then Lieutenant Slattery received a navy commendation in recognition of his tireless dedication and highly reliable counsel as a member of the Naval Task Group supporting the Senate inquiry into incidents of sexual harassment in the ADF – the HMAS *Swan* Board of Inquiry. In 1995 the head of the NSW Reserve Legal Panel made the comment: 'Already held in the highest regards in the Navy. His qualities warrant rapid advancement and he is most highly recommended for promotion forthwith.'

Michael continued his steady climb up the ladder of achievement and was promoted to lieutenant commander in 1996, commander in 2000 and to captain in 2005. A former director-general of the Defence Legal Service observed: 'He is widely respected by members of the ADF and reserve forces, and in particular by senior officers, for the quality of legal advice that he gives. He is also revered by his subordinates for the wise professional guidance and support that he gives to them in the performance of their duties.'

In 1998 he undertook a major investigation into allegations of misconduct at the Defence Force Academy and continued his outstanding advisory work for senior commanders, in the fields of management resolutions, mediations and investigations under the Defence (Inquiry) Regulations. In April 2003 Captain Slattery joined HMAS *Kanimbla* and deployed to the North Arabian Gulf to conduct an inquiry into concerns raised about anthrax vaccinations given to deploying personnel. In August 2005 Captain Slattery was appointed counsel assisting at the Sea King Board of Inquiry. He and his team, several of whom are present here today, received a Maritime Commander's Commendation for their outstanding dedication and professionalism in their role in support of the Sea King Board of Inquiry.

Captain Slattery was appointed queen's counsel at the New South Wales Bar on 1 December 1992. From March 2002 until December 2005 he served as head of the NSW Navy Reserve Legal Panel, which reflected his dedication, professional standing as a pre-eminent queens counsel and a person with strong leadership ability. He was president of the New South Wales Bar Association from November 2005 to November 2007 and in this role he had the responsibility to lead and protect the interests of the approximately 2,000 barristers practising in NSW. He was also a director of the Law Council of Australia from 2005 to 2007. On 25 May 2009, Captain Slattery was appointed as a justice of the Supreme Court of New South Wales.

On promotion to commodore today, Michael Slattery has been selected to fill the position of deputy judge advocate general – navy. His career to date is a source of inspiration to many in the navy legal fraternity and in the navy generally. It has been marked with a dedication to members, especially their concerns. Michael demonstrates what the navy stands for through our values of: honour, honesty, courage, integrity and loyalty. This was evident during the Sea King BOI where he devoted special effort to ensuring that the nine members who died had a voice, and their sacrifice was remembered, as well as his 2003 inquiry into members' concerns about vaccinations.

Bench and Bar Dinner 2010

The 2010 Bench and Bar Dinner was held at the Hilton Sydney on Friday, 14 May 2010.

Ms Senior Angela Bowne SC, the guest of honour, the Hon Justice Virginia Bell, President Tom Bathurst QC, Mr Junior Jeremy Kirk

His Honour Judge Greg Keating, the Hon Justice Brian Preston, AG John Hatzistergos, Chief Magistrate Henson

Jeanette Richards and Pam Koroknay

Peter Kintominas, his Honour Judge Peter Zahra SC, Shadow Attorney General Greg Smith SC

Andrew Tokley, Phoebe Arcus, Matt Lewis

Cleopatra Sclavos, William Summers, Miranda Nagy, Christos Mantziaris

Jane Needham SC and Todd Alexis SC

David Williams SC and Laina Chan

Sarah Mahmud, Nick Tiffen and Gerald Ng

Tom Bathurst QC, the Hon Justice Virginia Bell, Attorney-General Robert McClelland

Liz Bishop, Federal Magistrate Rolf Driver, Rachel Francois

Justin Hogan-Doran and Sophie Callan

David Rayment, Madeleine Avenell and Philippe Doyle-Gray

The Hon Justice Michael Pembroke

On 12 April 2010 Michael Pembroke SC was sworn in as a Judge of the Supreme Court of New South Wales.

His Honour completed his schooling at St Ignatius College Riverview and then studied arts/law at Sydney University, subsequently obtaining a Master of Laws at Cambridge University. His Honour commenced practice at Freehill Hollingdale in July 1978 and commenced practice at the bar in 1982. His Honour joined 12th Floor Wentworth Chambers in 1984, and was appointed senior counsel in 1995.

Pembroke J practised widely in commercial law including banking law, building and construction, trade practices, telecommunications and international commercial arbitration. Outside practice at the bar, his Honour was a member of the London Court of International Arbitration, chair of the Appeal Tribunal of the Australian Stock Exchange, a member of the Australian Institute of Company Directors and of the St James Ethics Centre.

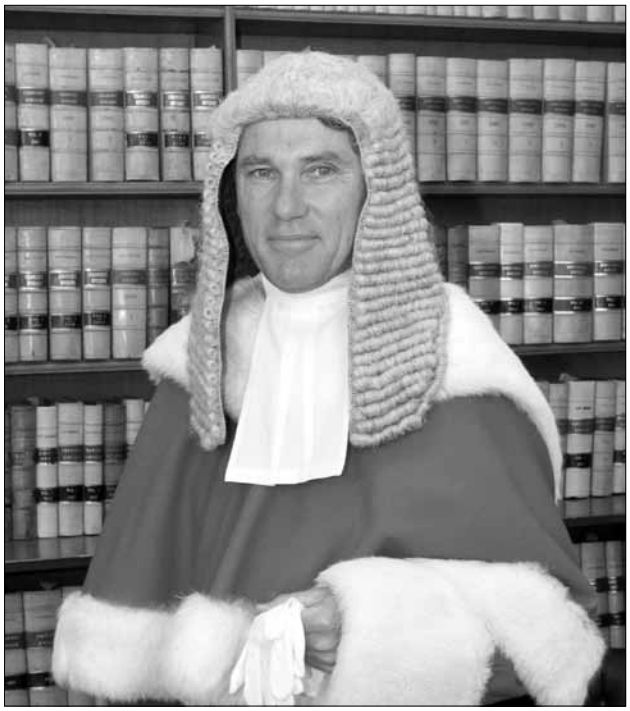
The president of the Bar Association Tom Bathurst QC spoke on behalf of the New South Wales Bar. Mary Macken spoke on behalf of the solicitors of NSW. Pembroke J responded to the speeches.

The president spoke of Pembroke J's arguments:

> Your Honour was an economical barrister in the best sense of the term. Your Honour's arguments were always well structured, concise and dealt only with the points that were worth arguing. That was due in large part to the meticulous preparation you undertook in all cases in which you were briefed. Your Honour was an unflappable opponent. You went by the motto don't complain, don't explain, and no matter how difficult the case was your Honour always maintained a calm and cheerful composure. I had the privilege of appearing with and against your Honour on a number of occasions, the last being only a few weeks ago. Your Honour was always a formidable but courteous and fair opponent.

Both the president and Ms Macken referred to his Honour's property at Mt Wilson and his Honour's writing about it. The president said:

> In a marked contrast to the generally held view that the dry exterior of practitioners at the commercial bar is matched by an even drier interior your Honour is an incurable romantic. Your Honour has constructed a remarkable property at Mount Wilson, replete I'm told with a lake which is described by many as a mini-Versailles. Justice Nicholas has described it to me in even more extravagant terms. However, not content with designing and building such a beautiful edifice your Honour has written about it. Your Honour's works, *Trees of History and Romance-Essays from a Mount Wilson Garden* was reviewed by John Griffiths SC who described your writing as rich in its imagery and pregnant with sexual innuendo. It described your description of a birch as slim, subtle and unmistakably feminine. I don't know how your Honour's submissions would have been received by the Court had they been written in that style, I can only hope that your judgments will be.



Ms Macken described the book as a:

> …rather whimsical look at the history, mythology and botany of tree species interspersed with personal memoirs and poetry focused on many of the trees growing on your property at Mount Wilson in the Blue Mountains. As Mr Bathurst has noted, the property is aptly named Hawthorn and spans some five and a half acres, once being a pine forest. Today it has made way for a park-like landscape with natural groups of trees, mainly oaks, beeches and birches overlaid with a lake and a small temple. Light in winter and providing shade in summer the mighty oak, the first tree to be planted, is one of your Honour's favourites. Like the words of Lord Tennyson's poem, The Oak, your Honour "strives to live thy life young and old like yon oak".

Ms Macken also referred to his Honour's life-long and biding interest in the natural environment having been inspired by the herbaceous borders in the gardens of Selwyn College at Cambridge University. Ms Macken noted that his Honour was a governor of the World Wildlife Fund Australia and trustee of Australian National Wildlife Collection Foundation.

Ms Macken had referred to his Honour's wide travels as a child of a military man. Pembroke J said that:

> …for the first seventeen years of my life I neither knew any lawyers nor thought of the legal profession. My sole objective

was to follow my father and lead a platoon of soldiers anywhere, but preferably in battle.

Somehow the years of Latin and English literature and the fact that most of the other boys at school were the sons of doctors and lawyers had an effect. Even then I was ambivalent and when I went away at the end of the year leaving it to my father to enrol me, my instructions were to put me down for Medicine or Arts/Law, whatever I got into.

So it was that in March 1973 I started at the university with Bret Walker, and others who have become more well-known than I am or could ever expect to be. A few years later when I arrived at the Law School, Dyson Heydon was the Dean and Bill Gummow was one of my lecturers. It never occurred to me that in years to come I would work with each at the Bar and appear before both as judges.

His Honour referred to his experience as a solicitor at Freehill Hollingdale & Page:

I first went there as a summer clerk during two university vacations. In those days we were called Christmas beetles. Freehills was then at 60 Martin Place and the office was a more relaxed environment than I suspect it has since become. I ran errands for Peter Hollingdale, Kim Santow and others. The place was so relaxed that in one empty office there was a cricket kit and two of us would go there on an occasional quiet summer afternoon and throw a cricket ball around. That other person is now the chairman of a bank. When the ball was thrown too hard or our reflexes were too slow the sound of leather crashing against the plywood panelling of Ian Hutchinson's adjoining office was deeply embarrassing.

Pembroke J said that after commencing at the bar:

I made a lot of mistakes but I think I learned quickly. One of my worst mistakes occurred when, in the early months, I dutifully attended my first swearing-in. Knowing nothing, and not being shy, I arrived in this Court in good time, saw that the best seating appeared to be at the bar table and promptly positioned myself at the left-hand end, where Mr Margo is. I could not help noticing that all the places to my right were gradually filled by very old barristers wearing long wigs. They must have been in their forties and fifties. Eventually I realised that something was quite wrong. I decided to vacate my place when I received a tap on the shoulder from an even older, tubby barrister, whose name I later ascertained was Maurice Byers.

His Honour also said:

In the beginning I did lots of little equity cases, often defending the indefensible for a small finance company that did not stay in business. As my responsibilities broadened I spent more time in the Commercial List. For my generation the most significant judicial force of the 1980s was Andrew Rogers. I was there at his first Friday list in December 1979 and frequently throughout the ensuing decade. I know that I am not alone in saying what a transformative effect he had on the practice of commercial law at that time.

The Hon Justice Michael Ball

On 13 April 2010 Michael Ball was sworn in as a judge of the Supreme Court of New South Wales.

His Honour graduated from the University of Adelaide in 1978 with a combined degree in Arts and Law, and subsequently obtained a post-graduate degree in philosophy and formal logic. In 1981–1982 Ball J served as a senior law reform officer at the Australian Law Reform Commission, working on the ALRC Report 20, *Insurance Contracts*, with the commissioner in charge of the reference, David Kelly. The draft bill in the ALRC Report later became the *Insurance Contracts Act 1984*.

Ball J became a solicitor at Allen, Allen & Hemsley in 1983, and became a partner in the litigation department. His Honour was involved in high profile cases in competition and insolvency law including *C7*, *Antico v Heath Fielding Australia*, the *Linter* litigation, the *Pioneer and Giant Resources* litigation and *Trade Practices Commission v Australian Meat Holdings*. His Honour contributed to the Law Society of New South Wales Costs Committee, and was instrumental in drafting new chapters in the *Costs Guidebook*. His Honour was also a member of the Litigation Law and Practice Committee since 2008.

In welcoming Ball J, the chief justice referred to his Honour's experience particularly in commercial litigation, and said that his Honour 'will add considerably to the skill set available to this court in the years to come.'

The junior vice-president of the New South Wales Bar Association, Phil Boulten SC, spoke on behalf of the NSW Bar. Mary Macken spoke for the solicitors of NSW. His Honour responded to the speeches.

Boulten SC referred to his Honour's work over many years with the Bar Association reviewing barristers' professional indemnity insurance policies and negotiating amendments with underwriters, which could be said to give the bar an unfair advantage in its dealings with insurers.

Boulten SC also referred to his Honour's calm temperament and incisive intellect:

> Practitioners in both branches of the profession are quick to praise your Honour's keen intellect, diligence and composure, 'He never lost his temper, never raised his voice' said one former member of the Bar.
>
> …
>
> Shakespeare's 'brevity is the soul of wit', is a standard proverb but many have mentioned your skill in drafting what they call concise correspondence, often as brief as one or two words. … One senior counsel observed that briefs and letters drafted by your Honour consisted of little more than a series of essential propositions.

Ms Macken also referred to his Honour's reputation for succinctness:

> While the veracity of the following story cannot be 100 per cent substantiated, it is certainly indicative of your Honour's personality and reputation for efficiency and excellent advice - and thus I repeat it. A potential client came into the office to seek legal advice about pursuing a claim against someone. An animated monologue ensued lasting about an hour during which time you listened quietly and took the occasional note. When the client ran out of steam you stated that, 'Nothing you say suggests that you have any basis for a claim under the law'. The statement encouraged the client to continue his monologue and at a suitable juncture you again calmly stated that 'nothing further you say suggests that you have any basis for a claim under the law'.
>
> Ultimately, I am told that your client valued your succinct message that there was no merit in the client wasting money on a claim that could not succeed. Such succinctness and focus augurs well for speedy resolutions to matters that come before your Honour at the bench.

Both Boulten SC and Ms Macken referred to his Honour's involvement with Allen's art collection. Boulten SC said:

> You worked with Allen's art collection founder Hugh Jamieson to help form one of the nation's iconic private collections of Australian contemporary art. For some years you and Hugh Jamieson were the odd couple of the corporate art world. Your Honour's preference was for abstract lyrical works, while Jamieson preferred bold gestural abstracts or figurative works. Together, you purchased early indigenous works by Adam Cole and Kathleen Petyarre which pre-empted the firm's

reconciliation policy. One of the Bar's art critics, of which there seems to be a surplus, described the Allen's collection as legendary. After succeeding Hugh Jamieson you were a one man committee purchasing work that met the criteria of being challenging and by emerging artists. It sounds like the sort of job many would dream of. Your Honour's choices for Allen's sponsored artist's projects could perhaps foreshadow the style of your judicial opinion writing. Maybe we should expect judgments that resemble Robert MacPherson's vernacular fruit stall signage or Kathy Temin's Alice in Wonderlandish soft toys.

Since your Honour has gradually accepted an invitation to become a member of the Bar Association there is hope and expectation afoot that you will provide similar guidance on its collection of art which some say is in need of direction now that the Honourable R P Meagher QC's services are no longer available.

Ms Macken said:

Colleagues on the Bench can expect to see some of your Honour's own collection adorning the chamber walls and with any luck, the corridor as well. Woe betide the hapless person who dares to breach the unwritten art works display policy by incorporating any sports memorabilia.

Shakespeare's 'brevity is the soul of wit', is a standard proverb but many have mentioned your skill in drafting what they call concise correspondence, often as brief as one or two words.

In reply to the speeches, his Honour referred to his own early advocacy experience:

Now it is a little known fact, but I have some advocacy experience myself. When I was a first year solicitor at Mollison Litchfield I used to do parking prosecutions for the Adelaide City Council. As you might imagine they were normally fairly routine affairs. Mostly, the defendants did not even show up.

Unhappily, that was not true on one occasion. The defendant was a law student who was represented by one of Adelaide's leading criminal barristers. Suffice it to say that the prosecution did not go well. By the end of the first day of hearing, it became obvious to me that the complaint would have to be withdrawn, not least because of the many comments made during the course of the day by the magistrate whose name, Peter Kelly, I still remember today.

It was equally obvious, or so I thought, that the defendant was guilty and it seemed to me, in those circumstances, some statement to the court was called for. When I stood up the following morning to announce my intentions, the magistrate's response was that if I was going to say something, then he would too; and I got the impression that it would not necessarily be all favourable. Even so, I had spent quite a lot of time preparing what I was going to say, I had passed what I proposed to say by my supervising partner. And justice after all required that something be said. Well, much to my horror, the ensuing exchange was reported quite prominently in *The Advertiser*, the local newspaper, the following day.

I feel that I learned one important principle of advocacy from this experience, and that is, that sometimes it is better to keep quiet.

His Honour attributed his training and litigation to one of the partners with whom he did most of his work as an employed solicitor, Fred Lind:

If Allens has a particular style of litigating, then that is largely Fred's style which continues in those he trained and now, increasingly, those trained by them.

One of Fred's qualities is his succinctness. One of my early experiences of this is when I got back to my office one day to find a pile of papers on my chair with a note from Fred written on a scrap of paper, there were no post-it notes back then. The note contained two words apparently written in the English language. I studied them anxiously trying to work out what on earth I was being asked to do. Then, it finally clicked. The words were, "please fix".

His Honour also said:

There are many things I will miss about Allens but perhaps most of all is the opportunity it provides to train lawyers and to see them develop and, in many cases, go on themselves to have successful careers. This is not an opportunity that is unique to large law firms but it is an opportunity that is difficult to match elsewhere. I take comfort in the fact that when I look at the quality of many junior lawyers of today, I think the legal profession must have a bright future and in the hope that, as a result of this appointment, I may be able to contribute to that future in another way.

The Hon Justice John Nicholas

On 18 November 2009, the Hon Justice John Nicholas was sworn in as a judge of the Federal Court of Australia.

His Honour commenced studying for degrees in arts and law at the University of New South Wales in 1977. Whilst studying, he worked part-time at a small firm of solicitors, Paul A Brown & Co, in Bondi Junction. His Honour remained with that firm for a time after completing College of Law in 1982, before moving to Baker & McKenzie in 1983.

His Honour was called to the bar in 1987 and took silk in 2001. In 1991, his Honour established Nigel Bowen Chambers with John Ireland QC, David Catterns QC, Michael Rudge SC, Stephen Epstein SC and Ken Taylor.

Solicitor General Stephen Gageler SC spoke on behalf of the Australian Government. Tom Bathurst QC, spoke on behalf of the Australian Bar Association and the New South Wales Bar Association. Joe Catanzraiti spoke on behalf of the Law Council of Australia and the Law Society of New South Wales. His Honour responded to the speeches.

His Honour referred to his early experience at Paul A Brown & Co:

> I spent my first few years at a small firm in Bondi Junction where, under the supervision of a quite young practitioner, who I am pleased to say is here today, Mr Paul Brown, I was exposed to a wide variety of interesting matters, both civil and criminal. And it was during this period, as has been noted by speakers today, that I first realised that litigation was the area that I was most interested in and, from that point, it followed in my mind that sooner or later I would need to try my hand at being a barrister.
>
> Looking back, I think those first few years were of immense benefit to me. I dealt with a wide variety of people who were weighed down by all kinds of problems. Many of them used to look at me of course - I was then aged 23 - and ask themselves, 'Is this guy truly old enough to be a lawyer?' It was in these first few years of practice as a solicitor that I learnt some pretty basic lessons.
>
> ...
>
> Most of my first year of legal practice was spent in local courts, mainly at Waverley, but also at Glebe, Newtown, Manly, and places further afield. I did appear from time to time in sentencing appeals in the District Court, but there I ran into the all too frequent problem of the customer not turning up, with him or her then becoming the subject of a bench warrant, and leaving me to ponder whether I should have been more positive when talking them through the prospects of their appeal.
>
> I was introduced to the niceties of practice in country areas when I undertook the long drive to Narooma to appear in a civil claims case involving a very modest sum of money. As I was driving into the town the evening before the case was to be heard, I was flagged down by a policeman who proceeded to give me a breath test. The next morning I saw the same policeman moving about the courtroom behaving as though he was the court attendant, which I soon realised he was. And very soon after the case started the same policeman was called by my opponent to give some evidence in the case against my client. Finally, when the magistrate adjourned for morning tea, the same policeman joined us for that too.

On being called to the bar, his Honour read with Lindsay Foster, now the Hon Justice Foster. Bathurst QC said:

> 'Your Honour read with Mr Foster, as his Honour then was, building a long association with him, first as a pupil, then as a junior, finally as an opponent, but always as a friend. His Honour was fortunately able to impart to you most of his good habits. I am told that, on occasions, he regarded you as stubborn, particularly when you disagreed with some of his more interesting views on the facts and the law. It will be interesting to see how this manifests itself when you are both sitting on a Full Court.'

One of his Honour's first briefs was as junior to Simon Sheller QC (as his Honour then was) and John Garnsey, representing the Charles of the Ritz Companies in the Australian Chapter of a worldwide trademark battle with the Ritz Hotel of Paris. The hearing before McLelland J occupied some eight or nine months, including time spent taking evidence in London and New York.

During his career at the bar, his Honour was known for his expertise in intellectual property, but also practised in general commercial litigation.

Mr Catanzraiti said:

> Your Honour is known at the bar for your skill, intellect, commitment and sound judgment in your areas of practice. Your Honour has appeared extensively in the Federal Court of Australia over the years, in a wide variety of other courts and tribunals, including the High Court, the Supreme Courts of New South Wales, Victoria, Queensland, the Copyright Tribunal and the Human Rights Commission. You have also appeared in various Royal Commissions, including most recently as Senior Counsel for two former directors of HIH in the Royal Commission into the collapse of HIH.

Gageler SC said:

> Your Honour's friends and colleagues attribute many fine qualities to your Honour, all befitting your elevation to judicial office. These include: a genuine interest in a very broad range of human activities; an eye for detail; a single-mindedness manifesting itself in a willingness assiduously to acquire new knowledge where new knowledge is required to master the case at hand; an innate appreciation of human nature; and an ability quickly to understand the human dimensions and dynamics that have led to any particular dispute.'

In response, his Honour said:

> I am looking forward to serving as a judge of this Court. It has a relatively short, but distinguished history. I have appeared before many of its judges at one time or another over the last 20 or so years. Two whom I would like to mention are the late Justice Lockhart and the late Justice Lehane. Leaving aside their extraordinary intellectual powers, they both had well-deserved reputations for their unfailing courtesy on the bench. That is something for which I would like to be remembered too. Of course, as my former colleagues remind me, time will tell.'

The Hon Justice David Yates

On 2 December 2009, the Hon Justice David Yates was sworn in as a judge of the Federal Court of Australia.

His Honour was raised and educated in Wollongong, New South Wales, before moving to Sydney, initially to study music. His Honour subsequently commenced a law degree at the University of Sydney, but remains a fine pianist according to Tom Bathurst QC who spoke on behalf of the Australian Bar Association and New South Wales Bar Association. Mr Joe Catanzariti spoke on behalf of the Law Council of Australia and the Law Society of New South Wales. Mr Ian Govey spoke on behalf of the Australian Government. His Honour responded to the speeches.

Mr Govey, Mr Catanzariti and Bathurst QC all referred to the breadth of his Honour's practice at the bar. Mr Catanzariti said:

> Your Honour is considered to be one of the leading barristers in patent and copyright cases. Your litigation work encompassing a diverse range of intellectual property cases and trade practices cases has seen your Honour appear in the High Court of Australia, the Federal Court, the Australian Copyright Tribunal, the Australian Competition Tribunal, the Patents Office and Trade Marks Office.
>
> Your Honour has appeared extensively both on behalf of and against the Australian Competition and Consumer Competition. Your Honour's work has extended to federal law, general commercial law and corporate law. Described by colleagues as one of the true gentlemen of the bar, your reputation is one of both gracious mentor and inspiring role

> model. Intelligent, caring, thoughtful and considerate in your approach, your Honour has the capacity to apply the letter of the law while maintaining a balance of empathy and compassion. Your Honour holds an enviable reputation amongst the solicitors of this country.

Bathurst QC said:

> It is a tribute to your Honour's unassuming nature that although you have, for a considerable period of time, been recognised as one of the leading intellectual property lawyers

> in this state and in this country, only those lucky enough to be in the know were aware of your talents in other fields, particularly trade practices law and even the criminal law. So far as the criminal law was concerned, some people had difficulty accepting that you had these talents. On one occasion there was a debate before Young J as to when a patent case should be set down. You said you were unavailable on a particular date because you had a prior commitment in a criminal matter in which you were briefed. Young J's only comment was, 'Someone stole a patent.'

Bathurst QC also said:

> ...your Honour also had a real ability to empathise with your clients whilst maintaining your independence. A good example was in a trademark case in which you were involved in Melbourne for a bakery company. Your Honour was almost always impeccably dressed, both in and out of court, but on this occasion you arrived in what can only be politely described as a somewhat dishevelled state. Your opponent inquired, 'What was the problem?' and you informed him that, because your client was short of money, you had come with him to court in his bakery truck at the end of his rounds.
>
> It's a tribute to your Honour's humility that your Honour was prepared to do that and also a tribute to the fact that, notwithstanding that, by the end of the day you were your usual impeccable self.

In response, his Honour acknowledged the opportunities presented to him during his career, both as a solicitor at Sly & Russell – a terrific firm to work in – and at the bar. Of his career at the bar, his Honour mentioned in particular the experience gained and lessons learned from as junior to Theo Simos QC, Ken Handley QC, John Emmerson QC and Bob Ellicott QC.

His Honour said:

> There's a risk in singling out practitioners as I've done. There are many other very dedicated and very talented senior counsel that I had the privilege of working with when I was a junior. But I've mentioned these senior counsel because I readily associate with them the passage of my own journey as a barrister. And although all four were completely different in personality and presentation as advocates, all shared a number of very important qualities which I admire.
>
> Each was assiduous in the preparation of a case. Each shouldered the burden of the workload of the case and never once shirked the responsibility to do so. Each took, unreservedly, the responsibility for the strategic direction of the case. And each was protective of all of those who were more junior, never brooking any public or intemperate criticism of a lapse, even though the temptation to do so must have been there. As a junior it is wonderful to be able to practise with such colleagues. Each of them has been a role model for me.

His Honour also referred to the team work involved in litigation:

> When he was counsel, Justice Handley had a number of sayings, one of which was: None of us is as good as all of us. I've always found those words to be true. Time and time again I've seen an idea spawned by one member of the team taken up, collectively fashioned and made into a cogent proposition that has had importance for the case. Without the team the full potential for that dynamic is just not possible. I will miss that interaction although, presumably, as a judge, I will become the beneficiary, or perhaps the victim, of it.

In concluding remarks, his Honour said:

> I'm very conscious of the great honour that has been bestowed on me by my appointment to this Court. I'm very conscious of the great responsibility that is entrusted in those who judge, a responsibility that is reflected in the oath that I've taken this morning. I'm looking forward to participating in, and sharing in, the work of the Court. And may I say, quite selfishly, that it's work that I want to do. And I've been made to feel most welcome. So I leave private practice with no regrets, but with excitement and great enthusiasm for this new phase of my life.

The Hon Justice Anna Katzmann

On 2 February 2010 Anna Katzmann SC was sworn in as a judge of the Federal Court of Australia at a ceremonial sitting in Sydney.

Her Honour attended Clovelly Primary School, Woollahra Demonstration School for fifth and sixth class and then attended Sydney Girls' High School. Her Honour studied law at the University of New South Wales, graduating with a Bachelor of Arts (Hons) and Bachelor of Laws, and immediately commenced practice at the New South Wales Bar. While at the bar Katzmann J had also been chair of the Mental Health Tribunal of Cumberland Hospital, an acting commissioner of the New South Wales Independent Commission against Corruption, a council member of the Academy of Forensic Science, from 1997 to 1999 a part time Legal Aid commissioner, a founding member of the Women's Legal Centre and an Executive member of the Women's Lawyers Association.

Her Honour was a member of the Bar Council continuously from 1994, and prior to her election as president in late 2007, had served as honorary secretary, honorary treasurer, junior vice-president and then senior vice-president. Her Honour had been a trustee of the Bar Association's Indigenous Barristers' Trust and trustee of the Jessie Street Trust. Reflecting her parents' passion for music, her Honour had been an enthusiastic member of the Bar Choral Society over many years.

Ian Govey spoke on behalf of the Australian Government. Joe Catanzariti spoke on behalf of the Law Council of Australia. The president of the Bar Association, Tom Bathurst QC spoke on behalf of the Australian Bar Association and the New South Wales Bar. Mary Macken spoke on behalf of the solicitors of NSW. Katzmann J responded to the speeches.

Mr Govey noted her Honour's commitment to the mental health needs of lawyers, recently confirmed with her Honour's appointment as a director of the Tristan Jepsom Memorial Foundation.

Mr Catanzariti referred also to her Honour's reputation as a fiercely committed and formidable advocate:

> These traits were noticed at a young age. Patrick White refers to your Honour as a schoolgirl addressing a meeting at the town hall, opposing the demolition of Sydney Girls' High to build an Olympic stadium, I think. Despite your youth, White described your Honour as being completely 'nerveless'.
>
> Your Honour has since assured us that despite White's magisterial descriptive powers, this was a most inappropriate description. However, I take it that you were nonetheless persuasive as ever. Colleagues also describe personal qualities which have made your Honour successful in just about everything you have embarked upon; qualities which will, no doubt, hold you in good stead as you embark on the new and very challenging chapter of your legal career.

Mr Catanzariti also referred to her Honour's meticulous preparation and work ethic:

> … opponents were always jealous of the way of you settling your sails so that even in light winds you outstripped them…
>
> Even the most obscure point was researched and eliminated or developed in a very thorough and challenging way. As one close colleague mentioned, 'It was frankly infuriating at times but that was her way'.
>
> Your Honour's chronologies are legend. You had a trademarked version which you would email to others who were briefing the case. Let me say that anyone appearing before your Honour better have a good chronology in the Anna Katzmann 'three column' style with appropriate font and spacing.

The president said that throughout her career at the bar her Honour:

> … demonstrated the qualities of integrity, courage and depth of legal knowledge which are the characteristic of all outstanding barristers. Your Honour rapidly established a

> thriving practice and was justly appointed senior counsel in 1997. Your Honour practised primarily in the common law area, but did a great deal of industrial law and administrative law; two of the growth areas, of course, in this Court.
>
> Unlike many other members of the Bar whose interests do not extend beyond their next brief or perhaps the next cheque, your Honour's extracurricular activities were both extensive and varied. Your Honour throughout your career was a tireless supporter of equal opportunity for male and female barristers. You were voted Woman Lawyer of the Year in 2002, and it was only because a person could only receive that award once that you did not establish a 'Federer' or perhaps I should say 'Serena Williams' like record in receiving it in all the years subsequent to that.

The president also referred to Katzmann J's opportunity, as president of the Bar Association, to ventilate her Honour's acting talents at the numerous swearing-ins at which she spoke:

> You set a standard of oratory which will be difficult for your successors to match, much less exceed. It was appropriate that your last brief was to prosecute Galileo in a mock trial of the University of New South Wales. … As a member of the [Bar Council], and particularly as president, your Honour worked tirelessly in support of the rule of law, human rights and the welfare of the members of the association.
>
> Your Honour will be particularly remembered for your tireless efficacy in support of a charter of human rights, the efforts you made to advance the position of women at the Bar and perhaps most significantly the way you caused the Bar to confront the reality of depression amongst its members and for putting in place facilities to assist members who had the misfortune of suffering such illness to be treated and otherwise assisted.
>
> There are many practitioners who would not be able to carry on practice in the way they are doing so, but for your Honour's efforts in this area.

Katzmann J referred to having been sent a letter, by one of her new brother judges on the announcement of her appointment, welcoming her to the asylum, and quoted what was reportedly said by the Italian prime minister to a British journalists from *The Spectator* magazine:

> To be a Judge… 'You need to be mentally disturbed. You need psychic disturbances. If they do that job', he added, 'it is because they are anthropologically different from the rest of the human race'.

Her Honour referred to the women who came before her:

> both at the Bar and on the Bench, many of whom were true pioneers. The efforts of the Honourable Mary Gaudron QC, then Solicitor-General for New South Wales, to ensure equitable briefing practices at the State Crown helped many women of my vintage at the Bar carve out successful careers. Janet Coombs forced us to confront the alienating environment of the male-dominated bar common room and helped so many of us feel that the Bar was a place for both men and women.

Her Honour contrasted her background to that of her predecessor as Bar Association president in New South Wales, Slattery J:

> … who I am sure as a baby wielded a gavel rather than a rattle, there was little in my background that pointed to a career in the law, let alone a commission as a judge. When I was born my parents, who, as you have heard, met in a choir, received a telegram from their fellow choristers which read, prophetically, "Singers welcome prospective alto."
>
> At school, as you have also heard, my passions were for music and drama. … Neither of my parents was a lawyer. … Although they were not lawyers, they had a deep sense of right and wrong and a strong commitment to justice. Their values and experiences profoundly influenced my attitudes.

Her Honour concluded:

> After 30 years of self-employment I don't relish the prospect of conforming to bureaucratic strictures. I also confess that I feel a little like Dante entering the gates of Hell as, midway along the journey of my life, I find myself in a strange place, having wandered off from the straight path. But I do look forward to the challenges in my new role. I shall try to conduct myself as a judge in the way I most admired in some of the judges before whom I appeared. If at any time I forget myself or I forget the pressures under which practitioners are required to work, I expect my many friends at the Bar to remind me. I shall also do my best to avoid the Heydonian sins of torpid languor and drowsy procrastination.

The Hon Justice Malcolm Craig

On Tuesday 2 March 2010 the Hon Justice Malcolm Craig was sworn in as a judge of the NSW Land and Environment Court. The president of the New South Wales Bar Association, Tom Bathurst QC, spoke on behalf of the bar and the president of the Law Society of NSW, Ms Macken, spoke on behalf of the solicitors of the state.

Like many distinguished judges before him, his Honour completed secondary schooling at Fort Street Boys' High, and went on to study law at the University of Sydney on a Commonwealth scholarship, graduating in 1967. His Honour then practised as a solicitor, both in Sydney and in Mudgee, for about ten years before he was called to the bar in July 1977.

At the bar, his Honour read with Mr Tamberlin QC (as he then was) and rapidly established a practice primarily centred on local government and environmental law, but including administrative law, equity and property law. His Honour's extensive knowledge of the law in those areas made him a formidable advocate in the Land and Environment Court, as well as elsewhere. His Honour took silk in 1989, after only 12 years at the bar, which was a remarkable achievement at the time, as Mr Bathurst QC noted.

As a silk, his Honour's practice continued to expand and his reputation continued to grow. Of his Honour's practice and skill, Mr Bathurst QC said:

> The important cases on which your Honour appears are far too numerous to mention but your ingenuity when encountering almost insuperable difficulties can be demonstrated by one of your submissions in a case, *Broken Head Protection Committee v Byron Shire Council*.
>
> Your Honour appeared for a mining company on a challenge to approval of a quarry. The objectors claimed the land was inhabited by numerous threatened species of fauna and in particular a mammal … known as the long-nosed potoroo … It was established apparently that a potoroo had been sighted in the area surrounding the quarry but undeterred or in desperation your Honour suggested that one would be forgiven for thinking there was only one potoroo in New South Wales which travelled from quarry to quarry when appeals to the Land and Environment Court were commenced.

In the course of his career, a broad spectrum of clients benefited from his Honour's ingenuity – establishments of all kinds, as well as the councils, agencies and other interest groups seeking to close them down or prevent them being built.

In the course of his career, his Honour also served his colleagues at the bar in numerous and voluntary capacities. In 2003, his Honour established Martin Place Chambers, and continued to exercise a 'benevolent dictatorship' over the floor thereafter. From 2003 to 2008, his Honour convened the Environmental and Local Government section of the Bar Association. And for a number of years, his Honour was also president of the Environment and Planning Law Association, and a part time Commissioner of the New South Wales Law Reform Commission. Significantly for barristers, for the two decades from 1989 to 2009, his Honour was a director of the Barristers' Sickness and Accident Fund, and for fifteen of those years, his Honour was also the chairman of that fund. Many barristers owe his Honour their gratitude for that dedicated work.

His Honour's personal qualities, together with his knowledge and experience, will be a great asset to the court and the community in his new role. As Mr Bathurst QC noted:

> The Land and Environment Court plays an increasingly important role in the life of the community at the present time. The Court and the community are fortunate that a person of your skill and experience is prepared to join it.

In his reply, his Honour referred to the fact that when he commenced practice at the bar in 1977, the term 'environmental law' was generally foreign to practitioners. Noting the changes wrought by the enactment of the *Land and Environment Court Act* in 1979, his Honour continued, saying:

> I am proud to join a court which since 1980 has had the function as a court of first instance to develop the jurisprudence appropriate to the administration and application of environmental laws in this state. As a relatively young statutory court, it has already taken significant steps in that regard. However the ever changing provisions of environmental legislation coupled, importantly, with the heightened awareness in the community of the fragility of our environment, have meant and continue to mean that the development of the law in this area remains dynamic. I trust that I have the capacity to make a contribution to this important area of the law which is at least complimentary to that which has already been made by present members of this court as well as by those who have served it in the past.

His Honour then paid tribute to his family, colleagues, solicitors and others for their personal and professional support. His Honour acknowledged his indebtedness to the state, for the public education that was provided to him both at school and university, and welcomed the opportunity to repay it by service to the community in his role on the court.

In closing, his Honour indicated that the following words of Lord Bowen, writing in 1884, resonated with him:

> As for the law, it is no use following it, unless you acquire a passion for it. … I don't mean a passion for its archaisms, or for books, of for conveyancing; but a passion for the way business is done, a liking to be in Court and watch the contest, a passion to know which side is right, how a point ought to be decided.

As he embarked upon his duties as a judge, his Honour acknowledged that same passion and motivating force.

Glenn Noel Whitehead (1953–2010)

By Lou Lungo

The last time I was asked to speak at a gathering where Glenn was the centre of attention was as the best man at his wedding to Sue. He returned the favour not long after. I was looking forward to that speech but this is one I never wanted to have to give. Well not so soon anyway.

Glenn was raised by his grandparents in Mowbray Road, Chatswood from an early age. His grandmother died when Glenn was 21 and the signet ring he wore was in memory of her. His grandfather 'Pop' lived on at the old house and Glenn would visit regularly. Dragging me along on occasions proudly displaying his latest motor bike!

Glenn attended Mowbray Public School just down the road from home. Years later, Piet Baird, one of his many instructing solicitors, recalled Glenn from the school and more particularly on the footie field. Piet was playing half back and in third class and recalls his first game passing the ball to the older Glenn who was in sixth class and playing five-eighth. Piet was to pass Glenn many briefs years later.

Glenn then went to North Sydney Technical High School which is now the site of the Greenwood Hotel.

Now some of you may not know this but Glenn fancied a man in uniform – himself that is. That's probably why he joined the Navy; then the Police then came to the bar – another uniform.

Glenn joined the Royal Australian Navy after he left school and served at HMAS *Lewin* in Western Australia and also in Nowra. However, after his service period was completed and probably because he didn't reckon white suited him he left to join the New South Wales Police Force.

Glenn joined the Police Force on 3 May 1976 and came third out of approximately 120 recruits in his initial training class with a mark of 93.72 per cent. Probationary Constable Glenn Noel Whitehead, registered number 17285, was first stationed at the Central Police Station. However, hoofing the beat and locking up drunks wasn't his destiny and he soon found himself at the Police Prosecuting Branch where I first met Glenn in 1978.

This was where Glenn's legal career started. He completed the Police Prosecutors Course. He also matriculated so he could commence his law degree. It was around this time that he met his first wife Susan. Together they had a daughter Caitlin who was one of Glenn's great joys in his life, together with Holly and Sue.

I recall on one of my recent visits to Glenn at Greenwich Hospital, Caitlin and Glenn's other daughter, Holly comforting each other and thinking how wonderful it was that they had each other at that difficult time.

Glenn, Lee Downey and I spent many a night at the Century Hotel where we would meet up before lectures for a refreshment. I'm sure some nights we didn't even make lectures however we would have been discussing law as the dean of the law school, Dean Bartholomew, was often with us.

Glenn certainly cut a fine figure as Sergeant Whitehead, police prosecutor. He sported a grand moustache and many people thought he resembled George Negus.

He had a habit back then of wearing three-piece suits or was it safari suits? Anyway, Glenn would always have his hands in his pockets leading to the nickname – 'pockets'. Can I dispel the rumour that the nickname had anything to do with objects (other than hands) going into his pockets – totally untrue!

Glenn was admitted to the bar in 1984 and commenced practice at First Floor University Chambers where Peter Dent QC was the floor leader and Mark Dalley the clerk.

Peter Dent could not be here today but has asked me to convey the following words on his behalf:

> Julia and I are on the medical treadmill and ask to be excused this day. We both knew and loved Glenn. He as nature's gentleman and so much fun to be with. He was always a truly professional barrister-at-law, who never, like so many, sold his soul for filthy lucre but remained an idealist from go to woe. He protected the defenceless all his career, and we happen to be people who see that as right and proper barrister conduct.
>
> He is a superlative barrister and we have no doubt he is already back in practice in another place, where the good and generous hearted are ushered at the end of their mortal service. *Au revoir* Glenn Whitehead – Mate.

I joined Glenn there in 1989. This is where Glenn met his wife Sue. Glenn not only became a husband to Sue but a father to her two boys Tim and Nathan and was there for them during the usually difficult teenage years.

They were fun times. We worked hard and we played hard. Occasionally we lunched in the NSW Leagues Club which was next door to chambers. Many a Friday evening was spent in the chambers common room. Glenn was in his element surrounded by his friends and colleagues.

Glenn then moved onto the Trust Chambers where I again joined him in

1995 with Greg Woods QC as the floor leader.

In 1997 Glenn, Bill Brewer and I defected from Trust to Samuel Griffith Chambers. You could say we were climbing up in the criminal bar but that was only because we went from level 15 to level 18 in the same building.

It was at 'Sammy G's' that Glenn and I started to customise the room we shared. This was continued on by Phil Hogan who replaced me in chambers when I took the 'Crown shilling' in 1998. Our room was anything but staid. There were no paintings of old English courtroom scenes or Chesterfields. Blues music would play and the colour scheme was 'wild blue' – hence the room name: 'the blue room'. This was where members of chambers; solicitors and friends would drop in for a chat and a drink. Glenn liked to do both very much.

Many of you know that Glenn stopped drinking a long time ago. For his health it was probably for the best. However, on or off the drink Glenn was the same person – sociable; funny; loving and caring.

Glenn became somewhat of an expert in running long criminal trials. He would set himself up at his spot at the bar table behind folder boxes with a good book (later to be the Good Book) and while away the hours forever vigilant for anything remotely relevant to his client. When he was called into action he would act swiftly and with deadly precision.

From the first day I met Glenn he was into fitness. That did fade off when the good life was in full swing but he later got back into it. It was mainly running but he also cycled and completed the Sydney to the 'Gong bike ride.

When we worked together at the Glebe Coroner's Court we would often go for a run at lunchtime. Glenn did become somewhat obsessive with running and not only ran the City to Surf but also a number of marathons.

When I saw Glenn recently at Westmead Hospital he said as soon as his hip got better he would be pulling on the running shoes. He never gave up.

You may wonder why I refer to Glenn's clients (or some of them) well because some of them did become his friends. It may not have been the done thing but it was more a case of them befriending him because of the sort of man he was. I can recall when sharing chambers with Glenn hearing him lecturing his clients (only the guilty ones of course) about how stupid they had been; how they were ruining their lives. They respected Glenn for his honesty and advice and many heeded his words and became his friend.

In his last days when at Greenwich Hospital one of those clients came to visit him and brought a gift for Glenn and cried at his bedside. That was the effect Glenn had on people.

Many years ago now Glenn and I embarked on what Cat Stevens referred to as 'A Road To Find Out'. We explored Buddhism and other Eastern philosophies. I detoured off onto the yogic path and Glenn even came along for a while completing a six week yoga course. But he was searching for something else and when he found it, Christianity, he never looked back, never looked any further and he maintained his faith until the end.

It was this faith, along with the support of his family and friends that helped him deal with the cancer that took his life.

The last case Glenn appeared in was a District Court trial at the Sydney District Court. It was a short trial lasting only two days however Glenn was gravely ill at the time and using a wheelchair to get around.

The trial started on Monday, 1 February this year. I recall seeing Glenn with his client and Greg Meakin his instructing solicitor in the coffee shop at the Downing Centre that Monday. Glenn was his usual upbeat and confident self. I didn't know how he would be able to run a trial.

I've spoken to the crown prosecutor in that trial, Paul Lynch, since. Paul said that Glenn, who was obviously in a great deal of pain, stood up and cross examined and he thought it was an incredible display of courage. 'Glenn was fighting for his client right up to the end' were Paul's words. He said Glenn did a superb job and kept his client out of gaol – what more could be asked of him? I'm sure I speak on behalf of Glenn's family and friends when I say:

Thank you for your friendship.

Thank you for the good times – and there were many.

Thank you for allowing us to be part of your journey in this life.

We love you.

We miss you.

We'll never forget you.

God bless.

Bernard John Sharpe (1949–2009)

By Robert Angyall SC

We are gathered here today to mourn the death of Bernard Sharpe, to honour Bernie's memory and to celebrate Bernie's life.

When you research a eulogy, you hope to find some people who will say nice things about the departed person that you can pass on at the funeral to their family and friends.

I have to tell you, that of all the persons I spoke to about Bernie, nobody said anything, nobody said anything ... but nice things about Bernie.

The picture of Bernie that emerged was utterly consistent with the Bernie that I knew. Bernie was the kindest, most decent, and most unassuming person imaginable. I never heard Bernie speak ill of anyone. It's hard to image anyone disliking Bernie.

My job is to tell you about Bernie's life in the law.

I first met Bernie at high school. After doing the School Certificate at Crows Nest Boys' High, he earned a Commonwealth secondary scholarship and came to Shore for the last two years of high school in 1966 and 1967. We did the very first Higher School Certificate.

Bernie's prowess at tennis already was obvious. He got Tennis Colours at a school where colours were not easy to earn. In our last year, 1967, he was also in the cricket first eleven.

Then it was off to uni and law school. Some of you will find this hard to believe but, at the time, Sydney University Law School was the only law school in New South Wales, so that's where Bernie and I went. Bernie graduated with a BA in 1971 and his law degree in 1974.

Bernie then became a solicitor with Stephen Jacques and Stephens - now Mallesons – in 1973. He worked there until he went to the bar in 1984. He became a litigator and very ably did a broad range of litigation. He became known as the person to whom sensitive work should be sent. In those days, it wasn't thought quite proper for the big firms to do family law so they only did it as a favour to important clients. Bernie became the '*go-to*' man for this sort of work, which he did with sensitivity and tact. It was a harbinger of the way his practice developed at the bar.

Bernie went to the bar in 1984 and took chambers on Ninth Floor Windeyer Chambers. In 1993 he joined Sixth and Seventh Floor St James Hall Chambers. He was one of the earliest members of our chambers and, for all of us there, it is going to be very hard to imagine those chambers without Bernie being a part of them.

At the bar, Bernie developed a strong commercial practice, with a loyal following among solicitors. Ian Plowes, who has done so much for Bernie in his last year, was one of those solicitors.

In one of the earliest cases I can find where Bernie appeared, he represented a company director sued on a guarantee by one of the Big Four banks. The bank was represented by Charles Sweeney QC and Philip Dowdy, both of whom became members of our chambers. The case was heard by the chief judge of the Commercial Division.

Bernie claimed that a critical clause in the bank's guarantee was unjust and should be declared void as a result. He was undaunted by the heavy artillery arrayed against him. The result was that Bernie succeeded in having the clause in the guarantee declared void. I understand that, as a result of the case, the bank changed the wording of its guarantee.

Coincidentally, in the last case I could find in which Bernie appeared, he again was opposed to a member of our chambers, this time, David Jay. It took place at the end of last year, just before Bernie became ill.

By this time, Bernie had become a recognised leader in the area of wills and estates. He frequently appeared against senior counsel who specialised in this area. He gave seminars on the law in this area. He had a loyal following among solicitors.

Most of these cases involve disputes within families about how the property of a deceased family member should be distributed. Ancient family disputes are rekindled. Emotions often run high. Bernie was the ideal barrister for this sort of work because, whatever the circumstances, he retained his calm, balanced and kindly outlook.

In the case I just mentioned, Bernie represented an adopted daughter who had been left only $10,000 by the will

of her adopting mother. The case was a hard one because the only substantial asset in the estate was a house that had been left to a grandchild. If Bernie's client was going to get anything more, the house would have to be sold. Also, there was strong evidence that Bernie's client was being supported by a *de facto* partner and didn't need any more money than her mother's will had given her.

Despite all this, Bernie succeeded in getting his client a substantial grant. David Jay describes Bernie as having run the case with a completely straight bat – or, in tennis terms, every shot was hit without any spin.

While at the bar, Bernie gave of himself by doing volunteer work. For many years, he was part of a team of barristers who marked the bar exams taken by lawyers applying to become barristers. It was unglamorous and absolutely essential work. Bernie also was nominated by the minister for health to the New South Wales Optical Dispensers Licensing Board – another unglamorous and essential task. As you'd expect, Bernie also extended himself to help his colleagues in chambers. There was an occasion when the barrister in the room next to Bernie – who long ago left our chambers – was having an affair with an artist. The artist furnished the barrister's room with paintings that were large, colourful and voluptuous. As you can imagine, this presented a problem when the barrister's wife visited his chambers. You've probably guessed what the solution was: Bernie's room suddenly took on the appearance of an art gallery.

At his 50th birthday party, there were suggestions that he was a confirmed old bachelor. In his speech, Bernie responded by saying that he carried a photograph of a woman around with him in his wallet. Following his speech, at least three women discreetly approached Bernie's clerk and asked if they were the woman in the photograph. She couldn't bring herself to tell them that when Bernie bought the wallet, the photo had come with it.

I should say a word about Bernie and women. Bernie had a lot of female admirers. At his 50th birthday party, there were suggestions that he was a confirmed old bachelor. In his speech, Bernie responded by saying that he carried a photograph of a woman around with him in his wallet. Following his speech, at least three women discreetly approached Bernie's clerk and asked if they were the woman in the photograph. She couldn't bring herself to tell them that when Bernie bought the wallet, the photo had come with it.

I come back to the nature of the man. Bernie was unfailingly polite, fair, upright and unassuming. His door was always open to other members of chambers who needed advice, especially more junior members. He always had time for others.

As I said at the beginning, nobody said anything but nice things about Bernie. In a profession where egos often are huge, where everyone is stressed by the demands of appearing in court and where everyone gossips relentlessly, that is quite amazing. It speaks volumes about the essential goodness of Bernie. He was the very definition of a good person.

There is a school of moral philosophy which teaches that the way to determine how to act morally is to follow this rule: act unto others in the way you would wish them to act unto you. They call this the 'Golden Rule'. Bernie's example suggests a better rule, which I will call 'Bernie's Rule': act unto others in the way that Bernie would have acted unto them.

Ladies and gentlemen, in the same way as that photo was a fixture in Bernie's wallet, he was a fixture in our chambers. We find it hard to visualise chambers without Bernie being a part of them. Bernie's life was cut short, untimely and cruelly. We all mourn the loss of Bernie and extend our sincere condolences to his family. Like them, we will miss Bernie terribly.

Frank Stratton McAlary QC (1925–2010)

By Andrew Bell SC

Frank McAlary QC has died at the age of 84, having retired in 2003 after 55 years of highly distinguished practice at the New South Wales Bar, including almost 35 years as a silk. His retirement was noted in the Winter 2003 edition of *Bar News*. The memorable dinner in honour of Frank, Chester Porter QC and Tom Hughes QC on the occasion of their respective 50 years of practice was also featured in the Spring 1999 edition of *Bar News.*

Frank McAlary was a formidable, courageous advocate and a forceful and highly skilled cross-examiner, with an unqualified commitment to his clients' cause. He cut his teeth in the common law and workers' compensation, being regularly briefed on behalf of injured workers and was highly influential in the New South Wales Labor Council, but he came to develop the broadest of practices, appearing in every jurisdiction from the courts of petty sessions to the Privy Council. His practice traversed criminal and family law, local government, equity, commercial and company law as well as the common law, and he was equally at home at trial as on appeal.

His arguments were described as being marked by 'clarity of definition of issues and agility of expression' accompanied by 'a mine of persuasive anecdotes.'

He continued to appear at the highest appellate level right up until his retirement, in his final years at the bar arguing three significant appeals in the High Court – *Astley v Austrust Pty Limited* (1999) 197 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520. He appeared regularly in the New South Wales Court of Appeal over five decades. In the course of his final case, in what may be an unprecedented tribute to a still practising advocate, the then president of the New South Wales Court of Appeal, Justice Keith Mason, made reference to McAlary having the hallmarks of a true appellate advocate, namely 'the ability to inform, to persuade and not to bore the bench; and to do so with charm and utter frankness.' His arguments were described as being marked by 'clarity of definition of issues and agility of expression' accompanied by 'a mine of persuasive anecdotes.'

Nicknamed the Roan Bull, and also immortalised iconically as 'The Dancing Man', McAlary QC was a man of many dimensions: on the one hand, a man of profound faith and compassion whilst at the same time enjoying

enormous success as a businessman and pastoralist (with extensive interests in the Kimberleys and northern New South Wales) as well as being, simultaneously, one of New South Wales's leading advocates for many decades. His success was entirely self-made, with his father having died when he was 10 and not attending formal schooling until the age of 13. His country roots gave him a deep knowledge of human nature, which he teamed with an insatiable intellectual curiosity and interest in world affairs. He will be remembered by members of the New South Wales bench and bar with enormous respect and deep affection.

In a wonderful tribute, a function open to all, and attended by many members of the bar, was held in the Bar Common Room in April of this year to celebrate his life and contribution to the New South Wales Bar (of which he was a life member). Retired District Court Judge John McGuire, Brian Rayment QC and James Poulos QC all delivered memorable tributes that were recorded on video and are available in the Bar Library. His old Floor, Eleven Wentworth, has named a new conference room after him which was opened in February of this year by Spigelman CJ who also paid a moving tribute in the presence of his widow, Patricia, children and grandchildren, as well as former Floor colleagues.

The red-haired boy of the Stone Age, Frank very early came to the fore. Year Rep. in his first year, he was on the S.R.C. in his third and fourth years. He took a courageous stand last year in the often thankless job of Director of Student Publications. A brilliant student, he left no page of Stone unturned. The child Jesus disputing with doctors in the temple would have been no match for Frank disputing in lectures with the Doctor of Scientific Jurisprudence.

EG Whitlam on McAlary, Blackacre, 1947

But to really understand his technique of advocacy one had to see him from the other side of the Bar Table. Opponents never knew his secret weapon. It was those eyes. It was unbearably painful for a judge to reject the slightest argument, however trivial, of a barrister always so utterly convinced of the rectitude of his client's cause. I hope those eyes are captured on video in the High Court's filmed archives. They should be played and replayed in centuries to come to teach new judges of the need to be on the lookout for advocates of passion like Frank McAlary. A big mind. A big heart. Impossible to believe that he will retire.

MD Kirby on McAlary's retirement

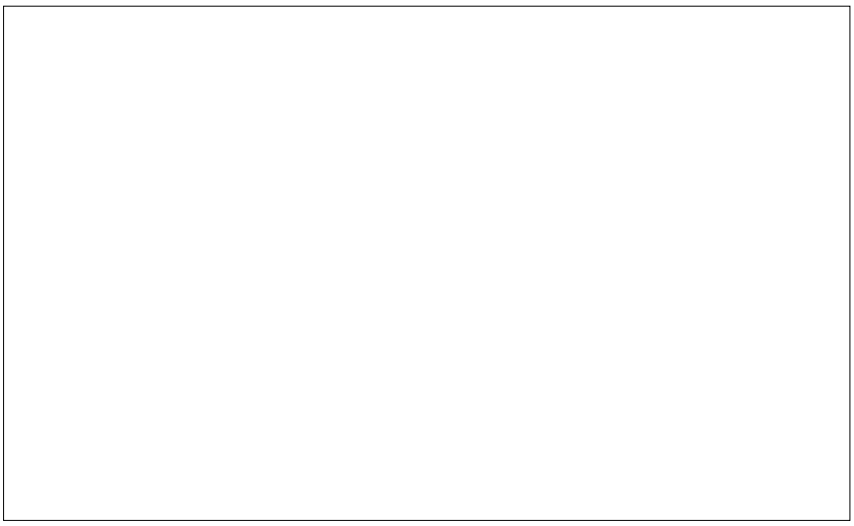
Your advocacy has been marked with clarity of definition of issues and agility of expression. You have a mine of persuasive anecdotes. … The marks of a true appellate advocate are the ability to inform, to persuade and not to bore the bench; and to do so with charm and utter frankness. These have been your hallmarks.

Keith Mason on McAlary's retirement

The Hon Jeffrey William Shaw QC (1949–2010)

By the Hon Justice Michael Walton

The Honourable Jeffrey William Shaw QC was a member of the New South Wales Parliament whose renown came not from being a politician, but from his contribution as a lawyer, law reformer, policy maker and statesman. He was an outstanding queens counsel and, in the field of industrial law, a giant, inheriting the mantle of Neville Wran, Jack Sweeney, Michael Kirby, Sir Richard Kirby and Bill Fisher; a scholar and an author, writing on subjects ranging from legal and labour history and theory to Bob Dylan; an academic holding visiting and adjunct professorships; and a devotee of literature (with Bertrand Russell rating highly in that interest), of drama (where Shakespeare was preferred) and music (ranging from Mozart and Beethoven to the Beatles and Bob Dylan).



'Jeff personified and discharged the central ethos of the independent bar'. Photo: Newspix

However, it is his role as a lawyer that shall primarily occupy my tribute today. The preparation for that has been greatly enhanced by Jeff's propensity not to waste any good thought without publication.

Jeff was admitted as a solicitor on 19 September 1975 and commenced practice with WC Taylor & Scott Solicitors. He was admitted as a barrister on 28 May 1976 and commenced practice as a barrister on 4th Floor Wentworth Chambers (where he bought a room from Neville Wran QC), later moving to 14th Floor Wardell Chambers. Jeff initiated the creation of a new chambers, HB Higgins Chambers (which was opened by Justice Michael Kirby on 4 September 1987). He was very proud of the significant role those chambers played in many areas of legal practice, particularly industrial law.

Jeff was the very embodiment of what a barrister and, ultimately, a queens counsel should be. His capacity to identify the substance of a case and to present the argument with great clarity, conciseness, reason and logic made him a powerfully persuasive advocate. He was a superb appellate advocate and was warmly received in the High Court.

Jeff personified and discharged the central ethos of the independent bar. He was a fearless advocate who was not afraid to advance arguments that were unpopular or against the perceived wisdom.

In some respects, and perhaps slightly enigmatically, he adopted a relatively conservative legal philosophy, often referring in his writings, with approval, to the legal theses of Albert Dicey.

Jeff was no ordinary man, though he behaved like the everyman. He was neither lofty nor pompous. He was courteous, engaging and kind to those connected to litigation, even to opponents, and often, particularly in industrial matters, would try to find a consensus. That quality ultimately resulted in the successful passage of the *Industrial Relations Act 1996* which is, in itself, an enduring legacy of the man.

He did much to encourage and develop aspirants for legal practice. Recognition of Jeff's achievements in the law led to his appointment as a justice of the Supreme Court in 2003.

However, there can be no greater demonstration of Jeff's love of the law than his eventual return to practice, as a solicitor, originally with Jones Staff & Co. and then by the establishment of The People's Solicitors. (The name was, quintessentially, Jeff.) That step also demonstrated his great courage, resilience and humility.

The public accolades for Jeff's outstanding record in the law and as a law reformer have been much welcomed by his family and friends after the burdens of recent times. However, many of the accounts omit giving proper emphasis to one aspect of his work from which he gained his greatest distinction as an advocate and which represented, for Jeff, an abiding passion. This was the practice of labour law.

Even in his final days at the Royal Prince Alfred Hospital, he insisted, over my desire to have a more personal exchange, on receiving the 'latest update' on industrial affairs, and, to my amazement, displayed an intimate knowledge of recent cases. That devotion started very early in his working life. In fact, Jeff disappeared from his honeymoon to do an urgent matter before Sir Alexander Beattie of the New South Wales Industrial Commission.

In his 2003 article entitled 'Our heritage of practicing industrial relations', Jeff stated that the 'professional practice of … labour relations … as a … lawyer is a socially useful occupation, intellectual and tactically challenging'. On this analysis, he must be considered pre-eminent in the field. In correspondence to Elizabeth Shaw, Margaret Fisher, the widow of Bill Fisher, former president of the NSW Industrial Relations Commission, said that 'Bill always said that Jeff was the most able counsel and the best mind that ever appeared before him'.

His successes in significant industrial litigation in the High Court of Australia are legendary. For those aficionados of the area, I need only mention *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656*; Re Australian Education Union and Ors; Ex parte State of Victoria and Ors* (1995) 184 CLR 188; *Re Boyne Smelters Ltd; Ex Parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 177 CLR 446 and *Re State Public Services Federation and Anor; Ex parte Attorney-General for the State of Western Australia and Ors* (1993) 178 CLR 249.

Jeff's abiding interest in and influence on industrial arbitration and industrial relations should not be overlooked. It is where he won many significant benefits for working people, and contributed to the establishment of precedents that continue to be applied. One small example of his success in the field, about which he was fond, was that he established, then somewhat improbably, jockeys may be employees as opposed to independent contractors and, hence, eligible to join The Australian Workers' Union. Apart from the enjoyment of meeting many prominent jockeys in the process, he was also delighted that he was able to resist the strong challenges brought by racing clubs to the New South Wales Industrial Registrar's decision by demonstrating there was, in fact, no appeal. He subsequently celebrated this success by the taking of a part share in a racehorse named *Solitary Echo* but this venture proved much less successful. Nonetheless, for Jeff it was exciting. On one occasion the horse, to the shock of all concerned, actually ran third. Jeff was so elated that he endeavoured to give the victory speech reserved for the winning syndicate at the presentation of the race trophy.

This recounting of Jeff's love of industrial law would not be complete without referring to his philosophy. His passion for this area of the law came with his understanding that it could be a force for the betterment of ordinary working women and men. What was foremost in his thinking was the pursuit of fairness and, ultimately, social justice. He was a compassionate person and he had a great empathy for ordinary people.

A correlate to these philosophies was his active support for trade unions, and, particularly at an international level, for the protection of trade unionists.

I received a communication from Professor John Lund, the deputy assistant secretary of labour in the Obama Administration, who, after hearing of Jeff's death, commented on the excellence of his international efforts in the fields of industrial relations and occupational health and safety.

Jeff was no ordinary man, though he behaved like the everyman. He was neither lofty nor pompous. He was courteous, engaging and kind to those connected to litigation, even to opponents, and often, particularly in industrial matters, would try to find a consensus.

Jeff achieved much for labour rights in Papua New Guinea. He travelled to PNG, at his own expense, and, *pro bono*, gave lavishly of his time to assist PNG trade unions who were then under resourced and often unrepresented in significant court cases affecting their members' interests. He gave advice as to a wide range of legal and industrial issues, and, in particular, designed a legal strategy and ensured the legal resources to resist various challenges brought by substantial industries in PNG (represented by some large and well equipped law firms from Australia) to the legal capacity of industrial tribunals to reinstate an unfairly dismissed employee. His stewardship ultimately resulted in a substantial legal victory for

the PNG trade union movement in their Supreme Court.

If I may combine this account with my earlier discussion of Jeff's diverse interests, I should also mention that on the final occasion he went to PNG he was joined in celebration on the last evening by local unionists to show their thanks for his work. The evening was intended to be a small gathering of the key union officials but turned out to be a gathering of about 100 unionists and workers. The resulting picture was magnificent, as the evening was celebrated by Jeff on piano, accompanied by a local trade unionist with a rather good voice, singing a medley of Beatles songs. I remember with particular affection their rendition of *Let It Be*.

This tribute would not be complete without noting my admiration for Elizabeth, James and Jonathon for the love and support they gave Jeff, and for their devotion and bravery in the most difficult of circumstances. They have my sincere condolences.

In conclusion, another measure of this man was the wide array, from all walks of life, of his friends who were and remain intensely loyal to him.

I was deeply honoured to have known Jeff Shaw; to have shared in his triumphs at the bar and to have been his confidante. He was a close friend, teacher and mentor. He leaves, too soon, a legacy that few will match in the practice and the development of the law in New South Wales. I have witnessed and been proud of his many achievements, none of which can be taken away from him. To paraphrase the Beatles: 'there, let it be'.

From a *Bar News* interview with the Hon Jeff Shaw QC in 2000

Fernon: When you first entered parliament you then had an established and successful career at the bar. What were some of the things that motivated you at that time to change your direction to take on the political career?

Shaw QC: I had been practising at the bar since 1976 and took silk in 1986. When an opportunity came up in 1990 I thought it was time to seize it and to take the chance. It was not without regrets and not without some sense of apprehension but I took the view that many barristers had played a role in public life and given the chance placed before me, I should do likewise. I don't regret that for a minute and although the five years in opposition were hard, combining the role of a shadow minister with the role of practitioner at the bar, the five years between 1996 and 2000 as attorney general were very satisfying. I was motivated to take a position in the parliament by seeking to pursue some reformist ideas about the law and the legal system, to strive, however difficult the task is, to make the law more accessible to ordinary people. Hence, it was satisfying to me that I was able to persuade the Treasury in each of the five years in office to not only maintain but actually increase the amount of legal aid available from the New South Wales budget. I also took the view that it was useful to be able to persuade a government to maintain fundamental legal principles in the criminal justice system and to avoid the intervention by politicians into, for example, sentencing processes or other aspects of the legal system.

Fernon: What lessons do you think you've learnt from your time in politics?

Shaw QC: I have become a little more world weary and sceptical, but nonetheless there are ideals that are worth fighting for and I have come away from public life with the idea that, despite popular prejudice to the contrary, there are many people in the parliament, indeed most of them, who are well intentioned and who are receptive to reasoned views from the community. Indeed, I think the great preponderance of people who go into public life are motivated by the idea of doing good things and that this is probably not sufficiently appreciated. The legal profession needs to understand , I think, that the politicians on both sides of the Parliament are receptive to rational argument and although there are occasionally some primitive anti-lawyer prejudices, mostly the members of parliament have regard to the views propounded by the barristers and solicitors of New South Wales, especially when under pressure and in need of good advice.

Stephen Maxwell Stewart (1955–2009)

By Andrew Stewart

Dad was born in Katoomba on 14 October 1955. His life changed when a young squash player named Kay Fitzgerald caught his eye. Throughout his life he endeavoured to make Mum feel special. Limousines, butlers and seaplanes were all part of the deal, as was the Bette Midler love song dedication on the radio. For a surprise party on Mum's 40th birthday Dad made guests park in neighbouring streets so she wouldn't recognise the cars. He conned Mum into coming home from the restaurant early with him by spilling a drink down his pants and insisting he had to change.

Dad was an enigma. He practised transcendental meditation and loved Shintaro the Samurai. He loved *Fawlty Towers* and the Far Side. I remember when I was young, I tried to understand what he saw in all this. He told me: 'Just listen'.

There were many eclectic and somewhat illogical things that made sense only to him: working in the garage with Elton John or Pink Floyd blaring at noise pollution levels, or falling asleep in his armchair watching documentaries about the Second World War. He was also an amazing mimic. He even taught himself to play the piano like his beloved Elton John. He was fascinated by the weird and wonderful. He loved pen collections at the Easter Show, ovens from Danoz Direct, conspiracy magazines and natural remedies. He loved going to Bunnings and Flowerpower on the weekend. He also had some culinary flair, and enjoyed sweating profusely after a bowl of his curry. It cleansed the pores, he would say.

He was a passionate photographer with his Nikon, and was particularly interested in different aspects of natural landscapes. Later in life he rediscovered his love of cars. Deep in his own world, he would sit and take in the noise of the V8 cars and photograph the races till they finished.

Dad was passionate about whatever he did. As a young legal practitioner, he always carried a briefcase to give the impression he had many clients.

He could see the humour in any situation - even the most serious. He enjoyed calling up his first boss's secretary and using names like Terry Bull and Des Gusting. Nothing was sacred with Dad's sense of humour - not even himself.

Although gifted and talented in many areas, Dad always had problems with coordination. While fishing off the jetty he never managed to catch any fish. He was too busy waiting for Lynne to untangle his line while he tangled hers. He was the sort of person who would get lost in a revolving door, or get sidetracked in a crowd and have to go back the way he had come. His navigation skills were such that family drives never went smoothly.

Dad never let us know he was in pain. If asked how he felt, he would respond: 'I'm fine'. He was always out early and home late, typing up an advice or working on an upcoming case. A colleague said Dad enjoyed that sought-after 'balanced life': highly professional with his work but possessing a solid understanding that work was not the be all and end all.

He went for walks with his younger brother James, just as he would with myself, Matthew and Christopher. Dad was shattered after Christopher's death. As someone who always knew what to say, found solutions and solved complex puzzles, he found it difficult to live without a clear direction. He travelled through his grief, mostly alone but always thinking of others. He did not want his colleagues to see him as someone who had suffered greatly, but as someone who was capable of carrying on with his work. One night late last year he told the family he had decided to apply to become a judge. In seeing the pride in his face I saw not only a man who had fallen, but a man who had stood back up again.

I will always be grateful to Dad for helping me when I was vice captain in year four at Del Monte. I was a fraud. Dad wrote all my speeches for me. He wrote the Father's Day assembly speech with me, and I will always remember doing the last sentence. It was one of those moments that stick with you, I remember how awkward it felt, speaking those words which were not my own, yet were exactly what I wanted to say.

Today, these are still Dad's words, and I feel proud to say them. Thanks Dad, for teaching me how to laugh, and how important that is in life.

Christopher Martin Egan (1949–2010)

By David Hooke SC

We can all be confident of one thing. Chris is holding court, surrounded by friends both old and new, and grumbling about all the fuss which is being made. At the same time, he is quietly chuffed that we are all here and saying nice things about him.

Chris was many things to many people. He gathered friends in many circles and in many walks of life. Someone said to me last week that he adopted people. I am honoured to be one of them.

When Chris made friends, he made them for life. I feel a bit like a Johnny-come-lately. I've only known Chris for 23 years. He became friends with Michael Delaney in 1963 when he started at St Bernard's College in Katoomba.

Chris's arrival at St Bernard's was the start of a lifetime of keen negotiation for Chris. He and his mother, Zola, were in dispute about matters of discipline. Chris had assumed the role of head of the family at the ripe old age of 11 and took that role very seriously. He remained very protective of both Zola and his younger sister, Karen, until Zola's passing in October 2006 and his own last week. Karen, our hearts go out to you.

Of course, as Chris well knew from that early age, with responsibility came rights (at least I think that's how it went) and he was determined to exercise them. Legend tells of a broken jaw, a shattered ankle, a harpoon through a leg and the use of household bleach to attain the right Bondi tint in his hair. He was given a lift home by the Bondi police more than once and when Zola summoned the family priest to discuss the facts of life with him, Chris had absconded out the window to the beach.

It was at about this time that Zola decided that Chris needed a firmer hand, so she took him on a tour to Boys' Town. Chris decided that Boys' Town wasn't for him and recognised the need to settle. St Bernard's it was.

The following year St Bernard's closed and Chris, Michael Delaney and others moved to Oakhill College where he met the Kelly boys. He ended up doing the Leaving Certificate at South Sydney High in 1966 not having measured up to his own exacting standards the year before.

After school a group decision was made to play some rugby. Colleagues in Woollahra were the beneficiaries of the arrival about that time of Chris, the Kellys, Michael Delaney, Chris Webb, Mike Fitzgerald and Chris's late English mate, Cal Armstrong.

A gentle run in 5th grade was the go, but having recovered from his earlier-mentioned ankle injury Chris decided that he should progress up through the grades. He embarked on a rigorous regime of training and healthy living. He reduced his smoking from 60 to 30 a day, and stopped drinking beer between Monday and training on Thursday night. His efforts and raw talent were noticed and the following season he was plucked from the mighty 5ths to play 1st grade. It's nice to see Tom and Sam following in his footsteps.

In 1967 Chris embarked on his career in the law. He started work as an articled clerk with Teakle Ormsby and Francis and remained there until about 1973. He told me (perhaps more than once) that during that period he had the biggest High Court practice in the country. He briefed and became

He was given a lift home by the Bondi police more than once and when Zola summoned the family priest to discuss the facts of life with him, Chris had absconded out the window to the beach.

We are all well aware that Chris's appearance never changed - except once when he shaved his beard, and the less said of that the better! Bayne Kelly says that at the age of 17 he and the rest of the gang looked 17 but Chris looked 27. This enabled Chris to breach various provisions of the Liquor Act to the benefit of his more youthful looking mates.

friends with some great counsel. He is apparently responsible for giving Jim Poulos his first common law brief during this period.

In 1968, confronting the Vietnam draft the following year (along with a number of his mates, including Bayne Kelly), Chris hit upon the solution. He rang Bayne and said 'Mate, I have an idea. A mate of mine in the CMF reckons that

if we sign up with them for seven years we don't have to do National Service and so there's no chance of Vietnam.'

Bayne was conscious of the fact that not all ideas were good ones and responded 'Do you really want to go on an Army parade every Monday night for the next seven years and annual camps and so on? Why don't we just take our chances?' Of course, in the result Bayne was called up and Chris missed out. Bayne tells of Zola calling him soon after to express her concern for him and to wonder whether a tour in Vietnam for Chris might be just the firm hand she had been searching for.

In about 1973, Chris went to work for Ivan Judd for a year or so before moving on to McLellands where he established an extraordinary major claims practice and where he remained until completing his law degree at the then fledging NSW Institute of Technology law faculty.

On 19 August 1978 Chris married Trish, his wife of over 30 years. Trish, our hearts go out to you.

During this time Chris became interested, and then passionate, about sailing, both in the harbour and offshore. He commenced his sailing career on the famous Erica J and became very close friends with Alan Brown, Kenny Davies, Gavin Anderson and many others. His love of sailing and of the water never waned, although Heaven help anyone who had a sheet override or a winch handle disappear overboard! He also became a keen snow skier and his times at Thredbo are legendary.

Immediately he graduated, Chris was called to the bar where he read with Hayden Kelly on 14 Wardell. He stayed on the 14th floor until the floor sadly closed down, and forged many deep and lasting friendships there.

It was when he was on the 14th floor that I met Chris. I was a baby clerk sent up to a conference with counsel and client. Margaret Ashford was Chris's clerk then and for most of his years at the bar. As I was leaving at the end of the conference I spoke with Margaret. I said (and you'll forgive some revision of the exact conversation) to Margaret 'That guy's a complete [not very nice person] and I don't want to have anything else to do with him.' Margaret offered some sage advice: 'Next time he behaves like that, and he will, just turn around and tell him to [go away].' Of course, he did and I did and the rest is history. Thank you Margaret.

In the interim the most important thing in Chris's life had begun. He became a father. On 2 March 1983, Tom was born. Sal followed on 2 November 1984 and Sam on 14 April 1988. Guys, you were the love and the light of his life. He loved you more than life itself. Know that, and cherish that knowledge in your hearts forever. Losing a parent is an awful thing and our thoughts are very much with you all.

Chris's sometimes gruff exterior on occasions masked a heart of pure gold; a heart the size of Phar Lap's. His love and loyalty were true and his generosity was boundless. No-one could ask for a better friend than Chris. He was the real deal.

Likewise, he was the consummate professional. His honesty, integrity and independence were beyond reproach. He read every line on every page of every brief. He was a wonderful mentor, not only to me but to countless others who learnt enormously from being around him and, if fortunate, adopted by him. His generosity of spirit is an inspiration to all of us who were lucky enough to know him.

Alfred, Lord Tennyson, wrote:

> Sunset and evening star,
> And one clear call for me!
> And may there be no moaning of the bar,
> When I put out to sea,
>
> But such a tide as moving seems asleep,
> Too full for sound and foam,
> When that which drew from out the boundless deep
> Turns again home.
>
> Twilight and evening bell,
> And after that the dark!
> Any may there be no sadness or farewell,
> When I embark;
>
> For tho' from out our bourne of Time and Place
> The flood may bear me far,
> I hope to see my Pilot face to face
> When I have crost the bar.

Chris, we love you, we are sad, we miss you, we salute you. We will always remember you.

We have been lucky indeed to be your family and your friends. Rest in peace and thank you for being in our lives.

Roger Stephen Quinn (1954–2010)

By Gillian Quinn

We have gathered here today to celebrate and pay tribute to the life of our brother Roger Stephen Quinn. This is not an occasion for mourning but one of remembrance and celebration of our brother's life. Each of you is here today because his life has touched you in some special way. It is now time to remember those occasions and while Roger has passed on he will live in our hearts forever.

Rather than grieving, I rejoice in having had him in my life. He was always very special to me and from comments that many of you have made, I know those feeling were reciprocal. The love, pride and joy I have in knowing him, I hope you will use that combined with your own knowledge to complete a picture of Roger, the man – the friend, the colleague, to form everlasting memories of him.

Roger was an extraordinarily talented and multi-faceted man: barrister, sailor, musician, composer, poet, author and, surprisingly, an accomplished magician specialising in legerdemain and illusion.

Roger was born in Sydney on 9 August 1954 to parents John and Betty Quinn.

The Quinn family resided in Seaforth for all the childhood and teenage years of the three siblings Tim, Roger and Jill.

Growing up in Seaforth was a wonderful playground for the three children and it provided an amazing, carefree childhood. There was the harbour pool just below our house where after school all the local kids went to swim. Our Dad who spent the whole of WW II in the navy serving in all theatres of war, used to ring a navy ship's bell at 6:00 pm, which was the signal that dinner was ready. (For Dad, it was always 'At the order or the bugle sounding action…'

There were many wonderful childhood experiences and it was quite idyllic.

In our early teenage years the harbour also became our playground when a group of local kids decided to build canvas kayaks. With the help of our fathers who all completed a boat building course at Manly High School, we were soon paddling around the upper reaches of Middle Harbour and Bantry Bay.

Sailing at Clontarf Sailing Club was a family event where all members of the family participated. Roger in his teenage years bought a Moth sailing boat and raced with the Seaforth Moth Club. Even today he still raced a high tech moth called a Blade Rider out of the Balmoral Sailing Club and I have just bought my own scow moth and was intending to be instructed by, and sail with him.

Roger once told me the greatest gift our mother had given him was the opportunity to learn to play the piano and read music. Our mother cashed in an insurance policy to buy a piano and went back to work to pay for the lessons for both Roger and myself. It was a gift that has endured for 50 years and brought incredible enjoyment to Roger.

Culture was an important part of our upbringing and our mother tried to show us a different side to life. While Dad was working, Mum organised trips for the three children to museums, art galleries, the ballet and the theatre trying to instil in us an appreciation of the arts. I'm sure seeing *Summer of the Seventeenth Doll* ignited the author in Roger. Mum was a staunch monarchist. Whenever Queen Elizabeth visited Sydney there was the mandatory trip to the city so her three children could see the Queen pass by.

Our childhood was without a television and all three children learnt the appreciation of the written word and all became avid readers. Every Friday there was the visit to Seaforth library for more books. Roger quickly graduated to reading Dickens and the classics at an early age.

Roger was very intelligent and excelled academically. He had a love of English and great command of the language as evidenced by his Honours degree from Sydney University. He eventually went on to complete a Bachelor of Laws and started a Doctorate of Juridical Studies, which he converted to a Master of Laws in 1997.

Roger's early working years could only be described as unusual. He had a variety of jobs none of which related to his university degrees.

Roger used to write short stories for various magazines and for the *Daily Telegraph* which led to writing a restaurant guide for the paper. Every night Rog would go to a different allotted restaurant for a meal upon which he would write a critique. Dad, who always worried about Rog during this unusual phase of his life relaxed because he knew Roger was getting a regular meal. However, I think his first published article was about Bondi where he was living at the time.

Rog had a stint as the leader of his own

rock band. Even then, he composed all the words and music. His band was offered a recording contract but being young, he eschewed being controlled by others. I attended a few 'gigs' as they were called then. I am not sure how Roger's hearing survived that period of his life as the band was very loud.

Roger was later to tell me in private that he had wasted the first ten years of his working life. I disagreed with that assessment because it shaped who he ultimately became.

He entered the law because of his innate sense of justice and fairness. He was admitted as a solicitor in 1989. He worked briefly in a small private practice before moving to the Australian Government Solicitors where he specialised in taxation. He stayed there for 10 years before joining the bar in 2002. He undertook many cases for the AGS and the ATO, appearing in the High Court of Australia, the Federal Court of Australia, the Court of Appeal and the Supreme Court of NSW as well as District and Local Courts. He acted almost exclusively for Commonwealth agencies.

Over the next seven years Roger worked tirelessly six to seven days per week applying some extraordinarily long hours. His law practice was very busy over this period, a testament no doubt to his successes and hard work. Roger's clients could always be assured he gave their cases more preparation than was required to ensure a successful outcome.

During this period of Roger's life he had three passions: his music, sailing his high tech moth and an unstinting focus on the law with all its nuances.

In music, he loved boogie woogie, a sub-genre of the blues and he proudly told me recently that he had acquired every piece of this genre that has ever been written. Roger's Blade Rider provided endless hours of enjoyment every Saturday. The exhilaration he felt when skimming the waves, wind in his face, water spraying over the boat, was tremendous respite from the intensity of his law practice. The last time he went sailing, he said he really enjoyed hanging out with the other sailors at Balmoral and he left home at 7.30 to gain as much enjoyment as he could from the day.

He loved practising the law and he recently said his aim was to acquire a greater command of the law. While he never revealed details, he would explain the complexities of the law and the subterfuge that people employed to get around the law. He took great delight in unravelling their nefarious legal strategies.

In July and August of this past year, when even Rog's legal practice slowed down, he took about five weeks off to spend time repairing the Quinn family home at Seaforth. I don't think I have ever seen or experienced Roger in such a relaxed demeanour.

He had actually switched off or shut down for the first time in ten years and was actually enjoying some of the simple pleasures that Seaforth had to offer, the quietness, the sound of kookaburras in the trees, the casual pottering around the garden, painting a wall. Rog seemed very much at peace with himself.

While Roger loved living in Newtown with its rather bohemian life style and myriad restaurants and cafes, he was clearly re-establishing his roots in Seaforth. I now wish he had taken more time off to re-establish those roots and just take time out, but his practice rapidly picked up with new clients and Rog was back to working those long hours.

His impulse trip to go to Thailand was a last minute decision for which he has paid a terrible price.

All our extended family dearly loved Rog. Words can barely describe the sharp pain we feel from this senseless accident and his absence from our lives. Aged 55 is all too young to pass on and Rog still had so much to live for both professionally and privately.

I am glad I experienced Rog in the middle of last year in such a relaxed state unshackled from the pressures of work and private life. It is how I intend to remember Roger best.

Good bye Rog, you will remain forever in our hearts and memories.

Vale, Roger. *In pace requiescas. Dulce et decorum est cum parentibus requiescere.*

Et pour moi, Adieu, Roger. Tu me manqueras toujours.

In accordance with his wishes, Roger is to be buried with his parents. Because he died so far from his loved ones:

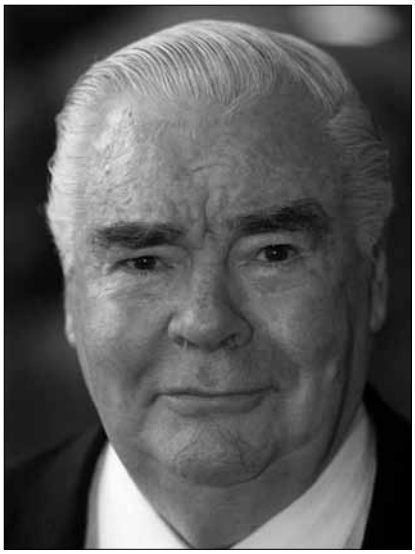
Und deine Seele spannte
Weit ihre Flugel aus
Flog durch dem stillen Lande
Als floge sie nach Haus

Which translates as:

And your soul spread
wide its wings and
flew through the quiet land
as if it were flying home.

William Kenneth Fisher AO QC (1926–2010)

By the Hon Neville Wran AC QC



I feel distinctly honoured to have been asked to speak for the Bar on this significant occasion convened to honour the Late Bill Fisher AO QC.

Bill Fisher, as we all know, was the second long-serving President of the Industrial Relations Commission since it was established in 1902.

As Michael Kirby observed in his Kingsley Laffer Memorial Lecture, and I quote: 'It is fashionable nowadays in some quarters to dismiss the industrial relations system that operated in Australia for most of the 20th century.'

That certainly was not the case during the long years of Bill Fisher's presidency and if anything his contribution as president emphasised the permanency of industrial relations tribunals.

Fisher was a man of great integrity and commitment to principle – both in law and in life. He believed that people from all walks of life and all ages and all races should have the benefit of the Australian doctrine of 'a fair go'.

I can attest to that commitment for I knew him passingly at school, and at Sydney University, and then at the bar, and then we both had chambers on the 4th floor of Wentworth. The 4th floor, I might say, was in the early days regarded as a bit of a dumping ground for the odds and ends of the bar who had missed out on chambers in what was then the new building.

The 4th floor comprised mainly newly admitted barristers and some senior lawyers who had not early arranged their chambers.

As time went on, the perception changed and there evolved virtually a bar within a bar – as distinguished advocates like Bill Fisher, Lionel Murphy and Jack Sweeney put their stamp on industrial relations in this state.

All of those three I have mentioned, of course, went on to occupy senior office in the judicial or industrial firmament. In Bill's case, I happened to be the head of government which appointed him president of the Industrial Relations Commission on 18 November 1981. His appointment signalled a change of direction; a change of commitment in the regulation of industrial relations in New South Wales. I believe it is fair to say that Bill reshaped the institution and the direction it took thereafter.

He was a highly active president. He sat as single judge quite frequently, unlike his predecessor Sir Alexander Beattie who rarely did. He encouraged active co-operation with federal industrial relations tribunals and amongst members of the Industrial Relations Commission itself. Terms such as balance and flexibility were grafted into the lexicon of principles in common use in the industrial relations field of practice.

Apart from fundamental changes that reached the four corners of industrial relations regulation, he was responsible for changes that before his presidency had been talked about, but never implemented. In the long list of such achievements – and it is a long list– I would mention but two: redundancy pay and no stoppage agreements in the construction industry.

Fisher's commitment to fairness undoubtedly influenced his approach to fairer redundancy laws, and as John Shields observed, the credit for entrenching redundancy pay as an award entitlement for Australian workers rightly belongs to Bill Fisher and the New South Wales Commission.

As to no stoppage agreements, Fisher was very much involved in encouraging the use of such agreements and his interest in efficiency as a matter of principle greatly assisted the completion of major developments like Darling Harbour, Sydney Harbour Tunnel and so on. The effects of Justice Bill Fisher's legacy will be felt and measured for many years to come.

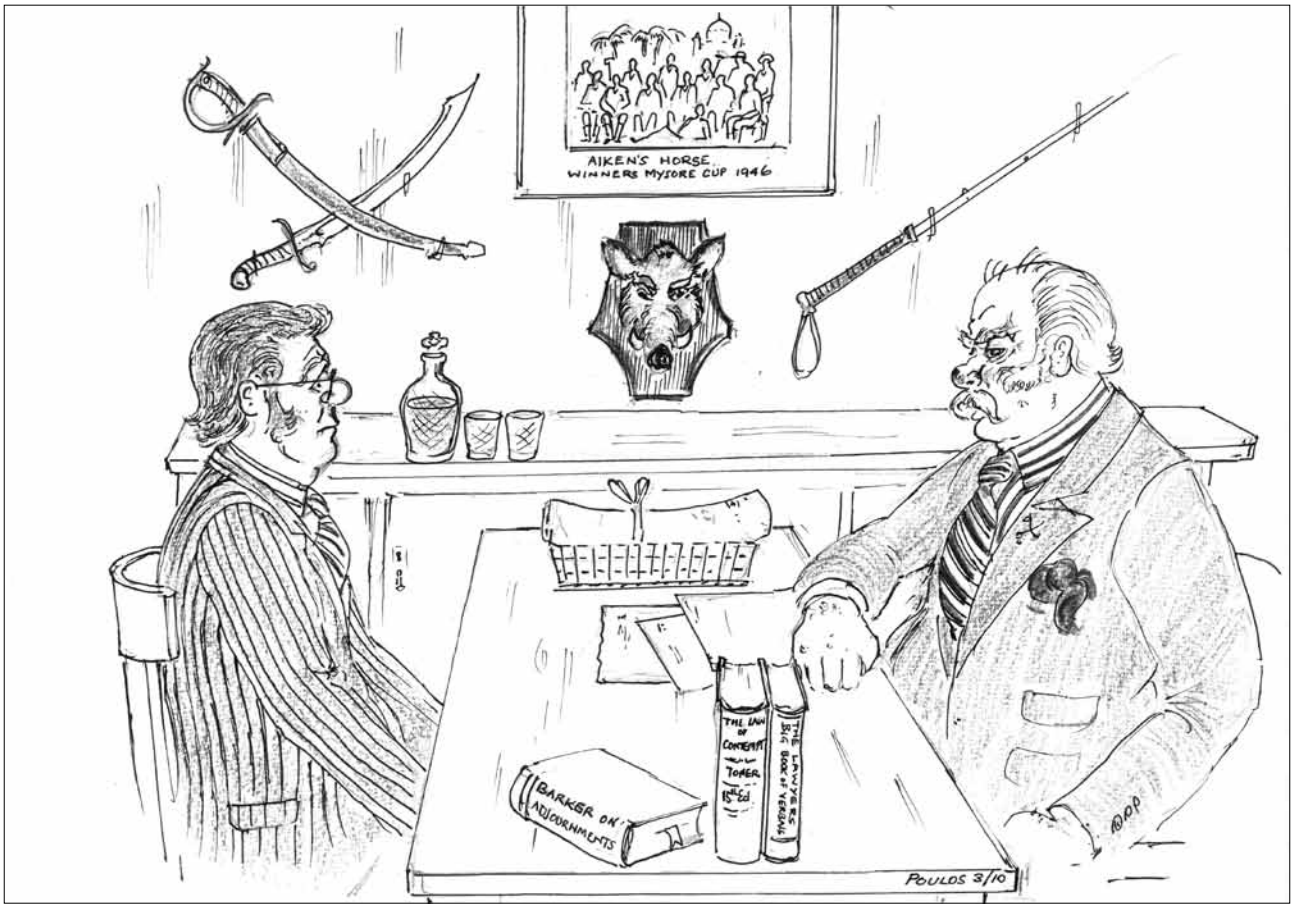
Of course, he had a wide practice outside industrial relations. I don't intend to articulate each item in his CV, but I do wish to observe that its length and depth and relevancy to public affairs is quite astounding. Royal commissions, national inquiries, judicial deliberations at high levels fell to Bill Fisher's skills.

What is astounding is that he could do so much in so many fields in such a relatively short time. Outside of the law and industrial relations, he involved himself as a trustee of the Opera House, a strong supporter of Sydney University and other worthwhile activities too numerous to mention.

The fact of the matter is that Bill was a special individual who contributed to the public life of New South Wales and Australia. His wife Margaret and the children are here this morning and we are grateful that we share with you the admiration and respect for Bill – a highly distinguished Australian.

Young Bullfry and the Colonel

By Lee Aitken (with illustrations by Poulos QC)



Bullfry refreshed his Scotch, and thumbed the index of the latest judicial autobiography in his extensive library – *A Day's March Nearer Home: Memories from the Lighthouse* – a catchy title if ever there was one – although the cover left something to be desired – an abstract representation of a Conventional Estoppel was unlikely to beguile the lay reader! Thumbing the index took him back to his own earlier days –

'You're not a poodle-faker, or a scrimshanker, are you lad?'

'Lad'? Bullfry was 24, and sitting opposite the senior crown prosecutor, a half-pay, ex-Indian Army colonel, whose main occupation, after finishing a law degree, (part-time by post), before appointment, was umpiring the polo at Bungendore. The ageing warrior appeared to have a glass eye, and his face otherwise bore the scars of more battles than most would want to see, and testified to a long acquaintance with single malts.

You're not a poodle-faker, or a scrimshanker, are you lad?

Bullfry was unsure how to answer. Was he a poodle-faker? Or a scrimshanker? From the tone of the question, an affirmative answer seemed likely to diminish his chances of a junior prosecutorial appointment. But surely the Public Service Act barred questions at interview involving one's private life, even if it involved poodles?

'I don't think so, Colonel'.

The red face beamed.

'I didn'a think so, lad. I didn'a think so. As long as you're buckshee, I'll take you.'

Was he buckshee? Apparently so, for within a week he was there with The Colonel, involved in learning how to prosecute some of the most difficult crime which the territory could offer.

What an incomparable mentor. An advocate who opened 'high,' and frequently provoked an application by

the defence for immediate discharge of the jury; an advocate tactically astute, who could use the last word to change the basis of the Crown case, and then withstand complaint about it before the full Federal Court; an advocate with great powers of rhetoric, a direct manner, an inimitable style.

That he knew very little law was not a hindrance – he had an innate knack of sensing what (usually within the bounds of forensic propriety) was most likely to inflame a jury – in a certain class of case, experienced defenders would challenge any female member of the panel, in order to attempt to deflect the force of his opening. Even he sometimes overstepped the mark – it was after all going a bridge too far to open on charges not included in the indictment – but those were modest sins.

Assisting him was his deputy. A languid Englishman – a former patrol officer – ex Tanganyika, and the Sepik River – unflappable except when confronted by an inane inquiry from a witless and callow PLO from the Justice Division of 'Puzzle Palace' (on the other side of the Lake) about a captious *nolle prosequi* application:

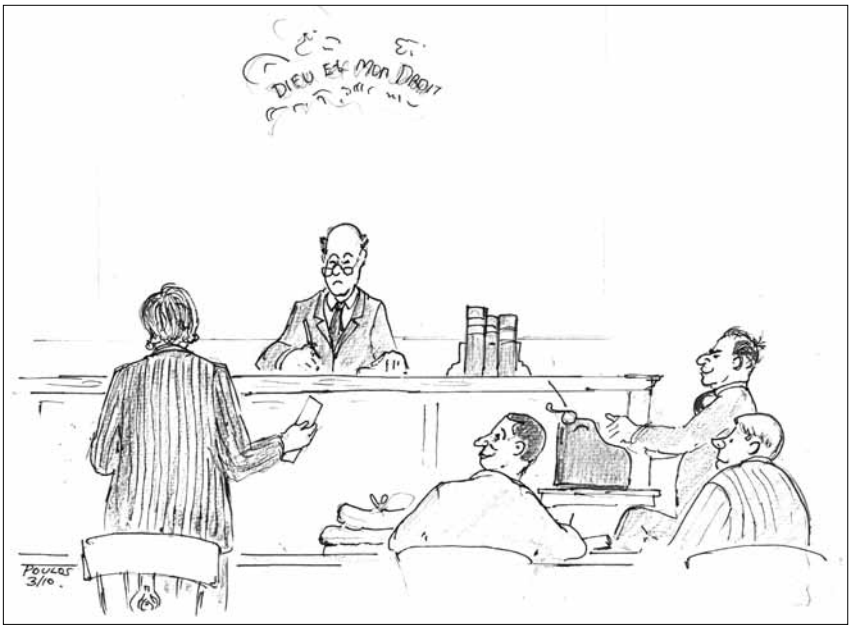
'Sozzlebain here, from Head Office. I have just been reviewing your trial transcript for this *nolle*. Why didn't you ask more questions about the shotgun?'

'How many murder trials have you run?'

'Well, now you ask, none'.

At some point a little further on, voices would be raised, and the sound could be heard around the office of the Bakelite hitting the wall.

With two such mentors, how could a young advocate not advance? And what better place to start than the parking prosecutions? The first day Bullfry was so deployed, the senior magistrate put the inspector in the box before Bullfry had arrived! Bullfry rushed to a court which was packed with counsel and clients, and announced his appearance in bravura style for the informant.



'Case dismissed; informant to pay the defendant's costs'

This was it – as good as it gets – Sir Edward Carson, Sir Norman Birkett, Sir Patrick Hastings, Sir Horace Davey, Viscount Haldane of Cloan, Sir Jack Smyth - young Jack Bullfry! In best legal workshop form, he began separately to tender the relevant documents, bundled together, which provided the statutory presumptions which founded the prosecution.

'Do you rely on the usual evidence of ownership?'

'Yes, your Worship'.

'Case dismissed, informant to pay the defendant's costs'.

Aghast, Bullfry looked down to discover that he was still holding a 'yellow' in his trembling hand:

'May it please the court, I seek leave to re-open.'

'Leave refused – case dismissed; informant to pay the defendant's costs'.

Crestfallen he turned to face an audience which was revelling, in the kindest way, in his discomfiture. In the coming weeks, wherever he went, and whatever he was doing in the court, someone seemed innocently to ask about the parking prosecutions. A less kind colleague suggested he should write something academic on the topic.

Of course, once he got up to speed, things changed markedly. He could move rapidly, after being handed the 'blues' by the informing police officer, on any number of fronts – resisting bail on an armed robbery; extraditing a drug accused to Adelaide; seeking a bench warrant for an absconder; cross-examining on almost no notice a shoplifter, or minor supplier of narcotics.

The larger committals and trials were still a test – armed robbery; pillage and rapine; murder. As to the last, he once fought a defended committal for over three weeks after being thrown

into battle by the colonel at short notice. After a bitter fight, the accused was committed. At trial, the Crown witnesses gave varying accounts of the relevant events – the inherent weakness of the case best shown by the colonel's observation to Bullfry after a conference with the main witness – 'Lad, she was as drunk as a fiddler's bitch'.

All happy, happy days. He would be there still, no doubt at the most senior level, but for the colonel's management style. An attractive, slightly more senior post was advertised internally which promised the conduct of full Supreme Court trials, and other grand opportunities. Bullfry raised the matter with the colonel.

Crestfallen he turned to face an audience which was revelling, in the kindest way, in his discomfiture.

'Mr Tompkins is numbered off for that post, lad'.

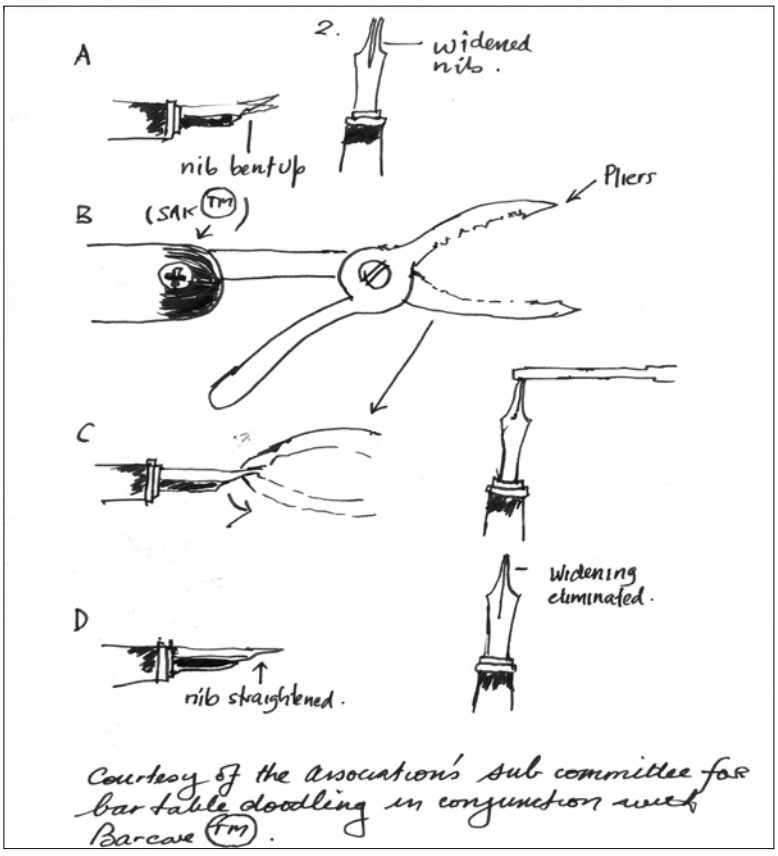
'But he just does the health prosecutions, colonel' (sausages tainted with too much sulphite, occasional cockroaches in a kitchen, and the like).

'We work on army lines, lad. You must wait your turn in good time'.

Two months later, Bullfry had transferred himself effortlessly to a senior post doing the bloodless work of defending ADJR applications (and drafting interminable section 13 and 27 statements) for a large outlier department. He wondered ever after whether this had been a wise move.

Jim's Bar Practice Management Tips

No.1 Cost Control (CPD Points 0.75)



In House Repairs

A barrister dropped an expensive fountain pen damaging its nib. He took it to the vendor who quoted the sum of three hundred and fifty dollars plus postal charges of thirty five dollars for the repair (not replacement) of the nib.

The barrister, having consulted with floor colleagues, decided to attempt repair *'in house'*.

By using his Swiss Army Knife™ he was able to effect a repair. He used the pliers *'app'* to straighten the nib (see accompanying illustration), the whole process (including collegiate discussion) took some three minutes.

Cost, including a depreciation factor, was one *"billable unit"* A$18 resulting in a saving of three hundred and sixty seven dollars.

The Governors of New South Wales, 1788–2010

David Clune and Ken Turner (editors) | The Federation Press | 2010

The colony and later the state of New South Wales has had 37 governors. We are well served by the recent issue of *The Governors of New South Wales 1788-2010,* edited by David Clune and Ken Turner. It contains lively and informative accounts by a range of different authors; the work as a whole is a major contribution to the social, political and constitutional history of New South Wales. The fairest way to review 37 lives is via the clerihew, the four line rhyme biography invented by Edmund Clerihew Bentley. Given that the colony was founded during the reign of King George III and developed into a liberal state, I start with two of Bentley's own.

George the Third
Ought never to have occurred.
One can only wonder
At so grotesque a blunder.

John Stuart Mill,
By a mighty effort of will,
Overcame his natural bonhomie
And wrote *Principles of Political Economy*.

Arthur Phillip
Had more than a fillip
Getting a most important appointment
Yet being refused the salve of official ointment.

John Hunter
Crossed Macarthur
So while an able naval officer
Is something of a martyr.

Philip Gidley King
Gave his sons a local ring
One was 'Norfolk', one was 'Sydney'
Charles Darwin thought of him ideally.

William Bligh
Went awry
Mutiny on land, mutiny at sea
Two answers to his tyranny.

Lachlan Macquarie
The first governor from the army
For this his bicentennial year
The Bents and Mr Bigge shed no tear.

Thomas Brisbane (Sir)
Descendant of a Scot Chancellor
The woolsack sets the family's tone
The family name means 'to bruise the bone'.

Ralph Darling
Took a mauling
From Whigs at home and interests here
Conservative aloofness cost him dear.

Sir Richard Bourke
Of flexible Irish liberal quirk
His daughter married the scion
Of the only PM to suffer assassination.

Gipps, Sir George
Did fiscal sense forge
Which stood him in good stead at home
Which sunk him in the squatters' loam.

Sir Charles Augustus Fitzroy
A surname suggesting a bastard boy
A colorful career, more leaps than bounds
His estate coming in at just twenty pounds.

Sir William Thomas Denison
Was governor during our self-imposed denization
From its start in '56 till he went in '61
He saw six ministries having fun.

Sir John Young
His reputation rests upon a high rung
Is this because he was a bureaucratic star
Or because he read as a barrister?

Somerset Richard Lowry-Corry, Earl of Belmore
Was not himself an auditor
But he martialled some ministerial tact
To leave as his legacy, the Audit Act.

Sir Hercules George Robert Robinson
The exemplar of colonial administration
He presided over seven governors' tables
Resisting not one of Augeas's stables.

Sir Augustus William Frederick Spencer Loftus
Was tagged by Disraeli 'a mere Polonius'
He supported Dalley's Sudan contingency
And died, aged 86, in bankruptcy.

Charles Robert Carrington, Baron Carrington,
Supported Parkes and federation
His greatnephew was later High Commissioner to Australia
Later still, Foreign Secretary to Margaret Thatcher.

Victor Albert George Child-Villiers, Earl of Jersey,
With his wife was rather choosey,
Like Carrington he befriended the Australian delegation
Who left as colonists, who returned a nation.

Sir Robert William Duff
Part naval part politico stuff.
Kind, honest, able, no sense of malefice
The first governor to die in office.

Henry Robert Brand, Viscount Hampden
Great great grandfather of Sarah Ferguson
His sole premier was Yes-No Reid
Unpreparing for a peaceful cede.

William Lygon, Earl Beauchamp
Was something of a scamp
Later known for manservants with whom he flirted
The model for Marchmain in Brideshead Revisited.

Sir Harry Holdsworth Rawson
Sailed through any imperial maelstrom
He had the running of the Anglo Zanzibar war
At 37 minutes from first shot to last, the shortest by far.

Frederic John Napier Thesiger, Baron Chelmsford
Grandson of a Lord Chancellor
Himself at one stage a barrister
He became Viceroy of India.

Sir Gerald Strickland, Count della Catena
A combative wartime governor
Recalled for ignoring a non-interventionist mantra
He regrouped to be prime minister of Malta.

Sir Walter Edward Davidson
Honest and dignified imperial man
So to some, a couple as square as two cubes,
For the Prince of Wales, 'such hopeless boobs'.

Sir Dudley Rawson Stratford de Chair
The first to taste Mr Lang's constitutional fare
Descended from Huguenots
He coupled dignity with repose.

Sir Philip Woolcott Game
Asked Lang to quitclaim
For some a constitution-wrecker
He became Metropolitan Police Commissioner.

Sir Alexander Gore Arkwright Hore-Ruthven
Took a VC in the Sudan
He would become our longest serving governor general
So five prime ministers found him vice regal.

Sir David Murray Anderson
Along with Duff and Davidson
Sadly died in office
In his case, on just six weeks' notice.

John de Vere Loder, Baron Wakehurst
With his wife proved that last is first
An outstanding vice regal duo
The last appointees from a Whitehall bureau.

Sir John Northcott
Gets the 'first Australian-born' spot
His wife is commemorated by a Manly ferry
He, by his work with disability.

Royal visit to Government House, February 1954. L to R: Miss Elizabeth Northcott, Governor Northcott, Her Majesty Queen Elizabeth II and the Duke of Edinburgh.

Sir Eric Winslow Woodward
The first with a NSW umbilical cord
He had little taste for high society
Happy to convey a modest propriety.

Sir David Murray Anderson

Sir Arthur Roden Cutler
A veritable viceregal showstopper
A shot off leg, a VC, more than six foot three
He balanced colour and dignity.

Sir James Anthony Rowland
War hero, concerned for the working man
A governor for the bicentenary
The third last military man in our memory.

Sir David Martin
Descended from the Rum Corps administration
Appointed with a smile and a sense of auspice
He died with great dignity after exposure to asbestos.

Peter Ross Sinclair
Led the Nyngan recovery affair
He led not from the person but by the office
But the office, for some, had become surplus.

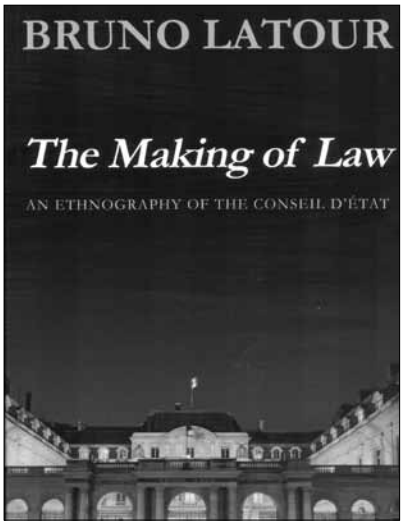
Gordon Jacob Samuels
Had legal nous in amples
Living in a private house
Did not make him an ex officio mouse.

Marie Roslyn Bashir
Is here
A model governatrice
With not one thing done amiss.

Reviewed (and composed) by David Ash

The Making of Law: An Ethnography of the Conseil D'Etat

Bruno Latour | Polity Press | 2010 (English edition)



This is a fascinating work of practical philosophy examining the decision-making process within the Council of State, a quasi-judicial body that applies administrative law at the highest level in France. In his good-humoured preface to the English edition the author provides at least two good reasons why an English-speaking common lawyer ought to read this book.

The first is that despite being born at the same time as the Napoleonic code, the Council of State has developed a body of precedent-based law which is unique on the Continent. It is therefore more closely related to the common law in the manner of its reasoning than the code-based systems of civil and criminal law that operate alongside it.

The second reason is that the Council of State and the body of law it applies is (apparently) as unfamiliar to the average French citizen as to anybody else:

> in the average French person's eyes it seems as distant as the rules of Bantu marriage or Earth of Fire initiation ceremonies.

As a consequence, Latour adopts the position of an interlocutor tasked with explaining French administrative law to an extra-terrestrial visitor, not taking into account any assumed knowledge (of philosophy, French, or law) whilst at the same time admirably avoiding the adoption of a patronising tone.

Broadly speaking Latour is a philosopher (he prefers 'ethnographer') whose work critiques the concept of the 'social' as a meaning-producing paradigm, preferring instead to analyse the 'associations' between 'connectors' – semantic, religious, political, technological, economic or legal. He takes an approach to the subject matter of his studies that has been labelled Actor Network Theory or ANT, yet the book is refreshingly free of jargon which makes the concepts discussed far more easily assimilated by the uninitiated.

For fifteen months over a period of four years Latour observed the deliberations of the *Commissaires du gouvernement*, who despite their title perform a function which is sufficiently removed from the influence of the Executive to justify them being referred to as judges and their decisions as judgments. In contradistinction to the formation of judgments in this country which is essentially the solitary task of a single judge, within the Council of State the act of judging is mediated through a series of collective but closed deliberations between counsellors and various other officers, each with a defined role to play in the review of the administrative decision at hand.

Latour declares rather ambitiously and yet unashamedly that his aim in analysing these deliberations is to capture the 'essence of law' in the practice of judicial decision-making, not in a definition. A judgment is not 'handed down' as the commandments were to Moses but is the result of a long and complex process involving the interplay of litigants and lawyers, oral and documentary evidence, arguments and texts, interests and opinions, which in the ANT taxonomy are all 'actors' with a role to play in producing the final judgment.

Although Latour follows closely the deliberations in individual cases, to preserve the anonymity of the judges they are not expressly identified, which might also distract from the aim of capturing the essence of the law. He does however note the importance of parties' names in ordering the body of case law on which precedent is based, contrasted with the practice in science whereby important theories are directly attributable to the scientist responsible, which serves to illustrate the detachment of lawyers from the subject matter of disputes compared to scientists who are deeply involved in the subject matter of their investigations.

... Latour goes a long way to filling what appears to be an immense gap in French administrative law, which is the absence of written reasons for judgment.

The bones of the book are Latour's hand written notes, fleshed out and placed in the context of the facts of each case, with the words dissected and then analysed as specimens of legal reasoning. Latour's hypothesis is that the quality of legal reasoning engaged in through interlocution is no less than that which is found in a written judgment. In that regard, Latour goes a long way to filling what appears to be an immense gap in French administrative law, which is the absence of written reasons for judgment. A short form of judgment

is published – resembling a head-note – which includes the orders made, but it is left to a cohort of chroniclers to explicate the reasoning that links the facts with the law for publication in the official reports. The decision to reproduce tracts of conversation within the body of the text – rather than place them in appendices – causes moments of reading tedium (in the same way that any transcript will do), but these passages are admirably brief and rightfully occupy a central place in a work devoted to understanding the law as it is enunciated by actors tasked with 'declaring the law'.

Latour's insights into the judicial process make a rousing contribution to the near soporific state of debate as to whether judges make or declare the law. In fact, the debate is shifted to another dimension. Having noted that judges define their role in terms of their capacity to 'say the law', he analyses the modification of ten 'value objects' through 'the ordeal' of judicial decision-making, specifically:

1. The *authority* of the agents participating in the judgment

2. The *progress* of the claim as it moves through obstacles

3. The *organisation* of the cases, which enables the logistics of claims to be respected

4. The *interest* of cases, which is a measure of their difficulty

5. The *weight* of the texts, which makes for an increasingly contrasted landscape and history

6. The process of *quality control* by means of which the conditions of felicity of the process as a whole are verified reflexively

7. *Hesitation*, which produces freedom of judgment by unlinking things before they are linked up again

Photo: iStockphoto

8. The *means* of arguments which compel the linking of texts to cases

9. The *coherence* of law itself as it modifies its internal structure and quality

10. The *limits* of law, which are defined by regulating the right to launch or suspend a legal action

The word 'moyen' which is translated as 'means' of argument has a stronger connotation for English-speaking lawyers when given its alternative translation of a 'ground' of argument.

In observing the deliberations of the judges as they sift and weigh these value objects Latour comments, 'judges do not reason: they grapple'. Law with a capital 'L' is not a monolithic edifice but is situated within a landscape of contingencies.

Latour describes the Law as a lacework of tissue that connects everything within the social body and yet remains superficial. In other words, it does not seek to resolve that which is not necessary to resolve for the disposal of proceedings. He consciously deflates the 'excessive' claims that have been made for and on behalf of jurists, including the claims to enunciate the truth and deliver justice. The law holds 'referential chains' – plans, maps, testimonies, fingerprints, various experts' reports – without being able to prove with scientific certainty the veracity of the information referred to. His example is a case concerning an illustrator's status as a journalist for the purpose of membership of a professional association. While the journalist was able to prove as against her opponent that her work was within the definition of a journalist in the relevant statute ('in the sense of Article R-126'), Latour contends the result says nothing of her essence as a journalist.

An example closer to home might be the decision in *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 in which it was held that it was within the discretion of the board of trustees to decide whether or not the portrait of actor David Gulpilil was a painting within the express terms of the grant of trust, which says nothing profound about the elements of a work of art that will constitute it as either a painting or drawing (despite lengthy submissions on the point). It was not necessary to decide what those elements were in order to dispose of the proceedings. Another example might be the decision of the High Court of Australia in *R v Lavender* (2005) 222 CLR 67 in which it was held that there is no element of subjective intention to be taken

into account when assessing whether conduct departs so far from the standard of a reasonable person that in the circumstances it amounts to gross negligence, which says nothing about the content of the conduct by which to measure the degree of departure, leaving it instead to the tribunal of fact to decide what is reasonable on a case by case basis. There is no shortage of examples to support Latour's conclusion that while the law is a powerful force of social cohesion it is lacking in depth of information about the subject matter it traverses. The Law produces no new knowledge, and yet:

> It has better things to do than to know: it maintains the fabric of imputations and obligations.

Latour undertakes an extensive comparison of scientific and legal practices. Surprisingly, he finds practitioners of the law to have a better claim to objectivity and detachment in relation to the facts of a matter than scientists, whose research is passionately concerned with the nature of the facts under investigation. A judgment is made, 'within the limits defined by the adversarial logic of the case'. A determination of the facts in issue does not stray beyond evidence adduced at the hearing. A research scientist is not so constrained in the scope of enquiry (but is not required to pass final judgment either). Latour also asserts that classifying cases according to legal rules is a system of ordering which lacks predictive power and is therefore not the same as a scientific system of classification.

Scientists and lawyers both inhabit a textual universe, in that their work is bound up with the manipulation and interpretation of texts. The proliferation of texts results in a task of exegesis of Sisyphean proportions. To assist in this task values are assigned to heterogenous texts, so that a lawyer will attribute more weight to a reported as opposed to an unreported judgment, and a scientist have greater regard for an article in *Nature* or *Science* rather than one posted on the Internet. Both also rely on coded systems of citation and reference, and engage in a collective effort of interpretation:

> In both domains, everything may already have been written, but still nothing has yet been written, so that it is necessary to begin again, collectively, with a new effort of interpretation.

Latour describes the Law as a lacework of tissue that connects everything within the social body and yet remains superficial. In other words, it does not seek to resolve that which is not necessary to resolve for the disposal of proceedings.

In the final chapter of the book Latour goes back on his earlier promise not to attempt to define the essence of the Law. He conscripts Wittgenstein in rejecting a definition of the law based on rules and sanctions, and adopts the proposition that human action cannot follow rules, only refer to them. The closest that Latour comes to formulating a singular, self-contained definition of the law is the statement that, 'all law can be grasped as an obsessive effort to make enunciation assignable'. His prime example of this effort of assignation is appropriately the humble signature.

Overall the beauty and originality of Latour's approach is the manner by which he has managed to humanise the Law without diminishing its force, exemplified in him asking:

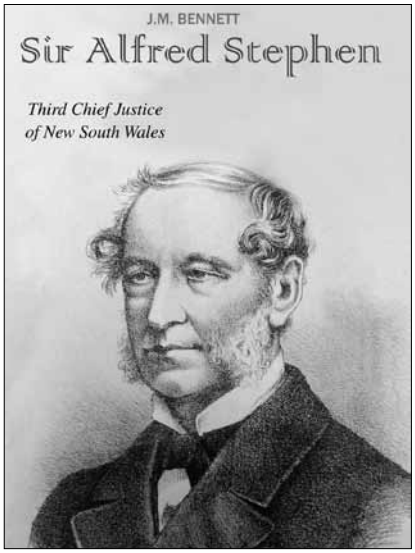
> What is the origin of the kind of defeatism that compels us to believe that if a human speaks he inevitably and quite pitifully lapses into error and illusion, and a thundering voice must always emerge from nowhere – the voice of nature or the voice of Law – to dictate his behaviour and his convictions? Are we poor earthlings really so impoverished? The way in which unquestionable truths are gradually constructed through human interactions has always seemed to me to be more interesting, more enduring and more dignified.

Inevitably the practice of law is too heterogenous for Latour to entirely succeed in capturing its essence. For instance, Latour would have to concede that the publication of reasons for judgment as distinct from a chronicler's second-hand report is a crucial measure of difference between the practice of administrative law in France and law in Australia. Neither is it any revelation that scientific and legal reasoning are two different things. Otherwise judges could be replaced by experts. The characteristic of a judgment is that it is final, unlike the opinion of an expert, which may be contested. Nevertheless, one can hear clear echoes within the bounds of our system of precedent-based law, such as the careful 'hesitation' in reaching a final judgment which gives litigants confidence that their interests have been weighed fairly, the general tendency of the law toward homeostasis and stability, and the textual universe of the law in particular. That said, the most refreshing aspect of this book is the humanising of the law as seen through the eyes of a well-informed and acutely observant outsider.

Reviewed by Sean O'Brien

Sir Alfred Stephen: Third Chief Justice of New South Wales

By JM Bennett | The Federation Press | 2009



You could be forgiven for thinking that the latest in Dr Bennett's series on the lives of Australian chief justices is, at 540 pages, the granddaddy of them all. You would be wrong: when Stephen's grandson took a permanent appointment on 10 June 1929, he was the fourth generation of the family to sit on the New South Wales Supreme Court.

While the Stephen family has inhabited Sydney's legal world for almost two hundred years, it is necessary to start from the other end of things to find out just how saturated in the dark arts of law and public service they always were. Alfred's father was a barrister, his uncle a noted abolitionist and Wilberforce's brother-in-law and, significantly for Alfred, the father of James, the British under-secretary of state for the colonies from 1836 to 1847 who was said by a colleague to rule the empire.

This James was father of the anti-Millian criminal codifier James Fitzjames Stephen and grandfather via mountaineer Sir Leslie Stephen of Virginia Woolf and Vanessa Bell. Is it apt or bemusing that the one person the eagle but not legal Leslie trusted to put together his Life and Letters was F W Maitland? Bennett sets out Maitland's summary of James the eldest, Alfred's grandfather and the person who with his wife caused it all:

> On many a page… his progeny have left their mark, for, whatever else a true Stephen might do, he would at all events publish some book or at least some pamphlet for the instruction of his fellow men. Solid and sober, for the more part, were the works of the Stephens: grave legal treatises – for theirs was pre-eminently a family of the long robe – or else pamphlets dealing argumentatively with some matter of public importance.

Alfred's father was a barrister, his uncle a noted abolitionist and Wilberforce's brother-in-law and, significantly for Alfred, the father of James, the British under-secretary of state for the colonies from 1836 to 1847 who was said by a colleague to rule the empire.

Alfred Stephen was born in 1802, when George III was still king and not merely father of a regent. Stephen died on the threshold of our federation, in 1894; his early career was spent advising (and disagreeing with) Lieutenant Governor Arthur of Van Diemen's Land, while among his last correspondence was a congratulatory note to the new chief justice of Queensland which concluded 'I have no doubt that in your new sphere you will continue to do honour to your name - & be of eminent service to the Commonwealth'. And so 'Damn Sam' Griffith did and was.

It was not only a long life but a long career which enabled Stephen to walk across as well as through history; he served an unbeatable time as chief in New South Wales, being given the job in 1844 upon the death of Dowling and only after some vigorous lobbying of cousin James, and standing down in 1873. (Stephen's father, our first puisne judge, served under Forbes and Dowling but not, for the curious, his son.)

Stephen was no Forbes; while he would describe his predecessor 'as a liberal, in advance of the age', I think an objectivising Alfred – and despite his vanity, he had that lawyer's gift – would have regarded himself as a humanitarian rather than a humanist, expressing himself through an often stern paternalism. One mighty step back was in the arena of civil procedure; Stephen's long stewardship heralded a withdrawal from the prescient pre-Judicature stance adopted by (or thrust by circumstances upon) Forbes and continued by Dowling. This is not merely of academic interest, as I suspect Stephen's efforts may have been the initial cause of why the Supreme Court Act was passed in 1970 and not 1870.

Stephen became antediluvian, but was rarely an antiquation. He didn't have the time. Our age is so specialised that

one needs a doctorate to find where the wood leaves the trees. For Stephen, life was simpler and infinitely more complicated; if there wasn't a law, one drafted one. Divorce, insolvency, court procedure, crime, admiralty, constitutional law, all was grist for Stephen's quill.

Stephen's efforts may have been the initial cause of why the Supreme Court Act was passed in 1970 and not 1870.

One of Stephen's later interests was the source of Australian geographical names. Statistically it may seem likely that Port Stephens was named for his family, but in fact and as Stephen ferreted out, it was named by Cook for the then first secretary of the admiralty, Philip Stephens, in whose sister's service Cook had been as a boy. Jackson was the then second secretary.

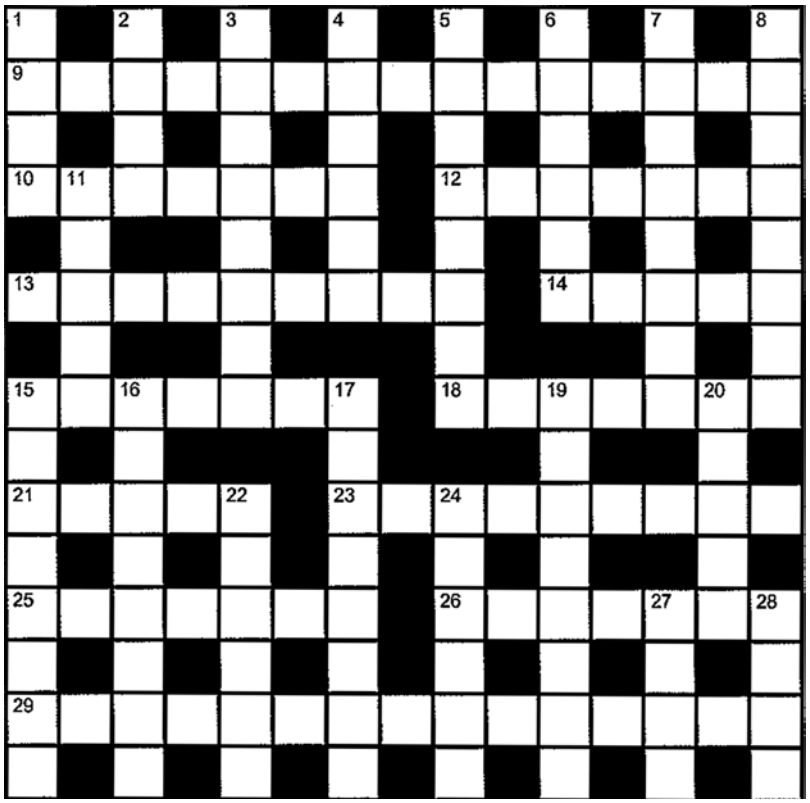
For the pedantic among the bar – and God knows… – please chastise your friends and relatives when they use 'Sydney Harbour'. Apart from being boring, they're wrong. As the Geographical Names Board puts it, Port Jackson is much more, 'A harbour which comprises of all the waters within an imaginary line joining North Head and South Head. Within this harbour lies North Harbour, Middle Harbour and Sydney Harbour.'

Stephens left no family and Jackson had to change his surname to keep the wife – and property owner – happy. I think there's something rather sweet in the singular Stephen, who was not content with a bundle of cousins but was survived by two sons and a daughter of his first wife and by three sons and four daughters of his second, wanting to lay down these two forgotten men for posterity.

Bennett does an excellent job of reminding us of the importance of gongs. We live in an age when any shibboleth can be seduced, so long as you have enough money. That's probably a good thing, something for which we can thank 'democracy' (no friend of Stephen). In Stephen's age, the pecking order was defined not by the purse but by the position. Stephen was just as keen as the rest of them, grateful for a CB (got up for him by one of his London champions, erstwhile Sydney albino barrister and the founder of modern company law Robert Lowe), a KCMG, a deserved upgrade to GCMG, and a PC. William Bede Dalley, the Catholic barrister who keeps one eye on the court and one eye on the cathedral from a plinth in Hyde Park, beat Stephen as the first councillor from these colonies.

Stephen had a high opinion of himself and was often justified in holding it. He performed many and varied roles in two colonies; indeed, his work as a politician and as lieutenant-governor while a judicial officer will amaze those of us who have been brought up to believe that a strict separation of powers is a totemic feature of the common law system. His last words are held by his family to have been to his doctor: 'My dear friend, you know this is getting beyond a joke'. This is the difficulty of life lived so full, when your family motto is *virtus ubique*.

Reviewed by David Ash



Across

9. Sardinian cinema displaced indigenous Western hemisphereans. (8,7)

10. Privy ill-used at liner. (7)

12. Frost (ie, cover in ruins). (Or iced half a vo vo from chaotic voiceover?) (3,4)

13. Barrister left value. Initially, 10 across. (9)

14. Reportedly reporter of reportedly loud report. (5)

15. Person from here descends like Superdog on a dog's ear. (7)

18. I messed with releases of deaths? (7)

21. An ungovernable governor? (5)

23. Fast food sounding hunted governor. (9)

25. Question an Anglican askew? (7)

26. Veto out over poll above. (7)

29. Heard taxi driver catch priest for government member. (7,8)

Solutions on page 160

Down

1. The "laugh at laws" monitor? (4)

2. Brothers gamble around the point. (4)

3. Oxymoronic brouhaha. (5,3)

4. Life's work, around about HM. (6)

5. Fiendish concoction at an end. (8)

6. Modern doing word, or informing the doing? (6)

7. Desert town salvages trick. (3,5)

8. Replaced pursuers with successful pursuers? (8)

11. Banjo (and Latin skinhead assists in criminal enterprise). (5)

15. Ambivalence (Environment? A replaced vale.) (8)

16. Adheres to twigs of secondary importance. (6,2)

17. Seizures keeping mum (Mrs taser scatters supports). (3, 5)

19. Alp could be in amount. (8)

20. Formerly first to be. (5)

22. Sharpening nigh on new. (6)

24. Head of endeavour that is the ship's biscuit. (6)

27. Territory wears glasses, relating to being (or up on?) (4)

28. From "learn" to this, beginner drops away. (4)

Lady Bradman Cup Cricket

Malcolm Holmes QC hit the winning runs in the inaugural Lady Bradman Cup cricket match between Edmund Barton Chambers and Eleven Wentworth 20 years ago. As fate would have it, Holmes was still at the crease on 17 April 2010 on a brilliant Bowral day, slightly less lean than in 1990 but still brimming with enthusiasm. He repeated the feat with an educated edge in the direction of the spritely Mater. Not a bad achievement for the former Sydney University Rugby Blue and Robertson potato farmer.

Edmund Barton had amassed 172 from 35 overs including a fine 30 (retired) from the Queensland Bar's Greg Egan who had no difficulty dealing with the Lancaster bomber, whose radar was clearly affected by Icelandic ash, and with Geoffrey Pike's increasingly slow swing.

With Holmes at the crease as Eleven Wentworth passed the Edmund Barton total was the talented all rounder, Chris Botsman, new to the Sydney Bar after 10 years in New York and specialising in corporations and securities matters. He may well have the best arm at the NSW Bar – his return from the boundary during the Edmund Barton innings was certainly too hot for Ian Pike to handle as he used his lower abdominal region to ricochet the ball onto the stumps after Botsman's blistering return. Pike's 10 ball final over was redeemed by an entertaining, even classical, opening cameo in support of the elegant strokeplay of the former Macquarie University first grader, Christian Bova (30 retired). That was backed up by a trio of 30s from Bell SC, Durack the Younger and Durack the Elder. David Alexander's medium pace held up the flow, all the more impressive given his rowing victory on the Hawkesbury that morning.

Earlier in the day, Durack SC's leggies had completely bamboozled the timeless Hodgson and MSM White but not Ireland QC whose three stumpings, including two from the off-spin of revenue guru and Lady Bradman debutant, Richmond SC, represented a new record at Bradman Oval. Poulos QC, equipped with new hip but old form and even older jokes, bowled a tidy over at the end of the innings, cleverly taking absolutely all pace off the ball. Sullivan QC, in his new role as non-playing captain and on field action photographer (as a consequence of the total absence of any remaining knee cartilage), delivered a generous acceptance speech on behalf of the winning side, suggesting that 'cricket was the winner on the day' (as indeed it was).

The Great Bar Boat Race 2009

The 25th Great Bar Boat Race was sailed on Sydney Harbour on Monday, 21 December 2009 when 20 yachts faced the starter's gun.The conditions were perfect with a 20 to 25 knot nor-easter and a glorious sunny day. The format of the race was altered this year to provide for one division with all yachts starting on the one starter's gun. It made for a more exciting race.

Peter Mooney was first across the line in *Endorphin* and took the Thomson Reuters line honours trophy. Thomson Reuters have supported the race over many years and we thank them for their sponsorship this year and look forward to a continuing association with them in the future.

First on handicap was Des Kennedy SC in *Eye Appeal*, second was Curtis J in *Another Dilemma* and third was Solomon J in *Yeromis IV*. The Chalfont Cup for competition between judges and silks went to Des Kennedy SC and Solomon J won both the Wooden Boat Cup and the Compo Cup. The Gruff Crawford Memorial Panache Trophy was awarded

to Williams SC in *Farrocious* which, regrettably, could not be presented because it has not been returned by a previous winner. Again, a request is made for the return of that trophy together with the Wooden Boat Cup.

The John Hartigan Shield for inter-chambers competition was once again won by Jack Shand Chambers being its fourth consecutive victory for this shield.

The post race celebrations, as usual, were held on Store Beach and made for a most enjoyable end to the race day. We look forward to the 26th Great Bar Boat Race in December and thanks are extended to the Bar Association and, in particular, Katie Hall for the conduct and organisation of this year's race.

Des Kennedy SC

| CROSSWORD SOLUTION |

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