

THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2013

barnews



FINALITY: The 2013 Sir Maurice Byers Address

Marriage equality before the US Supreme Court

Lawyers and commercialism: help or hindrance

Our reconciliation action plan

Barristers and elected office



Cover: The Australian Senate. Photo: Alex Proimos

Contents

2	Editor's note	66	Bar history
3	President's column		The conviction of Frederick Lincoln McDermott
5	Bar Practice Course 01/2013		Kevin Ross Murray: barrister and citizen soldier
6	Opinion		John Mortimer: an appreciation
	Barristers and elected office		Judges, barristers and NT reminiscences
12	Recent developments		
33	Maurice Byers Address	86	Appointments
	Finality	92	Obituary
42	Features	93	Crossword by Rapunzel
	On deployment to Afghanistan	94	Bullfry
	Marriage equality	96	Book reviews
	Lawyers and commercialism	99	The Last Word
	Our Reconciliation Action Plan	100	Poetry
64	Bench and Bar Dinner 2013		

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The doctrine of advocate's immunity is of particular interest to barristers. The decision of the High Court in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 established that the central public policy sustaining that immunity is the need for finality in litigation.

As the High Court observed in *D'Orta-Ekenaike*, 'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few narrowly defined cases' (at [23]).

This central and pervading tenet in its many guises is explored in this year's Sir Maurice Byers Address by the Hon A M Gleeson AC QC, which *Bar News* is delighted to publish in this issue.

As the address shows, the principle of finality is an important part of many areas of the law.

For example, the variety of estoppel which prevents a party taking a point which could reasonably have been raised in earlier litigation is sustained largely by the public interest in the finality of litigation.

Likewise the need for finality is an important consideration for an appellate court in determining whether to disturb the conclusions

reached by the court below.

This issue of *Bar News* also includes a piece by Chief Justice Bathurst on the question whether lawyers are a help or a hindrance to commercialism. The chief justice concludes that lawyers and the legal system play an important role in facilitating efficient business operations.

Later in this issue Ian Barker QC recounts some of his favourite anecdotes of life at the bar, drawing on his more than fifty years in practice.

In his discussion of the principle of finality in the Sir Maurice Byers Address Gleeson AC QC remarks:

In the criminal area, a striking example of the collision between the interest of finality and the need to recognize, and where possible, remedy a miscarriage of justice is a case where, after rights of appeal have been exhausted or time for appeal has elapsed, there is evidence that a conviction was wrongful.

One such collision is discussed elsewhere in this issue in an article by Caroline Dobraszczyk on the McDermott case. Frederick McDermott was an itinerant shearer who was found guilty in 1947 of the murder of a man in Grenfell.

In May of this year, some sixty six

years after McDermott's conviction and thirty six years after his death in 1977, the Court of Criminal Appeal reviewed McDermott's conviction on a reference by the attorney general. In the light of new and cogent evidence that had come to light since his trial, the court entered a verdict of acquittal.

In this issue we also examine the lives of two notable barristers. Philip Selth has a piece on Kevin Murray QC, a prominent and formidable Sydney silk in his day. And Emily Pender has a piece on John Mortimer QC, well known as the author of *Rumpole* and other works.

Other articles in this edition of *Bar News* include James Renwick SC on his recent deployment in Afghanistan, a look at two important recent decisions by the US Supreme Court on marriage equality by Jonathon Redwood, and a discussion by Rebecca Gall of two cases which examine the extent to which a judge can rely on 'cutting and pasting' counsel's submissions into judgments.

No public benefit in single-member corporations model

By Phillip Boulten SC



At its essence, practise as a barrister involves independence. All of us at the private, independent bar are sole practitioners – employed by no one, in partnership with no one and bound by the cab rank rule. We are different from solicitors. We play a different role to solicitors. The justice system would be very different without independent barristers.

The basis of our practice has been developed over centuries. Because we are not bound professionally to any other person or entity we exercise our skills and abilities for the benefit of our clients, no matter who they are or what they have done. Solicitors are free to decline to act where we are required to act.

Yet, the pressure of the legal market has led to major changes to barristers' practices in England where barristers can now initiate and conduct litigation and form corporations for the purpose of contracting legal

services – especially legal aid services. Barristers can even form associations with solicitors and other non-barristers to allow the pooling of risks and resources. It is a brave new world for English barristers.

Time will tell whether these changes deliver public benefits but they are clearly aimed at reducing the costs of legal services and making barristers' practices flexible and efficient.

What seems clear is that the only rationale for this model of incorporation is to reduce barristers' exposure to tax. No other policy is advanced by the move.

Our association's Practice Development Committee has considered some of these English proposals without formulating a decided or committed view about their utility. It is inevitable that the Bar Council will need to consider various aspects of barristers' practice.

In the moves over the last few years to establish a national set of Barristers' Rules and a national legal profession, the New South Wales Bar Association fought hard to maintain the existing concept of an independent bar bound by the cab rank rule, separate and apart from legal practice as a solicitor.

Inventive new structures have not been on the bar's horizon.

But now sufficient members have signed a petition requisitioning a general meeting of the Bar Association to consider a resolution calling on the Bar Council to amend the Barristers' Rules to permit barristers to offer services through a single-member, sole director company. I oppose this move.

The general meeting will be held on 17 September 2013. I trust that the meeting considers the issues carefully. Prior to the meeting the Bar Association will distribute three legal opinions that the Bar Council has sought on the issues.

What seems clear is that the only rationale for this model of incorporation is to reduce barristers' exposure to tax. No other policy is advanced by the move. No one is suggesting that single-member corporations will provide more work opportunities for the bar or that they will cut the costs of barristers' services or that they will lead to a more efficient administration of justice.

To my mind, cutting barristers' tax payments is a wholly unacceptable reason to seek a change in the rules and to convince the government to make the necessary amendments to the *Legal Profession Act 2004* to achieve this objective. If we are going to attempt to change the basis of practice at the bar, we ought to do it to deliver a clear public benefit.

If we are going to attempt to change the basis of practice at the bar, we ought to do it to deliver a clear public benefit.

To actively seek these changes on the basis of tax minimisation would endanger the standing and reputation of the bar with the government, parliament and the community as a whole, particularly at a time when the Bar Association is pursuing improvements to legal aid funding in the public interest.

In the past the Bar Council sought advice about the tax advantages of such a scheme. They are not obvious. Recent advice that will be circulated emphasises that there is, in fact, no material tax advantage conferred by the proposed model. Nor is there any other advantage. Rather, profits made by such entities are likely to be the subject of a determination under Part IVA of the *Income Tax Assessment Act 1936*. This is unsurprising where the sole purpose of incorporation seems so obviously to be to obtain a tax saving.

Recent advice that will be circulated emphasises that there is, in fact, no material tax advantage conferred by the proposed model.

The proposal would not only require amendment to the New South Wales Barristers Rules, but also significant changes to the Legal Profession Act and the upcoming national legal profession legislation.

Further, the proposed changes would not be of any assistance to those members of the bar in government practice, such as Crown prosecutors and public defenders.

In these circumstances it would be intolerable for the leaders of the bar to change the Rules, seek to have them gazetted and then advocate for changes in the Act for this purpose. If alternative practice structures are to be considered and advanced, it must be for a better reason.

On a completely different note, I am pleased to advise that the Australian Bar Association and the Law Council of Australia recently resolved to run a joint campaign to bring national attention to the appalling rates of imprisonment of Indigenous Australians. The campaign will involve advocacy of justice reforms, the adoption of strategies to prevent incarceration, the establishment of restorative justice models in each jurisdiction and the reform of harsh sentencing laws – such as mandatory sentencing – that work disproportionately to the disadvantage of aboriginal communities.

Much work needs to be done. The onus will fall heavily on our bar to both develop and then advocate appropriate policies that will make a difference.

Meanwhile, the Bar Association is continuing its fight against the New South Wales Government's proposed changes to the motor vehicle accident scheme. Andrew Stone and the Common Law Committee have had remarkable success in convincing members of parliament that the current proposals seriously disadvantage many people who are injured in motor accidents. More work is ahead on this issue but the bar is leading the debate.

Phillip Boulton SC
President

Bar Practice Course 01/13



Back row: Chester Brown, Dillon Morley, Jill Gatland, Julian Zmood, Ken Lord, Stephen Rugendyke, Zelig Heger, Angus Macauley, Nicholas Mirzai, Adam McGrath, Jack Tyler-Stott. **Fourth row:** Lee Corbett, Bill Hussey, Nick Siafakas, Ben Bickford, James Lee, Bernard Lloyd, Lisa-Claire Hutchinson, Greg Johnson, Jahan Kalantar, Aaron Cornish, Justin Brown. **Third row:** Ben Wilson, Lauren Smith, John Longworth, Julie Wright, David Robertson, Philippa O'Dea, Courtney Ensor, John Stanton, Justin Simpkins, Henry Durack, Kirralee Young. **Second row:** Renée Bianchi, Corrina Novak, Tamara Phillips, Julia Roy, Andrew Isaacs, Richard Raffell, Czar Calabazon, Will Higgs, Wilson Chan, Eric Oates, Elizabeth Nicholson. **Front row:** Mary Rebehy, Piria Coleman, Natasha Case, Claire Mudge, Rebecca Gall, Anthony Lloyd, Kevin Tang, Sarah Lothian, Faye Ashworth, Bill Tzatzagos, Svetlana German



Women readers 01/2013

Back row: Faye Ashworth, Renée Bianchi, Lauren Smith, Jill Gatland, Lisa-Claire Hutchinson, Zelig Heger, Kirralee Young

Middle row: Julia Roy, Corrina Novak, Tamara Phillips, Julie Wright, Philippa O'Dea, Courtney Ensor, Elizabeth Nicholson

Front row: Rebecca Gall, Piria Coleman, Mary Rebehy, Claire Mudge, Sarah Lothian, Natasha Case, Svetlana German

Barristers and elected office

By David Ash



The Australian Senate. Photo: Alex Proimos

Earlier this year, I woke up and decided to run for the Senate. I found a policy, I found a supporter, and I found a prime minister who set a date well in advance. At the time of writing, it's three steps forward and only one back...

This short piece doesn't look at my policies or beliefs. In a periodical dedicated to forensic advocacy, this would be unethical. It does look at who has given it a go; the difference between forensic and political advocacy; how Barwick fared; and what judges think about politics anyway.

Who has done it?

The barrister who wants to go into politics will tell you that 26 of 44 US presidents practised as lawyers before taking office. The barrister who will fail in politics will tell you that this is wrong, as there have only been 43 presidents, Grover Cleveland being a non-consecutive two-term.

This is more than twice the next gig (generals at a dozen). Moreover, averageness is no criterion, as both the shortest and tallest – Madison and Lincoln – were counsel. I am not sure who was the lightest but William H Taft was surely the heaviest.

St John would spend some turbulent years in the federal lower house before returning to the council's embrace in the late 70s.

Leaving the peculiar office of the Lord Chancellor to one side, Taft is the only political leader I can recall who later led his nation's judiciary. His Australian contemporary Sir Edmund Barton – likewise an epicurean – failed to succeed Griffith but gave a gracious welcome to former barrister Billy Hughes's choice, Adrian Knox, a former and to be again billionaire who had entered and left politics at a much younger age.

The first New South Wales Bar Council was chaired by the attorney. Other members included former premier and prime minister in waiting Reid; the Reid ministry's attorney Want; former Legislative Assemblyman Knox; and future premier and attorney Wade.

Half a century later, Barwick was president, while EG Whitlam was on his committee. Other names from the fifties included Nigel Bowen and Ted St John. St John would spend some turbulent years in the

The law is a jealous mistress. A candidate for Parliament may be defeated and find that he has lost time and money and such connection as he previously had at the bar.

federal lower house before returning to the council's embrace in the late '70s. Ellicott would serve in Fraser's ministry, while Hughes was president after doing a term as Gorton's attorney.

Hughes was the member for Parkes. Parkes had almost trashed his own career with misplaced anti-Fenianism. It is a fine irony that barristers Hughes (schooled by the Jesuits) and McTiernan (schooled, despite his middle name, by the Marists) would hold the seat named for him. Nothing with Parkes is simple, though, and the nineteenth century barrister and politician Edward Butler should not be forgotten.¹

In many ways Butler was probably the most attractive of New South Wales nineteenth-century politicians. More than any other citizen he nullified the bitter sectarianism that flared after the O'Farrell affair. His whole career exemplified tolerance and gave practical proof that Catholics could accept and nurture democracy. He had serious trouble with various bishops but no one doubted the deep sincerity of his religious belief and practice. He showed that Catholicism was not antagonistic to learning, urbanity or a sense of fun and that being an Irishman was subversive neither of colony nor Bar. He injected a radical note into his profession's conservatism and helped to open the law to talent unaided by birth or influence.

Butler and Parkes were close for 20 years, and the former worked hard to get Catholic votes for the latter, a force behind Parkes's repeated ability to shoot himself in the foot before growing a new leg. Needless to say, Parkes was as loyal as politics allowed, and at Butler's funeral (upon dropping dead in court), he was the notable absentee.

I think I am correct in saying that Helen Coonan and Victorian Sophie Mirabella are the only female barristers who have sat in federal parliament. Margaret Thatcher, who died this year, practised after doing the English equivalent of the Barristers Admission Board. Tax was her forte, with patents on the side. Her university background was science.

There are many other members who have been or continue to be involved. A recent example is Speakman, who is stomping at Cronulla on behalf of the O'Farrell government.

Both Speakman and Coonan achieved professional success before standing, doubtless mindful of the explanation provided by John Bennett in his 1969 *History of the NSW Bar*, himself quoting legal writer Philip Acland Jacobs from the 1943 *Famous Australian Trials*:

The careers of Wade, Holman, Reid and Hughes cannot be said to typify the Bar as a body. Interest in entering politics declined consistently with the advance of the twentieth century. One writer thus explains the reasons:

Alas for the youthful barrister who seeks political honours as a stepping-stone to success in his profession! The law is a jealous mistress. A candidate for Parliament may be defeated and find that he has lost time and money and such connection as he previously had at the Bar. Let him think of politics, if at all, when he has gained a firm footing on the professional ladder.

At the same time, the influence of the barristers referred to here does show that the principles of the Bar and the high standards for which it stood as a salutary effect on politics for the benefit of the community.

Forensic and political advocacy – the difference

Aristotle opens *Rhetoric* with the assertion that it is 'the counterpart of Dialectic'.² In modern terms, we might say that form is the counterpart of substance, or that the adversarial system is the counterpart of the inquisitorial system. At a broader level, the first is about competing versions of a truth whose criterion for victory is acceptance, while the second is a competition for a truth for which neither competitor might have been advocating. The first, while recognising and embracing life's larger uncertainties, produces minor certainties, albeit ambulatory, while the second cannot; so said Socrates, so saith Heisenberg.

What is the key to good advocacy? Advocacy, it is said, is the art of persuasion. And so it may be. Aristotle puts in rather different terms:

Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion.

Much learning in relation to advocacy is directed to

the ability to persuade. But surely the first thing to be learnt is the forum; who is it we are seeking to persuade? If we do not understand this, then what is the measuring stick we are supposed to use? It is no surprise, then, that Aristotle divides formal advocacy – my 21st century understanding of what he meant by ‘rhetoric’ – by reference not to the advocate but to the forum:

Rhetoric falls into three divisions, determined by the three classes of listeners to speeches. For of the three elements in speech-making – speaker, subject, and person addressed – it is the last one, the hearer, that determines the speech's end and object. The hearer must be either a judge, with a decision to make about things past or future, or an observer. A member of the assembly decides about future events, a juryman about past events: while those who merely decide on the orator's skill are observers. From this it follows that there are three divisions of oratory: (1) political, (2) forensic, and (3) the ceremonial oratory of display.

A barrister is a speaker by trade, but that does not mean that the barrister is a public speaker, any more than that any swimmer can do the Channel, or that any athlete can sprint. The difference is time. Forensics is about the past, while politics is about the future. Aristotle again:

Political speaking urges us either to do or not to do something: one of these two courses is always taken by private counsellors, as well as by men who address public assemblies. Forensic speaking either attacks or defends somebody: one or other of these two things must always be done by the parties in a case...The political orator is concerned with the future: it is about things to be done hereafter that he advises, for or against. The party in a case at law is concerned with the past; one man accuses the other, and the other defends himself, with reference to things already done.

... the same systematic principles apply to political as to forensic oratory, and although the former is a nobler business, and fitter for a citizen, than that which concerns the relations of private individuals.

The future is always nobler, for the past involves humans. Unless everyone is dead and politicians can romanticise. Anzac Day gives better hope than Vietnam.

Sir Garfield Barwick

Also, the future is a place where things get done. A colleague recently reminded me of Sir Paul Hasluck's remark about Barwick as attorney: unlike other lawyers who told you why you couldn't do something, Barwick looked for how you could.

Barwick fascinates. 1975 refuses to die, and readers will be repaid by another visit to David Marr's *Barwick*, and Barwick's own *Radical Tory*. I confess I had forgotten Marr's definition of lawyers as ‘shadows falling over other people's lives’.

It should be remembered that Barwick got under Whitlam's skin to the extent that the latter was named in the early '60s after referring to him as a 'truculent runt' and a 'bumptious little bastard'.

On 14 August 1958, Elvis Presley's mother died. Barwick gave his maiden speech, and his former colleague on the bar council rose to reply:

Honorable members have listened to the maiden speech of the greatest lawyer to enter this chamber since the Leader of the Opposition, and the greatest advocate to enter it since the Prime Minister. Mr Chairman, every member who serves in this place has gained satisfaction and status from the fact that a practising lawyer who has probably no equal in this country and no superior in the English-speaking world has, at a not inconsiderable sacrifice, similar to that made before him by the two leaders whom I have mentioned, come to serve with us here. His maiden speech was, as one would have expected, disarming, polished and demure. One can well believe, after the first two characteristics that I have described, that there is great truth in the axiom, which has been followed ever since the war by all the principal commercial interests in this country, that if you had a good case at law it did not very much matter whom you briefed to appear for you, but if you had an unmeritorious, an unsympathetic and an unlikely case, your only hope was to brief Barwick.

Of course, Whitlam quickly moved in for the kill. Nor do I claim a bygone age of elegance. It should be remembered that Barwick got under Whitlam's skin to the extent that the latter was named in the early '60s after referring to him as a ‘truculent runt’ and a ‘bumptious little bastard’.

Whatever, it is telling that on that first day, Jim Cope called across the chamber to Holt 'Bad luck Harold'. And, despite the Indonesian fiasco, Barwick was the likely successor. But, as many a would-be Cabinet minister or would be appellate judge will acknowledge, and as any minister or judge should admit, timing is, or is almost, all.

One version of the timing is that Barwick's tragedy, if it can be called that, was that he was a likely successor not to one but to two people, Menzies and Sir Owen Dixon. Menzies could have retired in pomp and circumstance before 1964, but did not. So when the latter did retire in that same year, Barwick's choice was stark. And he opted for the chief justiceship.

A different version was given by the *Independent* in its obituary:

In 1964, troubled by his diabetes, Barwick asked to leave parliament at the next election, and Menzies almost immediately appointed him Chief Justice. At the time some said that Menzies wanted him out of the way, but it is more likely that Barwick was simply the best person available for the post.

Both can be true. Whichever, the rest is history. And as I have said, it is a history which continues in a life of its own. Not in defence of Barwick, but because I think they are valid alternatives to the various orthodox histories that both the conservatives and the social democrats continue to espouse, I proffer two observations on 1975.

The first is the observation that it belongs to the New South Wales Bar as much as any other person or institution. I have just recited Whitlam's assessment of Barwick in 1958. Reread it and go if you will to the photographs between pages 208 and 209 of John Bennett's history. The last photograph, at the opening of some of Wentworth Chambers in 1957, shows Premier Cahill speaking, with Barwick to his left. In between, a row back, is John Kerr. One can – and we do – analyse, reanalyse, and overanalyse Kerr's Labor Party relationships and his alleged desire to cloak himself in the regalia of high office. One can – and we do – point, point again, and pinpoint the propriety of the executive seeking advice from the judiciary and not from the solicitor general. But I cannot be surprised that a person confronted by

a huge legal problem and who had been a member of the Sydney bar from the 40s to the 60s went to the one person who towered above all others in that milieu.

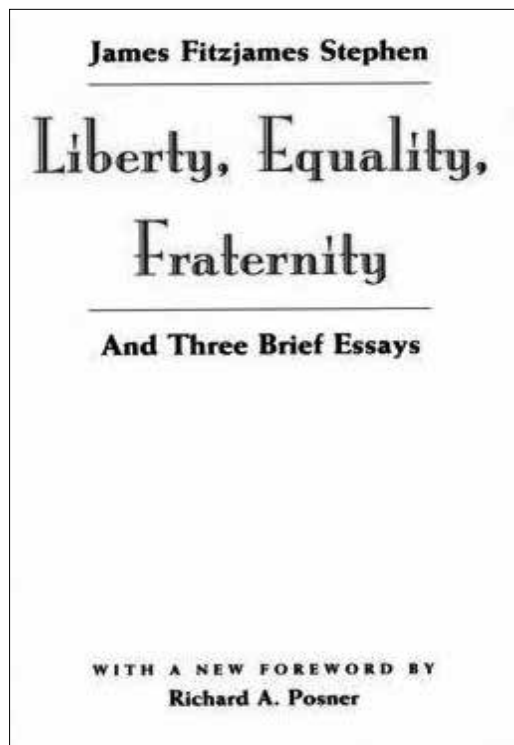
The second observation is founded upon Marr's final words:

... the repercussions of Whitlam's appointment to the court forms the theme of the final chapters of this book. In Kenneth Jacobs, Whitlam found a man of the sort of broad liberal sympathies that may characterise the best labour appointments, and with Lionel Murphy Whitlam broke with a long tradition of Labour timidity in choosing candidates for the High Court bench. The price for breaking with tradition was high: resentment at Murphy's appointment was a key factor in the fall of the Whitlam government.

When launching Stoljar's *The Australian Book of Great Trials: The Cases That Shaped a Nation*, Dyson Heydon said:

The book reminds us, too, of the strange posthumous career of Justice Murphy. In *Miller v TCN Channel Nine Pty Ltd*, delivered one hour before his death, all the other six judges opposed his contention in that case that there was an implied guarantee of free speech in the Constitution. Yet less than six years later, three of those six judges, together with three new judges, said in the *Australian Capital Television Case* that there was; and numerous other ideas of Justice Murphy propounded on the court and emphatically rejected in his lifetime were taken up after his death. It would be good to have a detailed study of Justice Murphy, neither hagiographical nor abusive, but penetrating.

Heydon, who has since put back up his shingle after a distinguished judicial career, is better placed to comment on Murphy than most, as jurist and as a scholar of the Trade Practices Act, still our most effective attempt to untangle the disastrous and unnecessary legacy of *Salomon v Salomon*. And it is to be hoped that when that penetrating study comes, it comes with a fair answer to the question 'Which attorney and member of the New South Wales Bar did so much to reform the viciously difficult areas of marriage and corporations?' The only fair answer is 'Do I have to choose between Murphy and Barwick?' The former's revolution is well remembered; the latter's pioneering work against the



conservatives of his own party should not readily be forgotten.

Judges on politicians

The journalists called Heydon J conservative, then capital-C conservative. Mindful that they could never improve on Ronald Reagan's own 'Sometimes my right hand doesn't know what my far right hand is doing', they gave up on hyperbole and settled for tautology in 'the lone dissenter'.

Whatever the correctness of these tags, one can recall with relative safety that Heydon has expressed admiration for a leading conservative (or, probably better, non-utilitarian liberal) thinker of the nineteenth century, Sir James Stephen.

In the Anglophone world, the influence of the Stephen family and its related entities from William Wilberforce to Virginia Woolf can hardly be understated. Apart from its activities in the northern hemisphere, we've had three generations of Stephens on the NSW bench. This particular Stephen left as his legal legacy his work on crime, and the

The journalists called Heydon J conservative, then capital-C conservative. Mindful that they could never improve on Ronald Reagan's own 'Sometimes my right hand doesn't know what my far right hand is doing', they gave up on hyperbole and settled for tautology in 'the lone dissenter'.

title of Heydon's 2011 lecture was 'The influence of Sir James Stephen on the law of evidence'.

But it is Stephen's political legacy which is relevant for current purposes. In 1873 he published *Liberty, Equality, Fraternity*, an attack on John Stuart Mill. Fastforward to *Re Castioni* [1891] 1 QB 149. He and other members of the Queen's Bench had to consider what comprised the 'political character' of an offence which would otherwise render a person extraditable to the country where the offence was committed.

The country was not the US, and the fugitive was neither Mr Assange nor Mr Snowden. Rather, he was a sculptor and redbearded revolutionary from Italian-speaking Switzerland who had shot dead a conservative Swiss MP who had come to parley. The court set the man free. Consider the observations of 'rational' judges on the 'real world' of politics. For Sir Henry Hawkins:

I cannot help thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement.

The by now Mr Justice Stephen continues on the same page:

I am of the same opinion. I published some years ago a book which has been considerably quoted to-day [his *History of the Criminal Law*] and in the passage in which I stated my views upon the subject, I gave what appeared to me to be the true interpretation of the expression 'political character' it is very easy to give it too wide an explanation. I think that my late friend Mr Mill made a mistake upon the subject, probably because he was not

accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but which it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. Having given my view upon that subject, I shall say no more with regard to the interpretation of the act of Parliament.

Barristers describe themselves as self-employed. Perhaps the better truth is that they are unemployable.

As to ease of understanding, events have overtaken us. A few months ago, I am sure that I heard a parliamentarian say that his party had ‘succeeded’ in getting some 70,000 pages of legislation through in the previous year. I assume I did not mishear. I assume he was serious. I stand corrected on both.

Conclusion

Barristers describe themselves as self-employed. Perhaps the better truth is that they are unemployable. In the past, this has led them to politics. Today, however, the only prerequisite for high office may be longterm employment in one or other of the major parties. At the least, a cv should contain ‘my gap year as an apparatchik’. Moreover, the flavour of parliamentary oratory seems to have moved from the political – from the future and the noble – to the forensic, with its emphasis on raking over old enmities to establish a past truth.

I accept that politics requires opponents, for one does not argue in a vacuum. At the same time, my one wish if elected would be the abolition of the expression ‘both sides of parliament’. A parliament has no sides. The bar succeeds because a system of forensic advocacy works best when adversaries hire dispassionate advocates to speak for them. Politics is

failing because a system of political advocacy works worst when people whose opposition should be in how to go forward, fall back against walls built on the past. Passion and politics go together, but that does not mean that dispassion is left to the unwinnable place on the ticket.

Endnotes

1. Australian Dictionary of Biography, <http://adb.anu.edu.au/biography/butler-edward-3127> [accessed 9 Jul 2013].
2. I use the translation by W Rhys Roberts, <http://classics.mit.edu/Aristotle/rhetoric.1.i.html> [accessed 8 Jul 2013].

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Determining probative value: considerations of reliability and credibility

Justin Simpkins reports on *R v XY* [2013] NSWCA 12

The Court of Criminal Appeal recently handed down a judgment of a five judge bench (Basten JA, Hoeben CJ at CL, Simpson, Blanch and Price JJ) dismissing the appeal (Basten JA and Simpson J dissenting) in a case that considered a challenge to the interpretation in New South Wales of s 137 of the *Evidence Act 1995* (NSW).

The facts

In November 2012, the respondent was arraigned in the District Court on an indictment containing six counts. Five were of indecent assault and the sixth was of aggravated sexual intercourse without consent. All offences were alleged to have been committed against the same complainant in 2002. Throughout that time the complainant was eight years of age.

The prosecution sought to adduce evidence of two recorded telephone conversations between the respondent and the complainant that took place on 25 August 2011 and were recorded pursuant to a warrant issued under the *Surveillance Devices Act 2007*. The telephone calls were initiated by the complainant, under the supervision of police investigating the complaints she had previously made, for the express purpose of engaging the respondent in conversation about her allegations, in the expectation or hope that he would incriminate himself.¹ The evidence of the telephone conversations was the subject of a *voir dire*.² The trial judge rejected the evidence pursuant to powers conferred by ss 90 and 137 of the Evidence Act. In rejecting the evidence, the trial judge took into account the reliability of an alleged admission made during the telephone conversations in her consideration of the objection based on s 137. The Crown appealed the trial judge's decision to reject evidence of the telephone conversations.

One of the issues raised on appeal was whether the court should depart from its judgment in *R v Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228, particularly the principle that in applying s 137 of the Evidence Act the court is to assess the capacity of the evidence to support a particular finding, but not its credibility and reliability, those being matters to be left to the jury if the evidence be admitted.³

Section 137 of the Evidence Act

Section 137 provides that the court must refuse to admit evidence adduced by the prosecutor in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The telephone calls were initiated by the complainant, under the supervision of police ... for the express purpose of engaging the respondent in conversation about her allegations, in the expectation or hope that he would incriminate himself.

It has been the position in New South Wales that in determining the probative value of the tendered evidence sought to be excluded under s 137, the evidence is to be considered on the assumption that it will be accepted so that the credibility or reliability of the tendered evidence will rarely be relevant.⁴

In *R v Shamouil*⁵ Spigelman CJ (with whom Simpson and Adams JJ agreed) said⁶:

The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility.

The approach taken in *R v Shamouil* was recently held by the Victorian Court of Appeal in *Dupas v The Queen* [2012] VSCA 328 to be 'manifestly wrong and should not be followed'.⁷ In that case it was held that a trial judge should consider the quality and weight of the evidence when assessing probative value.⁸

In *R v XY*, the Criminal Court of Appeal declined to follow *Dupas v The Queen* and instead held that New South Wales courts should continue to follow *R v Shamouil* when applying s 137 of the *Evidence Act 1995*.⁹

Reasoning

Three of the five judges held that the court should not depart from the general approach accepted in *R v Shamouil*.¹⁰

Justice Simpson held that questions of credibility, reliability and weight play no part in the assessment of probative value with respect to s 137.¹¹ Her Honour noted, *obiter*, that none of the sections in the *Evidence Act 1995* (NSW) that call for assessment of the probative value as a precondition to admissibility¹² give any indication that some exploration of credibility, reliability or weight ought to be conducted, or, if so, what limits are imposed on the extent of that exploration.¹³ As a result, the principle that questions of credibility, reliability and weight play no part in the assessment of probative value must apply in all cases where admissibility depends on an assessment of probative value.¹⁴ Central to her Honour's reasoning was that actual

probative value to be assigned to any individual item of evidence lies in the province of the tribunal of fact which, in most criminal cases, is the jury.¹⁵ Her Honour, in allowing the appeal, held that as the trial judge had taken into account the reliability of the evidence, she had fallen into error.¹⁶

Basten JA allowed the appeal on the basis that, *inter alia*, no real risk of unfair prejudice arose and for that reason, s 137 had not been engaged.¹⁷ His Honour raised doubt about the extent to which *Dupas v The Queen* departed from the principles stated in *Shamouil*, read in context. His Honour held that because the current matter raised slightly different issues from either case (not being concerned with identification evidence) there was no compelling reason to depart from the general approach accepted in *R v Shamouil*.¹⁸ His Honour held that in this case there was no choice to be made between the principles derived from *Shamouil* and those

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articulated in *Dupas v The Queen*, although he noted that the approach in *R v Shamouil* demonstrates how s 137 operates.¹⁹

Hoeben CJ at CL expressed his agreement with Basten JA and Simpson J that when assessing the probative value of the prosecution evidence that the accused is seeking to exclude under s 137, the court should not consider its creditability, reliability or weight.²⁰ His Honour held that to embark on a partial assessment of weight could be potentially productive of real injustice.²¹ However, in applying s 137 to the facts of the case, Hoeben CJ at CL came to a different result to Basten JA and Simpson J in concluding that the probative value of the evidence was outweighed by its prejudicial effect.²² As a consequence, his Honour dismissed the appeal.

Justice Blanch agreed that, in applying s 137, the prejudice of the evidence outweighed its probative value and the trial judge was correct in rejecting the evidence on that basis. His Honour held that the evidence of the telephone conversations did not give rise to any question of credibility or reliability because the evidence was known and could be evaluated.²³ As such, it was not necessary for his Honour to address the apparent conflict between *R v Shamouil* and *Dupas v The Queen*.

Justice Price agreed with Hoeben CJ at CL and Blanch J that the appeal should be dismissed. His Honour held that the evidence of the telephone conversations, viewed at its highest, was weak and was substantially outweighed by the danger of unfair prejudice to the accused, which could not be corrected by jury directions.²⁴ His Honour found that the Crown had not established that the trial judge's ruling on inadmissibility substantially weakened the prosecution case.²⁵ As such, the Crown had not satisfied s 5F(3A) of the *Criminal Appeal Act 1912* (NSW). Given that finding, it was not necessary for His Honour consider the conflict in the approaches to be taken to s 137.²⁶ However, his Honour noted (*obiter*) that 'it seems to me that enabling the trial judge to consider questions of credibility, reliability or weight when s 137 is invoked, is likely to enhance the fundamental principle that an accused is to

receive a fair trial'.

Conclusion

Following the Criminal Court of Appeal's decision in *R v XY*, it remains the position in New South Wales that where a court is considering an objection to evidence invoking s 137, questions of credibility, reliability or the weight to be attributed to the evidence in question has no part to play. By contrast, the position in Victoria, since the Court of Appeal's judgment in *Dupas v The Queen*, is that the court should consider the quality and weight of the evidence when assessing its probative value. It is likely that this division between states will remain until the issue is dealt with by the High Court.

Endnotes

1. At [103].
2. The content of the conversations are set out in the judgment of Blanch J at [184].
3. At [2].
4. *R v Shamouil* (2006) 66 NSWLR 228.
5. *Ibid*.
6. At [60].
7. At [63].
8. At [199].
9. Per Basten JA at [66]–[67], Hoeben CJ at CL at [87], Simpson J at [162] and [175], Blanch J not deciding at [198] and Price J dissenting at [224]–[225].
10. *Ibid*.
11. At [175].
12. Ss 97, 98, 101, 103, 135, 138(3).
13. At [171].
14. At [175].
15. At [167].
16. At [176].
17. At [73].
18. At [65].
19. At [73].
20. At [86].
21. *Ibid*.
22. At [90].
23. At [198].
24. At [223].
25. At [222]. Section 5F(3A) of the *Criminal Appeal Act 1912* provides that 'The attorney general or the director of public prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case'.
26. At [224].

Application of the 'Tendency Rule' in civil proceedings

Justin Simpkins reports on *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 21; 297 ALR 406

In *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* the High Court refused special leave to appeal in a case concerning the primary judge's use of tendency evidence to establish copyright infringement where the tendency rule was not complied with.

Tendency evidence

Tendency evidence is evidence that is tendered to prove (by inference), that because, on a particular occasion or occasions, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in a particular way (or had a particular state of mind).¹

The 'tendency rule', which is set out in section 97 of the *Evidence Act 1995* (Cth), provides, *inter alia*, that evidence of the character, reputation or conduct of a person, or tendency, is inadmissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind, unless reasonable notice has been given of the intention to adduce the evidence² and the evidence, either by itself or having regard to other evidence to be adduced, has 'significant probative value'.

Background

The applicants manufactured and sold electronic gaming machines and software. The respondents were in the business of selling second-hand gaming machines. The applicants commenced proceedings against the respondents in the Federal Court alleging copyright infringement.³ The essence of the applicants' case was that the respondents participated in a joint venture to counterfeit and sell second-hand gaming machines assembled using pirated copies of materials in which the applicants held copyright.⁴

The applicants' case was primarily based on circumstantial evidence.⁵ At trial, the applicants tendered, over objection, a number of email chains said by them to constitute 'instances of unguarded communications that make plain the true nature of the joint venture's trade (a counterfeiting operation)'.⁶ The emails did not relate to the alleged infringing transactions.

The primary judge held that the respondents had infringed the applicants' copyright.

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The Full Federal Court

On appeal, the Full Federal Court (Bennett, Middleton and Yates JJ) found that the trial judge used the email correspondence as an essential part of his reasoning process leading to his findings of infringement.⁷ The Full Federal Court found that the only way the primary judge could have made the necessary connection between the infringing transactions and the joint venture was to draw an inference, based on the content of the emails, that the respondents had a tendency to engage in infringing conduct⁸.

The Full Federal Court noted that Part 3.6 of the *Evidence Act 1995*, of which s 97 forms part, contains a number of safeguards to limit the potential misuse of tendency evidence.⁹ Those safeguards include the requirement under s 97(1)(a) to give reasonable notice and that the evidence has significant probative value. The applicants at trial had not given notice because they did not seek to use the emails as evidence that the respondents had a tendency to engage in infringing conduct.¹⁰ As the requirements of s 97 had not been complied with, the evidence was not admissible for a tendency purpose, and as a result the connection between the emails and the infringing transactions could not be maintained.

The High Court

The applicants sought special leave to appeal the Full Federal Court's decision, as to the question of whether the full court erred in characterising the primary judge's reasoning about evidence of the emails as inferring a tendency on the part of the respondents to engage in infringing conduct. The High Court (French CJ; Crennan, Kiefel, Gageler and Keane JJ), in refusing special leave, held that the full court's characterisation of the primary judge's reasoning was open to it and was not attended with sufficient doubt to warrant the grant of special leave, and handed down reasons for that judgment.¹¹ The court also held that the application did not involve a

question of law of public importance. The applicants had not argued that it did, but that the interests of justice required consideration by the High Court of the full court's judgment, which argument was rejected.¹²

The High Court found the email evidence had been properly admitted as relevant to credit and the existence of the joint venture. The issue was the use of the email evidence by the primary judge, albeit *sub silentio*, to infer a tendency to act in a particular way that was central to the reasoning of the full court.¹³

In response to the applicants' submission that the full court characterised the primary judge's use of the email evidence incorrectly, on the basis that there was nothing in the primary judge's reasons which indicated that he had used the emails as tendency evidence, the High Court held that the primary judge used the email evidence in such a way as to justify the full court's view of his reasoning process.¹⁴

Endnotes

1. *R v Cittadini* [2008] NSWCCA 256; 189 A Crim R 492 at [23].
2. Section 97(1)(a), the court may dispense with the notice requirement (s 100).
3. *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* [2009] FCA 1495; (2009) 84 IPR 222.
4. *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 2; 297 ALR 406 at [7].
5. *Allam v Aristocrat Technologies Australia Pty Ltd* [2012] FCAFC 34; (2012) 95 IPR 242 at [240].
6. *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 2; 297 ALR 406 at [12].
7. At [241].
8. At [241] see also *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 2; 297 ALR 406 at [28].
9. At [242].
10. At [242] and [243].
11. At [2].
12. At [36].
13. At [33].
14. At [35].

Do you mean sponsored links?

Louise Jackson reports on *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1

The High Court unanimously held that Google Inc (Google) was not responsible for contraventions of s 52 of the *Trade Practices Act 1974* (Cth) (the Act) when it displayed or published on its web pages advertisements called 'sponsored links' which contained misleading representations.

The web pages in question were 'search results' pages, generated in response to words or phrases entered by members of the public. These pages consisted of 'organic search results', meaning a list of links to other web pages, ranked in order of relevance to the search terms entered by the user (relevance being determined by an algorithm); and 'sponsored links', which were not displayed according to relevance, but were dynamically generated in response to a user's search terms. The content of the sponsored links was pre-determined and monitored via a self-service program, 'AdWords', offered by Google to advertisers for a fee and subject to terms and conditions.

Background

At first instance in the Federal Court of Australia, the Australian Competition and Consumer Commission (the ACCC) alleged that the display of certain sponsored links was misleading or deceptive or likely to mislead or deceive because the sponsored link reproduced the keywords a user had entered into Google's search engine and consisted of a headline that included the name of the advertiser's competitor but which linked to the advertiser's website, implying an association between the user's keywords and the advertiser that did not exist.¹ The ACCC alleged Google was strictly liable for any contravention of s 52 by failing to sufficiently distinguish the organic search results from the sponsored links on its search results pages and by publishing or displaying the relevant sponsored links.

There was no allegation that Google was liable for aiding and abetting, or that it was knowingly concerned within the meaning of s 75B of the Act in any contravention of s 52. Google relied upon the 'publisher's defence' provided by s 85(3) of the Act, that it did not know and had no reason to suspect, that

publication of the sponsored links was misleading or deceptive or likely to mislead or deceive.

At first instance, Nicholas J found the advertisements were misleading or deceptive or likely to mislead or deceive, but rejected the ACCC's claim against Google, holding that Google had not made the representations conveyed by the advertisements, it was merely passing on them for what they were worth and ordinary and reasonable members of the relevant class would have understood that the way the advertisements were displayed excluded the possibility that Google made the representations.

The Full Federal Court (Keane CJ, Jacobson and Lander JJ) allowed the ACCC's appeal.² The full court considered that Google, via its AdWords system, made the misleading representation by displaying the advertisements 'in response' to the entry of the user's search term and that Google had not made out the publisher's defence. The full court also held that the reasoning in *Universal Telecasters (Qld) Ltd v Guthrie*,³ relied upon by the ACCC, was not affected by later decisions. The full court of the Federal Court in *Guthrie* held that when a television station broadcast an advertisement containing spoken words it made a statement.⁴

The case in the High Court

In Google's appeal to the High Court, the ACCC submitted that the question was not whether Google had adopted the advertisers' misleading representations, but whether Google itself had made the misleading representations. This conclusion was said to arise because it was Google which decided whether and in what form the advertisements would be published, and, by making its AdWords functionality available to advertisers, Google was responsible for the collocation of a competitor's details with the advertiser's URL. In the ACCC's submission, Google had therefore done more than merely pass on the representations for what they were worth. It was further contended by the ACCC that Google and its search engine did not operate analogously to other intermediaries or agents and that the principles established in relation to

intermediaries or agents did not apply to the facts of this case.

Google relied upon the primary judge's findings that the ordinary and reasonable users of Google would have understood the sponsored links to be advertisements paid for by advertisers and that it was merely passing them on for what it was worth. It submitted that the AdWords program was not different in principle from facilities provided to advertisers by other intermediaries and it contended that any commercial association or affiliation between an advertiser and another trader was something peculiarly within the knowledge of the advertiser. Further, Google contended that each advertiser specified the relevant parts of a sponsored link – it had merely implemented the advertisers' instructions.⁵

In Google's appeal to the High Court, the ACCC submitted that the question was not whether Google had adopted the advertisers' misleading representations, but whether Google itself had made the misleading representations.

Adoption or endorsement by intermediaries

The ACCC's case against Google was framed and pursued partly on the premise that previous decisions had established a principle that a defendant which passes on a representation made by another engages in misleading or deceptive conduct only if the defendant endorsed or adopted the representation.⁶

The High Court considered that the correct approach to intermediaries was explained by the plurality in *Yorke v Lucas*,⁷ that is, the possibility that a corporation could contravene s 52 even though it acted reasonably and honestly does not necessarily mean that a corporation, which purports to do no more than pass on information for what it is worth, is engaging in misleading or deceptive conduct. Gleeson CJ, Hayne and Heydon JJ in *Butcher v Lachlan Elder Realty Pty Ltd*⁸ adopted this

approach. In the present case, Hayne J⁹ affirmed the proposition put by McHugh (in dissent) in *Butcher* that s 52 '... is not concerned with the mental state of the corporation'.¹⁰

The ordinary and reasonable user of Google

The question whether a corporation which publishes, communicates or passes on a misleading representation of another has itself engaged in misleading or deceptive conduct will depend on whether it would appear to ordinary and reasonable members of the relevant class that the corporation has adopted or endorsed that representation.¹¹

The primary judge's findings that ordinary and reasonable users would have understood the sponsored links to be statements made by advertisers which Google had not endorsed and was merely passing on for what they were worth were held to be clearly correct¹² and those findings were unchallenged by the ACCC.

In this case the misleading conduct was said to be entirely within the text of the advertisements. The advertiser dictated the relevant elements of the advertisement and paid for it to be displayed.¹³ Heydon J found that it was an error of fact to consider that Google created the 'message' sent by its technology because that finding incorrectly identified the misleading conduct as being a misrepresentation 'that the impugned advertisements ... would be responsive to the search queries made by users'¹⁴ which placed the misrepresentation outside the impugned advertisements.

In circumstances where the primary judge's findings remained unchallenged as to the fact that the ordinary and reasonable user of Google would have understood the sponsored links to be statements made by advertisers which Google had not endorsed, taken together with the fact that the ACCC had failed to show that Google, as distinct from advertisers, made the representations conveyed by the advertisements, Google's appeal was allowed.¹⁵

The publisher's defence

In *obiter* comments the High Court considered the

scope of s 85(3), holding that the statutory defence operates according to the circumstances of each case.

The court, *per curiam*, appeared to accept the general proposition that express words of adoption could result in liability wherever the s 85(3) defence could not be made out and express words of exclusion, or a 'necessary implication' to that effect, could result in immunity from liability.¹⁶ It is therefore possible to pass on or report a misleading statement by another person without being liable. The High Court was unanimous in considering there should be no distinction between the principles to be applied to Google's online publication of the sponsored links and earlier precedent in relation to more traditional forms of media.¹⁷

Justice Hayne's approach differed somewhat from that taken by the other members of the High Court in that his Honour held that when s 52 and 85(3) are read together, it is evident that the Act assumed that the conduct of publishing an advertisement made and paid for by a third party may contravene s 52. In some respects Hayne J's reasoning process is more transparent and the test is clearer. It may be summarised as follows:

Fundamental to s 52 is the identification of the impugned conduct: 'what did the alleged contravener do (or not do)?'¹⁸ The conduct may not necessarily be a representation.¹⁹

Was that conduct misleading or deceptive, or likely to be so?²⁰ The act of displaying an advertisement to people who would not otherwise see or hear it is 'conduct' capable of misleading or deceiving those who see or hear it.²¹

The test depends upon how the relevant class of persons would understand what was published.²²

The relevant premise for engaging s 85(3) was a contravention of a provision of Part V committed by the publication of an advertisement.²³ The issues that are posed by s 85(3) concern knowledge of and reason to suspect a contravention.²⁴

But for the defence, the publisher of the (misleading) advertisement would be liable for a contravention.²⁵

Notions of endorsement and adoption have no role to play in an allegation that the publication of a misleading or deceptive advertisement contravened s 52.²⁶ Such notions are only relevant only if the conduct is identified as the making of a representation.²⁷

His Honour considered that s 85(3) did not provide that publication of an advertisement was to be taken not to be a contravention of Pt V or Pt VC or unless the alleged contravener was shown to have endorsed or adopted the content of the advertisement.²⁸

In contrast, French CJ, Crennan, Kiefel and Heydon JJ considered s 85(3) to operate as a kind of 'backstop' in cases where a defendant did make a misleading statement or unwittingly endorsed or adopted such a representation, but where the criteria for immunity in s 85(3) are made out.²⁹ In such circumstances, an intermediary publisher may need to show it had some appropriate system in place to succeed with the defence that it did not know and had no reason to suspect that the publication of the representation would amount to a contravention.

In relation to identification of the relevant conduct, French CJ, Crennan and Kiefel JJ seem to have focused on the difference between an intermediary 'making' or 'passing on' a misleading statement, the former being contravening conduct that is determined by an express or implied adoption or endorsement of the statement, which in turn misleads the appropriate class of persons. Thus, in the absence of endorsement or adoption by Google of the advertisements, Google did not make or create the representations contained in the sponsored links.³⁰

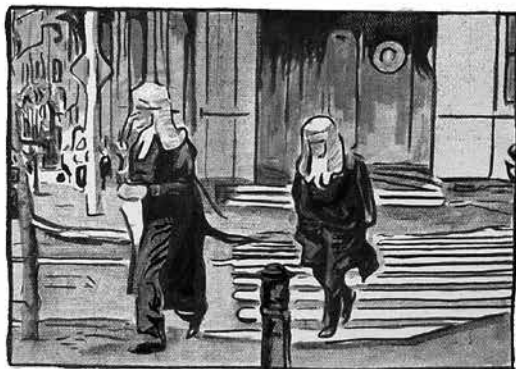
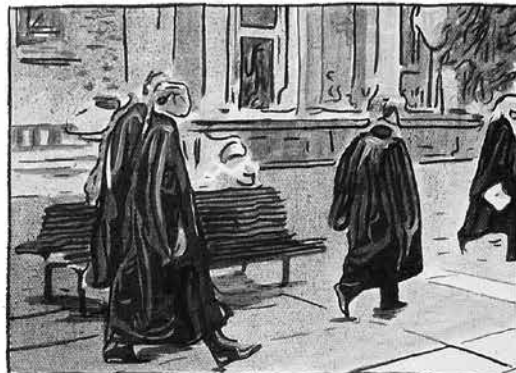
Justice Heydon characterised Google's response to a user's search query as a representation (that Google had responded to the user's search query) and considered that Google did not create the message contained in the sponsored links.³¹ His Honour held that it would be extreme to conclude that a trader in Google's position always 'makes' the representations in a third party advertisement, as it would put such traders in risk of numerous contraventions of the

Act unless s 85(3) defences were available or unless there was a distinction between advertising in online media and advertising in traditional media.³² Liability depended on whether the relevant section of the class regarded the 'carrier' as having adopted the representation.³³

Arguably, Hayne J's approach avoids such extreme results through a primary and careful analysis of the impugned conduct with each case dependent on its own facts and circumstances.

Endnotes

1. *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* [2011] FCA 1086 at [13].
2. *Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49.
3. *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531; (1978) 32 FLR 360.
4. *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531; (1978) 32 FLR 360 at 362, 368, 377.
5. Per French CJ, Crennan and Kiefel JJ at [66].
6. Per Hayne J at [99].
7. *Yorke v Lucas* (1985) 158 CLR 661 at 666; 59 ALJR 776 per Mason ACJ, Wilson, Deane and Dawson JJ at [7].
8. *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 79 ALJR 308 per by Gleeson CJ, Hayne and Heydon JJ.
9. Per Hayne J at [97] to [102].
10. *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [139]; 79 ALJR 308.
11. Per French CJ, Crennan and Keifel JJ at [15], per Heydon J at [162].
12. Per French CJ, Crennan and Keifel JJ at [70].
13. Per Heydon J at [143].
14. Per Heydon J at [144].
15. Per French CJ, Crennan and Kiefel JJ at [70], [73], per Hayne J at [82] to [83] and per Heydon J at [145], [148] to [149], [153].
16. Per French CJ, Crennan and Kiefel JJ at [75], per Hayne J at [84], [97] to [98], [111] to [112] and per Heydon J at [162].
17. Per French CJ, Crennan and Kiefel JJ at [69], per Hayne J at [116] and per Heydon J at [151].
18. Per Hayne J at [89].
19. Per Hayne J at [89] to [92].
20. Per Hayne J at [89].
21. Per Hayne J at [118].
22. Per Hayne J at [118] to [119].
23. Per Hayne J at [87].
24. Per Hayne J at [123].
25. Per Hayne J at [119] to [120].
26. Per Hayne J at [84].
27. Per Hayne J at [98].
28. Per Hayne J at [87].
29. Per French CJ, Crennan and Kiefel JJ at [75] and per Heydon J at [162].
30. Per French, Crennan and Kiefel JJ at [68] to [73].
31. Per Heydon J at [149].
32. Per Heydon J at [143].
33. Per Heydon J at [148].



Different but same

David Parish reports on *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10

If an insurance broker negligently fails to renew an insurance policy, when the bank is robbed and the policy does not respond, is the thief a concurrent wrongdoer in proceedings against the broker for negligence? That scenario never happened, yet eight appellate judges in NSW and Victoria and two High Court judges thought the answer was no. Three High Court judges said yes.

The hypothetical was tested in a case where a solicitor employed by Hunt & Hunt Lawyers prepared a mortgage for a lender, Mitchell Morgan Nominees. The mortgage was defective, the loan was a fraud, and when Mitchell Morgan came to call upon their security against the registered proprietor they were left with a mortgage that secured nothing.

The issue subject to the High Court's scrutiny in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*¹ was whether the fraudsters were concurrent wrongdoers under s 34(2) of the *Civil Liability Act 2002* (NSW). To be concurrent wrongdoers, their acts or omissions must have caused, independently or jointly, the damage or loss the subject of the claim. With the abolition of solidary liability under Part IV of the Act, successfully apportioning liability to the fraudsters as concurrent wrongdoers significantly reduced the lawyers' liability.

Court of Appeal

In the NSW Court of Appeal a bench of five held that to be a concurrent wrongdoer the loss caused by the fraudsters had to be the same loss or damage the subject of the claim.² By examining that economic interest lost, the Court of Appeal held that the loss caused by the lawyers was the loss of a security and the loss caused by the fraudsters was the money paid away.³ Being damage characterised differently than that the subject of the claim, the fraudsters were not concurrent wrongdoers.

In a fit of interstate efficiency, the Victorian Court of Appeal in *St George v Quinerts*⁴ considered the Hunt & Hunt Lawyers decision at first instance and decided it hypothetically in the same manner as that of the NSW Court of Appeal. In this respect, the High Court was in some ways reviewing the reasoning of the Victorian Court of Appeal as well.

In a fit of interstate efficiency, the Victorian Court of Appeal in St George v Quinerts considered the Hunt & Hunt Lawyers decision at first instance and decided it hypothetically in the same manner as that of the NSW Court of Appeal.

Same loss or damage

The High Court majority⁵ and minority⁶ agreed the loss or damage caused by the fraudsters had to be the same as that caused by the lawyers. This was an issue in the Court of Appeal and in *St George v Quinerts* because of the absence of the word 'same' in s 34(2) of the Act and its Victorian equivalent. However, the High Court thought it uncontroversial that the harm had to be the same because, as the majority put it, 'It is difficult to see that, as between concurrent wrongdoers, the damage they have caused can be other than the same for the purposes of s 34(2), since it is identified in each case as that which is the subject of the plaintiff's claim.'⁷

Economic loss or damage is the harm suffered to a plaintiff's economic interests. On this, the majority and minority also agreed.⁸

The majority and minority parted ways over what the loss or damage the subject of the claim was that the lawyers caused and what was that which the fraudsters caused. The majority thought the harm the same, the minority different.

Identifying the loss or damage the subject of the claim (French CJ, Hayne and Kiefel JJ)

Mitchell Morgan had sued the lawyers for negligently drawing a mortgage that turned out to secure nothing in the event of fraud. Giles JA had held the harm to economic interest caused by the fraudsters was Mitchell Morgan paying out money when it otherwise would not have done so and the loss caused by the lawyers was not having the benefit of the security.⁹ The second act only was the subject of the claim by Mitchell Morgan. The majority decided that the Court of Appeal's identification of the loss the subject of the claim as the loss of the security was incorrect. The analysis of Giles JA was criticised for identifying

It seems unusual that the effect of the proportionate liability provisions is that persons retained to protect clients from harm – valuers, brokers, solicitors – can be held only 12.5 per cent liable when they fail to protect from the very harm they were paid to prevent.

the immediate effects of the wrongdoer's conduct, important to causation but not to be equated with damage.¹⁰ By way of illustration, the majority noted that a negligently drawn mortgage was not necessarily productive of loss. In a case involving the loan of money, damage would be sustained when the failure to recover the money became ascertainable. If it is recoverable from the person who obtains the money, the mortgage has no work to do.¹¹

The majority then turned to the insurance broker analogy used by Nettle JA in *St George v Quinerts*¹² and referred to by the NSW Court of Appeal. Nettle JA drew a distinction between the damage caused by the thief stealing the money and the damage caused by the insurance broker in failing to ensure the bank could obtain indemnity from an insurance company. The majority found the analogy apt the opposite way; in both cases it was correct to describe the loss as the inability to recover the money: 'The harm at a certain point is the inability to recover the money from either source.'¹³

The majority drew parallels with *Kenny & Good Pty Ltd v MGICA (1992) Ltd*¹⁴ in holding that the economic interest lost by Mitchell Morgan was the loss of the recovery of the money lent.¹⁵ Once this was found, it was inevitable that the fraudsters were concurrent wrongdoers: there were two necessary conditions to render the mortgage completely ineffective, a void loan agreement and a mortgage without a debt covenant. The fraudsters caused the former; the lawyers, the latter; both caused the money to be irrecoverable.¹⁶

Identifying the loss of damage the subject of the claim (Bell and Gageler JJ)

The minority proceeded upon the same framework as the majority of first identifying the damage or loss the subject of the claim. This is where the minority and majority differed.

Bell and Gageler JJ agreed with the Court of Appeal that the economic interest lost by Mitchell Morgan was an effective security.¹⁷ That was the subject of the claim and no act or omission of the fraudsters caused the security to be ineffective.

Conclusion

In establishing what the economic interest lost is, the majority may be criticised for taking an overly reductionist approach. By deciding that at a certain point the harm is the loss of money may well be so generally applicable as to render the need for an identification of the damage moot. Is not all civil litigation 'at a certain point' about the loss of money? Does this get too close to conflating damage with damages as the Court of Appeal warned? On the other hand, the majority decision may be seen as no more than an application of well-established principles of determining the economic harm to the proportionate liability provisions. Either way it highlights the importance of considering what precisely the economic interest lost is when preparing cases involving economic loss.

Because the purpose of the proportionate liability provisions was to abolish the solidary liability of tortfeasors, the simplest way to test the High Court decision is to ask whether the lawyers could have recovered against the fraudsters for the same loss or damage under s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*. It is difficult to answer by reference to any authority as the contribution legislation does not extend to liability for breach of contract and it appears few insured tortfeasors bothered to seek contribution against impecunious fraudsters.

It seems unusual that the effect of the proportionate liability provisions is that persons retained to protect clients from harm – valuers, brokers, solicitors – can be held only 12.5 per cent liable when they fail to protect from the very harm they were paid to

prevent. Was this the intention of the proportionate liability provisions? Perhaps it was, when it is remembered that the mischief the provisions were intended to remedy was the deep pocket litigation against insurers indemnifying against economic loss.

Putting aside the policy behind the legislation, the ascertainment of the economic harm does not appear to be an exact science and well-reasoned arguments can be made for either conclusion. After the scrutiny of fourteen judges¹⁸ in which ten decided the fraudsters were not concurrent wrongdoers and four decided they were, it is clear that how loss is characterised is a matter over which reasonable minds can differ.

Endnotes

1. [2013] HCA 10.
2. *Mitchell Morgan v Vella* [2011] NSWCA 390 at [48] and [49].
3. *Ibid* at [41].
4. (2009) VR 666.
5. French CJ, Hayne and Kiefel JJ.
6. Bell and Gageler JJ.
7. *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (supra) at [21] and [92].
8. *Ibid* [24] and [100]
9. *Ibid* at [41].
10. *Ibid* at [30].
11. *Ibid* at [31] and [32].
12. *Ibid* at [39]
13. *Ibid* at [40].
14. [1999] HCA 25; (1999) 199 CLR 413.
15. *Ibid* at [28].
16. *Ibid* at [49] and [50].
17. *Ibid* at [100].
18. Young CJ in Eq (as he then was) at first instance; Bathurst CJ, Giles, Campbell and MacFarlan JJA, and Sackville AJA in the NSW Court of Appeal; French CJ, Hayne, Kiefel, Bell and Gageler JJ in the High Court; and analysed by the Victorian Court of Appeal in *St George Pty Ltd v Quinerts Pty Ltd* [2009] VR 666.

When is a share a preference share?

James Hutton reports on *Beck v Weinstock* [2013] HCA 15

The High Court, dismissing an appeal from the New South Wales Court of Appeal,¹ has confirmed that a share may be a 'preference share' for the purposes of the *Corporations Act 2001* (Cth) (Act) irrespective of whether there are any other shares on issue against which its rights are to be preferred. Accordingly, a company may issue 'redeemable preference shares' within s 254A(1) of the Act, and redeem them pursuant to s 254J(1) of the Act, without ever issuing any other shares over which the issued shares have preferential rights.

Background

As previously noted,² the dispute concerned whether a closely held family company, LW Furniture Consolidated (Aust) Pty Ltd (LW), had effectively redeemed, at par, eight shares styled 'redeemable preference shares' that it had issued to a Ms Hedy Weinstock. One of Ms Weinstock's executors commenced proceedings challenging the

effectiveness of the purported redemption. The par value of Ms Weinstock's shares was \$8 whereas the executor claimed that the true value of her shares on winding up would be over \$7 million.

LW's Memorandum and Articles of Association provided for its authorised share capital to be designated into four classes of preference shares classified 'A' to 'D' and ten classes of ordinary shares. The only shares ever allotted were 'A', 'C' and 'D' class preference shares. The 'C' class shares did not carry any right to vote, ranked equally as regards return of capital after the 'A' class shares but equally with the 'D' class shares and in priority to ordinary shares and ranked equally with both the 'D' class shares and ordinary shares as regards dividends. Accordingly, at no time were there any shares on issue carrying rights subordinate to the rights of the 'C' class shares. The 'C' class shares were liable to be redeemed at par upon the death of the holder.

In 2004 the LW purported to redeem, at par, eight 'C' class shares issued to Ms Weinstock, then recently deceased.³ Ms Weinstock's executor contended that the shares were not 'preference shares' issued in accordance with s 61(1) of the *Companies Act 1961* (NSW) (1961 Act) and therefore were not liable to be redeemed because there were no shares on issue by LW over which they took preference. Properly characterised, the shares were ordinary shares that could only be cancelled under a reduction of capital or a share buy-back.

The primary judge accepted the executor's submission and held that the redemption was ineffective. The Court of Appeal (Giles JA and Handley AJA, Young JA dissenting) allowed an appeal, finding that the shares issued to Ms Weinstock were properly characterised as 'preference shares' issued under s 61(1) of the 1961 Act and could therefore be redeemed at par.

The High Court decision

The High Court (French CJ, Hayne, Crennan, Kiefel and Gageler JJ) unanimously held that the 'C' class shares were effectively redeemed at par. A majority joint judgment was given by Hayne, Crennan and Kiefel JJ. French CJ and Gageler JJ gave individual concurring judgments. The reasoning in each judgment was similar although there were differences of emphasis and detail.

French CJ summarised the history and evolving character of the preference share. The chief justice observed that the preference share emerged in the United Kingdom in the eighteenth and nineteenth centuries as a means of enabling private infrastructure corporations to fund the completion of projects for which inadequate initial capital had been subscribed.⁴ However, by the mid to late nineteenth century it had become accepted that preference shares were able to be issued to raise part of the original (or ordinary) capital of a company.⁵ Accordingly, there was no historical rationale for the proposition that a share issued without the issue of any ordinary shares could not be designated as a 'preference share' within the meaning of the 1961 Act or the Act.⁶ There was no basis for such a restriction in the 1961 Act or the Act, or any of their predecessors,⁷ and it was not required as an incident of the principle of the maintenance

of share capital.⁸ Accordingly, the appeal was to be dismissed.⁹

The joint judgment examined the provisions of the 1961 Act and the Act in detail and concluded that there was no 'textual footing' for the executor's submission that a share was not a preference share unless the rights attaching to it gave some preference or priority over some other issued share.¹⁰ The joint judgment referred with approval to the distinction drawn by Handley AJA between the rights attached to the share (being whatever rights the company's memorandum and articles of association attached to it) and the enjoyment of those rights.¹¹

The joint judgment also addressed the question of whether a company could issue only redeemable preference shares and then redeem all shares on issue. That conundrum had troubled Young JA in the Court of Appeal, because his Honour considered that such a situation was incompatible with the rule against the reduction of share capital.¹² The joint judgment observed that although it was 'theoretically possible' for a company to redeem all shares on issue, it was doubtful that such a redemption could be effected by the directors of a company consistently with their duties.¹³ In any event, the point was 'wholly met' by the provisions of the 1961 Act and the Act which made it a ground for winding up by the court that a company had no members.¹⁴ The situation was therefore addressed by the relevant statutes and their language did not need to be strained to avoid it arising.¹⁵

Gageler J also regarded it as decisive that there was no textual foundation or policy rationale for the restriction sought by the executor.¹⁶ His Honour developed the distinction between the conferral of rights and their enjoyment by reference to the statutory contract formed by a company's constitution. His Honour noted that the rights attaching to preference shares under a company's constitution take effect in contract between the company and the holders of the preference shares upon the issue of the shares, irrespective of whether any other shares are on issue, and that the same rights take effect between the holders of the preference shares and the holders of ordinary shares if and when ordinary shares are issued.¹⁷

Comment

The circumstances of the case were peculiar and, accordingly, it might be expected that the High Court's decision will be directly applicable only rarely.¹⁸ The wider significance of the decision may lie in it being a further instance of the court refusing to impose a 'gloss' on the text of the corporations legislation by reference to canonical nineteenth century company law principles (such as the maintenance of share capital).¹⁹

The High Court's decision perhaps advances the position as it was left by the Court of Appeal in three respects. First, the High Court directly addressed the situation in which a company might only issue redeemable preference shares and then redeem all shares on issue.²⁰ Secondly, Gageler J developed the distinction drawn by the Court of Appeal²¹ between the conferral of rights on a shareholder and their enjoyment by pointing to a further distinction between rights against the company (which arise on issue of the preference shares) and rights against other shareholders (which arise only when other subordinate shares are issued). A preference share issued in the absence of any subordinate shares confers the first type of rights, which have independent operation and content.

Thirdly, before the Court of Appeal the executor submitted that the case turned on whether the 'C' class shares issued to Ms Weinstock were 'redeemable preference shares' within the terms of the 1961 Act.²² In the High Court, the executor framed the issue as whether a share can be a 'preference share' for the purposes of the (2001) Act if there were no subordinate shares on issue, on the footing that it was the provisions of the Act that governed the purported redemption in 2004.²³ The High Court judgments approached the question of which statute governed the outcome differently,²⁴ but there was no suggestion that the result would not be the same in either event, and French CJ specifically found that there was no restriction on the issue of preference shares in the absence of ordinary shares under either Act.²⁵ The High Court decision can therefore

probably be taken as authority that preference shares may be issued in the absence of subordinate shares under the Act as well as under the 1961 Act.

A related appeal to the High Court, concerning the validity of the appointment of a director to LW and the application of s 1322(4) of the Act, was allowed.²⁶

Endnotes

1. *Weinstock v Beck* (2011) 252 FLR 462 (Giles JA and Handley AJA, Young JA dissenting).
2. The Court of Appeal decision was the subject of a casenote in the Summer 2011-12 edition of *Bar News*.
3. Exactly when the 'C' class shares were issued to Ms Weinstock could not be ascertained. Argument proceeded on the basis that they were issued in 1971 (at fn 3, [52]).
4. At [23].
5. At [29]-[30].
6. At [31].
7. At [35], [42].
8. At [43]-[45].
9. At [46].
10. At [67].
11. At [69].
12. *Weinstock v Beck* (2011) 252 FLR 462 at [23], [50]-[52].
13. At [72].
14. At [72]. Section 461(1)(d) of the Act and s 222(1)(d) of the 1961 Act.
15. At [73]. See also Gageler J at [94].
16. At [80].
17. At [92].
18. No intermediate or ultimate appellate authorities directly on point were referred to by the High Court. It may well be that the issue has not arisen for decision in other jurisdictions.
19. See *Sons of Gwalia Ltd v Margaretic* (2007) 232 ALR 232 at [36] (Gummow J): 'There are no "general principles of company law" ... to which there must be reconciled those provisions of the Act and its predecessors'. *Sons of Gwalia* concerned the principle said to be established by *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317.
20. At [72]-[73] (Hayne, Crennan and Kiefel JJ) and [94] (Gageler J).
21. *Weinstock v Beck* (2011) 252 FLR 462 at [134]-[149] (Handley AJA, Giles JA agreeing).
22. *Weinstock v Beck* (2011) 252 FLR 462 at [111] (Handley AJA, Giles JA agreeing).
23. See [56]-[57] (Hayne, Crennan and Kiefel JJ).
24. See in particular [59] and [74] (Hayne, Crennan and Kiefel JJ) (applying the 1961 Act) and [78] (Gageler J) (applying the Act).
25. See [36], [42], [44] (French CJ).
26. *Weinstock v Beck* [2013] HCA 14.

The new Bail Act

By Caroline Dobraszczyk

A completely new Bail Act will commence, very likely sometime in May 2014. This of course is very important legislation for any criminal law practitioner so at some stage before its commencement, a detailed consideration of it will be required by all, as there are fundamental changes to this area of law.

The first main issue is that the *Bail Act 1978* will be repealed and we will have the new *Bail Act 2013*, to commence approximately 12 months after the date of assent. The date of assent was 27 May 2013. The time period has been set to allow for the training of police and judicial officers and for appropriate changes to be made to court technology.

The second issue is that the key principle to granting bail will be the consideration of the unacceptable risk test, and not offence based presumptions as appear in the current Act. The attorney general said in the second reading speech that 'This test will focus bail decision making on the identification and mitigation of unacceptable risk, which should result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person.'

Part 1 deals with preliminary issues such as the purpose of the Act, definitions and having regard to the presumption of innocence and the general right of liberty, when making a bail decision. Part 2 sets out the general provisions governing bail and includes the types of bail decisions that can be made, restrictions on who can make particular bail decisions and that bail ceases to have effect only if it is revoked or substantive proceedings for the offence conclude. This should streamline court bail procedures by having a system of continuous bail and remove the need for an accused to formally continue bail every time the accused person appears before the court. An accused person who is granted bail is still required to attend court as and when ordered.

Part 3 is the main part of the legislation and is entitled 'Making and variation of bail decisions'. Section 16 sets out a flow chart which sets out the decision making process that a bail authority (defined as a police officer, an authorized justice or a court), is required to undertake when applying the unacceptable risk test. (As in Chapter 3 of the Evidence Act, this is a very welcome addition).

Section 17 sets out that the first step that a bail authority is required to take is to decide whether there are any unacceptable risks. In particular, whether the accused, if released, will fail to appear in any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence: s 17(2). Section 17(3) then sets out an exhaustive list of matters that the bail authority will be required to consider when determining whether there are any unacceptable risks. None of these are unusual or unfamiliar:

- the accused person's background, including criminal history, circumstances and community ties;
- the nature and seriousness of the offence;
- the strength of the prosecution case;
- whether the accused person has a history of violence;
- whether the accused person has previously committed a serious offence while on bail;
- whether the accused person has a pattern of non compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behavior bonds;
- the length of time the accused person is likely to spend in custody if bail is refused;
- the likelihood of a custodial sentence being imposed;
- if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending, whether the appeal has a reasonably arguable prospect of success;
- any special vulnerability or needs the accused person has including youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment;
- the need to be free to prepare for their appearance in court or to obtain legal advice;
- the need for the accused person to be free for any other lawful reason.

It is interesting to note that some of these factors do

not go directly to the s 17(2) issues, except perhaps the failure to appear consideration, nevertheless they are relevant to the issue of determining unacceptable risk which a bail authority must consider.

Sections 18, 19 and 20 then set out what bail decisions are possible when there are no unacceptable risks and where there is an unacceptable risk, which includes a decision to grant bail with conditions. Section 21 provides for specific decisions for offences for which there is a right to release. Those offences are set out in s 21 (2), (3) and (4) and include a fine only offence and certain offences under the *Summary Offences Act 1988* and the *Young Offenders Act 1997*. Section 22 provides that court is not to grant or dispense with bail on an appeal against conviction or sentence to the CCA, or an appeal from that court to the High Court, unless it is established that special or exceptional circumstances justify the decision. This is the same test that applies currently.

Division 3 of part 3 is entitled 'Bail conditions'. In the second reading speech the attorney general stated that the Law Reform Commission 'noted concerns expressed by many stakeholders about the increasing use of bail conditions to address issues related to the welfare of the accused rather than achieving the traditional aims of bail, such as ensuring the accused's attendance at court. The government agrees that there needs to be appropriate guidance in the legislation regarding the permissible purposes for bail conditions and the restrictions that apply to them so that unnecessary conditions are not imposed...Consistent with the government's risk based approach to bail, [section 24] provides that bail conditions can be imposed only for the purpose of mitigating an unacceptable risk. Conditions must be reasonable, proportionate to the alleged offence and appropriate to address the unacceptable risk in relation to which they are imposed.' However section 25 sets out that bail conditions can impose conduct requirement (i.e. a requirement that the accused person do or refrain from doing anything) and section 26 states that bail conditions can require security to be provided. Sections 27-30 provide for character acknowledgments, accommodation requirements, pre release requirements (e.g. surrender of passport) and enforcement conditions (e.g. to undergo testing

for drugs or alcohol) as the type of conditions that can be imposed when granting bail.

Section 31 confirms the current position as to evidential requirements in any bail hearing and states that a bail authority may take into account any evidence or information that the bail authority considers credible or trustworthy and is not bound by the principles or rules of law regarding the admission of evidence.

Part 4 is headed 'Procedures after decision is made or varied'. Essentially, if an accused is granted bail he/she will be given a 'bail acknowledgment' which is a written notice setting out when an accused person is to appear before a court and specifying that an accused is to notify the court of any change in the residential address. This notice must be signed by the accused person before they will be released on bail. The notice also sets out the conditions of bail and includes information about any bail variations. Division 1 then sets out other notices and information to be given to the accused person. Division 2 provides for the prosecution to seek a stay of a decision to grant or dispense with bail in relation to a serious offence where such a decision is made on the first appearance by the accused so that a detention application can be made to the Supreme Court. There is also a restriction on the maximum period for which certain officers and courts can adjourn a matter if bail is refused. There are also notice requirements where bail is granted but the accused person is not released.

Part 5 sets out the powers to make and vary bail decisions. Division 1 deals with all issues surrounding bail decisions by police officers and Division 2 deals with courts and 'authorized justices' defined as including a registrar of the Local Court or the Children's Court. The new Act provides for three forms of bail applications: a release application (by an accused); a detention application (by the prosecutor); and an application for variation of bail conditions (can be made by any interested person).

Part 6 then sets out the powers of courts and authorized justices to hear bail applications and sets out a new regime for the rehearing of bail decisions. Division 2 deals with general powers, which includes

the power to hear bail applications if proceedings are pending in the court or if a sentence or conviction is appealed. Further that a court may hear a variation application for a bail decision made by the court however constituted. Division 3 provides for additional powers specific to the Local Court, the District Court, the Supreme Court and the CCA. Importantly, the Supreme Court may hear a release application if bail has been refused by another court, authorised justice or a police officer. Also, the Supreme Court may hear a detention application or variation application for an offence if a bail decision has been made by the District Court, the Local Court, an authorised justice or a police officer. Division 4 then sets out restrictions on powers e.g. when proceedings are pending in another court or when a decision has been made by the Supreme Court.

Part 7 is headed 'General provisions about bail applications' i.e. to be dealt with expeditiously, at the first appearance but a court may refuse to hear a bail application on discretionary grounds-ie the application is frivolous or without substance. Section 74 is equivalent to the existing s 22A restricting second or subsequent release applications made to the same court. The new section also extends these restrictions to second or subsequent detention applications by the prosecutions. There must be grounds for a further application. Section 74(3) sets out the grounds for a further release application, which include no legal representation when the previous application was made, relevant information not presented at the previous hearing, circumstances have changed, the person is a child, and the previous application was made on a first appearance.

This last issue is a new and takes into account a recommendation by the Law Reform Commission, noting that there are particular difficulties when taking instructions from children at the early stages of proceedings. Section 74(4) specifies what are the grounds for a further detention application, ie new information to be presented or circumstances have changed. An example in the second reading speech of such a change is where an accused enters a plea of guilty or is convicted of the offence following a hearing.

Part 8 deals with the enforcement of bail requirements. The second reading speech notes that the Law Reform Commission recommended that the new bail legislation set out the options open to police when responding to a breach or threatened breach of bail and the matters that should be considered by them. Sections 76 and 77 deal with this issue. Section 78 sets out the powers of bail authorities (defined as an authorised justice the Local Court or other relevant court that the person is to appear in by his or her bail acknowledgment), when someone has failed or was about to fail to comply with a bail acknowledgment or bail condition.

Sections 79 and 80 deal with the offence of failing to appear. Part 9 provides for bail security requirements and Part 10 deals with miscellaneous issues including the restriction on publication of certain information regarding association conditions, the facilitation of proof of bail acknowledgments, decisions and failure to appear, and the repeal of the Bail Act 1978. The new Bail Act is to be reviewed after 3 years in operation. The schedules contain usual features including savings and transitional provisions.

Unattributed copying of submissions in judgments

By Rebecca Gall

What happens if a judge or tribunal member writing a judgment ‘cuts and pastes’ a large part of that judgment from the written submissions of one side or another?

This issue has been considered in two relatively recent decisions.

The first was *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90, a decision handed down last year by the full court of the Federal Court.

The second was a decision of the English Court of Appeal in *Crinion v IG Markets Ltd* [2013] EWCA Civ 587, which was handed down in June 2013.

LVR concerned copying in a tribunal decision and *Crinion* involved copying by a judge of the England and Wales High Court (Mercantile Court). The two cases suggest that different considerations may apply to evaluating the reasons of a court from those which apply to a tribunal.¹

[*LVR \(WA\) Pty Ltd v Administrative Appeals Tribunal* \[2012\] FCAFC 90](#)

Basis of appeal

The appeal in *LVR* raised, on its face, a straightforward question: whether the primary judge erred in finding that the tribunal did not improperly exercise its power by failing to take into account a relevant consideration (the relevant consideration being an affidavit by a Mr Schokker).

However, the surrounding circumstances were, in the full court’s experience (North, Logan and Robertson JJ), unique as the tribunal’s decision comprised approximately 95 per cent verbatim copying from the successful party’s submissions (commissioner of taxation).

The circumstances by which the copying in the tribunal’s decision was uncovered were also unusual. The fact of the copying was not the basis for the bringing of the appeal² from the tribunal’s decision and the degree of copying had not been drawn to the primary judge’s attention. It was the full court who drew the attention of the parties to the extent of the verbatim copying, without attribution, a few days prior to the appeal.



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Degree of copying and analysis undertaken by full court

In assessing the degree of copying the full court set out in, some detail, the extent and nature of the unattributed copying.³ This included, for certain paragraphs, setting out the tribunal’s decision and the submissions side by side or marking up (in square brackets) the minor changes made in the tribunal’s reasons.

The full court analysed closely the tribunal’s reasons and the submissions that referred to (or omitted to refer to) the Schokker affidavit. Relevantly the full court stated that:

- because the material was copied from the submissions, the court was not prepared to infer that the tribunal did take the affidavit into account⁴;
- because of the ‘provenance of the reasons of the tribunal’ the court’s view was that relevant parts of the tribunal’s reasons should not be construed as referring to the affidavit or its contents⁵; and
- the references or omissions to the affidavit tended to ‘show a lack of active intellectual process in the tribunal’s decision-making’.⁶

Attention was also drawn to a paragraph of the tribunal’s reasoning which the full court said demonstrated ‘the dangers of copying’. In [43]

of the tribunal's reasons, the references to the number of witness statements in the commissioner's submissions became part of the paragraph numbering.⁷

Consideration of case law

The full court noted that they were not taken to and were not aware of any authority in Australia dealing with 'the very substantial and unattributed copying of a party's submissions as the basis of the reasons of a tribunal'.⁸

The full court did not consider copying by judges 'because there are important differences between those cases and the position of tribunals'.⁹ The differences noted included:

- the nature of the jurisdiction for a tribunal, generally being judicial review rather than an appeal;
- the nature of the available relief, that is, whether the court will decide the matter for itself or remit it to the tribunal;
- the different source and requirements of the obligations to give reasons on a judicial officer and tribunal member.¹⁰

However, the full court did refer briefly to:

1. Australian case law that dealt with using template or standard paragraphs or copying from earlier tribunal decisions; and
2. the practice in some North American courts of having the successful party write findings of fact and conclusions of law.

However, the cases referred to were generally distinguishable on the facts and none was expressly cited as the basis for the relevant findings by the full court.

Findings

The full court found that the tribunal failed to take into account a relevant consideration, namely the Schokker affidavit. The full court set aside the tribunal's decision and remitted it to the tribunal for further consideration. The full court did not have to consider whether the tribunal had to be differently constituted as the relevant member had since retired.¹¹

In reaching this conclusion the full court made the following findings:

- the fullest evaluation of the Schokker affidavit was in oral submission but the tribunal's reasons did not make any reference to those submissions¹²;
- the references to the Schokker affidavit in the commissioner's written submissions were some of the few paragraphs which were not copied by the tribunal¹³; and
- it was clear that the reason the tribunal did not refer to the Schokker affidavit was because the source of the reasons was the commissioner's written submissions. The full court stated that '[i]t is a distraction to examine the reasons of the tribunal as if they were an independent text without reference to their source'.¹⁴

Other observation – model litigant

While falling short of reaching a finding as to whether the commissioner breached its obligations as a model litigant, the full court made some general comments on the obligations of model litigants.¹⁵ The full court stated that in their opinion 'counsel representing the executive government must pay scrupulous attention to what the discharge of that obligation requires, especially where legal representatives who are independent of the agency are not involved in the litigation'.

Crinion v IG Markets Ltd [2013] EWCA Civ 587

Basis of appeal

In contrast to *LVR*, *Crinion* concerned the decision of a judge. The sole ground of the appeal was the fact that almost all of the primary judge's judgment was taken from the successful party's submissions.

Degree of copying

The English Court of Appeal found that the primary judge proceeded to write his judgment by taking the word file of the submissions as 'in effect, his first draft and revising it to include some, though not much, material of his own drafting'.¹⁶

The appellants calculated that 94 per cent of the

The appellants calculated that 94 per cent of the judgment was from the submissions and noted that the 'properties' file in the word document of the judgment reveals the 'author' is shown as 'SChirnside', being counsel who drafted the submissions.

judgment was from the submissions and noted that the 'properties' file in the word document of the judgment reveals the 'author' is shown as 'SChirnside', being counsel who drafted the submissions.

Underhill LJ (with whom Longmore LJ and Sir Stephen Sedley agreed) went into some detail in explaining what changes the judge had made to the submissions and noted that they were broadly of the following four kinds:

1. purely mechanical changes necessary to convert submissions into a judgment;
2. short introductory material;
3. small verbal changes for stylistic reasons or clarity;
4. some more substantial changes such as short summaries of the defences of the appellants.

However, his Honour emphasised that it was 'important to not lose sight of the fact that the overall impression on comparing the two documents is that the latter [judgment] is derived almost entirely from the former [submissions]'.¹⁷

Central arguments advanced by the appellants' counsel

Counsel for the appellants made the following two main criticisms of the primary judge's judgment:

1. an impression is created that the judge abdicated his core judicial responsibility to think through the issues for himself;
2. the judge failed to address the appellants' case, in particular, the arguments of the appellants' counsel, in any adequate way.

The first criticism was based on the proposition, submitted by counsel for the appellants, that it is of fundamental importance that 'justice should not only be done but should manifestly and undoubtedly be seen to be done'.¹⁸

The second criticism was that the judge did not quote

from the appellants' written submissions in contrast to the wholesale adoption of the respondent's submissions. Further, the fact the judge prepared his judgment from the respondent's submissions meant that he failed to consider at least the central arguments raised by the appellants as submissions were exchanged and, therefore, the respondent's submissions did not anticipate and answer every argument advanced by the appellant.¹⁹

Underhill LJ stated that it was 'thoroughly bad practice' for the judge to have constructed his judgment in the way that he did his Lordship and agreed that 'appearances matter'. Underhill LJ also stated that the way in which the judge constructed his judgment was 'wrong'.²⁰ However, his Lordship added that even serious defects did not mean necessarily that there had been an injustice which required the appeal to be allowed.²¹

Findings

Underhill LJ concluded, with some hesitation, that the judgment, when examined closely, showed that 'the judge performed his essential judicial role and that his reasons for deciding the dispositive issues in the way that he did are sufficiently apparent'.²²

His lordship went through each section of the judgment in detail and concluded that 'he did bring an independent judgment to bear on the decisive issues in the case, and it is sufficiently clear why he decided those issues in the case in the way he did'.²³

In agreeing with Underhill LJ, Longmore LJ and Sir Stephen Sedley also criticised the approach taken by the primary judge. Sir Stephen commented that he hoped 'that a judgment like the one now before us will not be encountered again'.²⁴

In the final paragraph of the judgment, Longmore LJ stated that 'we trust that no judge in any future case will lift so much of a claimant's submissions into his own judgment as this judge has done and that, if substantial portions are to be lifted, it will be with

proper acknowledgment and with a recitation of the defendant's case together with a reasoned rejection of it. It is only in that way that unnecessary appeals can be avoided and the litigant be satisfied that he has received the justice that is his due'.²⁵

Endnotes

1. *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 at [81] citing *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13 at [53] and *Wu Shan Liang v Minister for Immigration* [1994] FCA 926.
2. At [25]. The full court noted at [40] that counsel for the appellants had not appeared in the matter before the tribunal which may provide some explanation on their part. But counsel for the commissioner had appeared.
3. At [43] to [80].
4. At [50], [52], [53].
5. At [76].
6. At [74] and [75].
7. At [77].
8. At [81].
9. At [98].
10. At [98].
11. At [146].
12. At [128].
13. At [129].
14. At [130].
15. At [41]-[42].
16. *Crinion v IG Markets Ltd* [2013] EWCA Civ 587 at [4].
17. At [11].
18. At [13] citing *R v Sussex Justices ex p. McCarthy* [1924] KB 256 at 259.
19. At [14].
20. At [37].
21. At [16] and [17].
22. At [18].
23. At [37].
24. At [40].
25. At [44].

Verbatim

Justice Owen in *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [No.9], [2008] WASC 239, paragraph 960.

I will ignore the old adage about lies and statistics and add a further set of numbers to the record. The transcript of the hearing extends over 37,105 pages and the parties' written closing submissions take up 36,933 pages. I am not going to say that I read each and every page but I did have cause to examine and consider an uncomfortably large percentage of them. The task could hardly be described as gelogenic and if I never hear the terms cash flow, insolvency or subordination again and never meet a Mr Barnes or a Mr Addy or the Earl of Chesterfield, it will still be too soon.

Justice Scalia in *United States v Windsor*, handed down on 26 June 2013.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

The court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the 'judicial power,' a power to decide not abstract questions but real, concrete 'cases' and 'controversies.' Yet the plaintiff and the government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?

Finality

The Hon AM Gleeson AC QC delivered the Sir Maurice Byers Lecture on 10 April 2013.

I am honoured to have been invited to deliver a lecture in this series instituted by the New South Wales Bar to commemorate one of Australia's finest advocates, and a notable leader of the bar. I have selected the subject of finality. This is not because it is an idea that is now weighing heavily on me on account of my advanced age. It is a policy rather than a principle, and its impact operates at the levels of judicial organization, and decision-making in particular cases or classes of case, and also of legislation and even court funding. It is interesting to know what to make of it.

At the level of legal principle, finality should be of special interest to barristers. The plurality judgment in the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid*¹ said, at [25], that the decision was based in substantial part on the place that an immunity of advocates from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power. I will return to that particular topic, but it is necessary first to examine what lawyers have in mind when they speak of finality.

Plainly the concept is relative rather than absolute, and it takes its meaning from its context. If it is useful as an idea that advances a process of reasoning, and is not merely an announcement of the effect of a conclusion that has been reached by another means, or a statement of a personal preference that it is hoped others will share, then it must have a content that can be analysed. If it is part of a balancing process, there must be some way of knowing what weight to give it. The best way to explain it is to describe it at work.

Speaking in the context of civil actions, and principles of abuse of process, res judicata and issue estoppel, Lord Bingham of Cornhill said, in *Johnson v Gore Wood and Co*²:

The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

That case was analysed by the House of Lords as one of alleged abuse of process, where, after a



claim by a company had been sued upon and then settled, a personal claim by a shareholder, based on substantially the same facts, was brought against the same defendant. The first claim had not gone to a hearing, so principles of res judicata (or as the English call it, cause of action estoppel) and issue estoppel were not directly engaged, but the matter was treated as raising a broader question of abuse of process.

Lord Bingham quoted with approval³ an earlier Court of Appeal judgment in which it was said:⁴

The rule in *Henderson v Henderson*⁵ . . . requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

The House of Lords said that the application of the rule requires 'a broad, merits-based judgment . . . focusing attention on the crucial question whether, in

all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it [an] issue which could have been raised before⁶.

In *Port of Melbourne Authority v Anshun Pty Ltd*⁷ the High Court of Australia, in 1981, dealt with the case under the rubric of estoppel, based upon considerations of reasonableness.

What is of present interest is not the precise jurisprudential basis upon which the rule rests but the recognition, through a principle that extends beyond *res judicata* or issue estoppel, of a public and private interest in preventing parties from unreasonably or unfairly revisiting or amplifying a dispute after it should have been treated as resolved. As the facts of *Johnson v Gore Wood*, where the plaintiff in the second action was different from, but related to, the plaintiff in the first action, show, being twice vexed in the same matter is a somewhat open-ended concept.

An example of similar considerations at work is appellate practice concerning interference with concurrent findings of fact. There are recent discussions of this matter in the High Court⁸, but it is convenient to take what was said by Deane J in *Louth v Diprose*⁹, (referring in turn to what he had earlier said in *Waltons Stores Interstate Ltd v Maher*¹⁰), that it is well settled that a second appellate court should not, in the absence of special reasons such as plain injustice or clear error, disturb concurrent findings of fact made by a trial judge and an intermediate appellate court. He said, referring to the expense of litigation, that it is in the overall interests of the administration of justice and the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact where such concurrent findings have been made. Again, the qualification concerning 'special reasons' shows that the rule is not inflexible.

This rule of appellate practice had its origin in the Privy Council more than a century ago, but it is worth noting that the opportunity for attempted reversals of findings of fact has been magnified in recent times by the virtual disappearance of trial by jury in civil cases. The finality that attended jury verdicts is an aspect of civil litigation that is probably

unknown to many modern practitioners but it was a very important feature of the legal landscape in the past. If a civil jury were properly instructed, and there had been no other irregularity in the conduct of the trial, then the jury's verdict, being inscrutable, was for practical purposes immune from appellate interference unless it could be shown to be perverse. The bar for appellate review was set high.

The abolition of most forms of civil jury trial has diminished the practical finality of the trial process. The trial has now become a hearing at first instance, with an implied promise of more to come until one party or the other has exhausted its available resources or its avenues of appeal.

When trial is by jury, it is important to win at first instance. The abolition of most forms of civil jury trial has diminished the practical finality of the trial process. The trial has now become a hearing at first instance, with an implied promise of more to come until one party or the other has exhausted its available resources or its avenues of appeal. For several reasons, a reference to a litigant's 'day in court' rings hollow, unless day is given the same meaning as in the Book of Genesis. People who are perplexed by the expense, complexity and durability of the modern legal process may point to a number of causes, but the loss of the finality that accompanied trial by jury in civil cases is one of the most obvious. It is worth keeping in mind what was said, speaking of trials generally, in the joint reasons in the High Court in *Coulton v Holcombe*¹¹: '[I]t is fundamental to the due administration of justice that issues between the parties are ordinarily settled at trial'. The tendency to treat a trial as the first round of a contest that will last until one side or the other exhausts its funds or available avenues of appeal was undoubtedly encouraged by the abolition of most civil jury trials, but there are other professional influences at work. Equity suits and commercial cases were rarely tried by jury, but what was said in *Coulton v Holcombe* applied to them also.

There has developed a body of jurisprudence about the approach a court of appeal should take to a trial judge's findings of fact, based in part upon the interest of finality and also upon considerations of rationality and fairness.

Appeals are creatures of statute, although there is judge-made law upon such matters as raising new points, introducing fresh evidence, and appellate review of discretionary judgments. The idea of a public and a private interest in finality plays an important part in much of that law. Initially, however, it is legislation, and therefore the application by parliament of public policy, that creates and marks the limits of the opportunity for appellate review of a decision made at trial. For example, the practical effect of federal and state legislation is that, in an ordinary civil case in the Supreme Court or District Court of New South Wales, there will be one appeal,

to a District Court judge. Evidence and arguments were taken afresh, although if the parties were content to rely on the evidence given before the magistrate they could do so. The judge's obligation was to consider the evidence and arguments and decide the matter for himself or herself. The reasons for decision of the magistrate were not being examined in a search for error; they were given such weight as the judge thought they deserved on their merits but it was the duty of the judge to re-try the case. One reason was that, for most of the twentieth century, magistrates did not have to be qualified as lawyers. The appeal was the first opportunity for the parties to have the case dealt with by a qualified lawyer. There are, regrettably, some practitioners who present arguments in the Court of Appeal and even the High Court as though all appeals are of that kind: nothing more or less than an opportunity for the loser to have another go.

The opportunity which Australia provides for successive challenges by a person claiming to be a refugee to an unfavourable outcome is, by international standards, at least ample. This is rarely acknowledged in commentaries on our immigration laws.

as of right, by way of rehearing (an expression that does not mean what a lay person would take it to mean¹²), and a further opportunity to go to a court of final resort but only if special leave to appeal is granted. This degree of finality involves, among other things, a conscious rationing of judicial resources. It is imposed on litigants because a second appeal is not regarded as a matter of entitlement, and the seven members of the nation's ultimate Court could not possibly deal with more than a small percentage of the cases litigants want to bring before them.

Whether the subject is judicial review of administrative decisions, or appellate review of judicial decisions, ultimately the nature and scope of the available review is determined by legislative policy, which in turn reflects a compromise between the desirability of correcting error or other injustice and the need for finality. The most comprehensive form of review or appeal is one in which a case is simply heard again. An example was the old Quarter Sessions appeal, which was a hearing de novo. A party aggrieved by a magistrate's decision could take the case on appeal

Some legislation provides for multiple appeals, because of a view that this is required by public policy. That is essentially a political judgment. For example, when an immigration appeal concerning a claim for refugee status by an asylum-seeker reaches the Full High Court, the issue of the application of the Refugees' Convention will often be at the fifth level of decision making, and if the appeal is allowed the matter is likely to be remitted for re-consideration. The opportunity which Australia provides for successive challenges by a person claiming to be a refugee to an unfavourable outcome is, by international standards, at least ample. This is rarely acknowledged in commentaries on our immigration laws.

The administration of criminal justice provides examples of differential treatment of finality. Here jury trial remains the standard method of dealing with serious charges. That imports its own degree of finality. An acquittal by a jury is generally conclusive. This is explained in terms of double jeopardy. Autrefois acquit is a plea which, if made

out, defeats a prosecution. For a number of reasons an acquittal may be regarded as erroneous. Later evidence, such as a confession, or information based on developments in technology, may suggest that an acquittal was unsound. In the case of some serious crimes this may lead to a demand to rectify the error. In *The Queen v Carroll*¹³ a man was charged with murder and a jury found him guilty. His conviction was quashed after a successful appeal. Years later, after it was said that further evidence of his guilt had emerged, he was charged with perjury. The alleged perjury was his denial, on oath at his trial, that he had killed the victim. A plea of autrefois acquit was not available; he had never been acquitted of perjury. The High Court held that the perjury indictment was an abuse of process and should be stayed. In Australia, as in England, there has been a good deal of pressure in recent years to allow police and prosecution authorities to revisit cases of allegedly wrongful acquittal. It is not clear how it would be possible to distinguish in principle between some cases and others if this were allowed. It is impossible to formulate a legal rule tailored to fit only cases that cause a public outcry, and unjust to attempt it. In the present state of our law, acquittal of a criminal charge is attended by a high degree of finality. In the United States, civil actions for damages, with a lesser standard of proof, have been used even in the case of alleged murder. In Australia, the principle that a person is entitled to the full benefit of his or her acquittal may be invoked in answer to a later civil action, but individual circumstances may call for a careful analysis of exactly what the benefit amounts to.

Until the enactment of the *Criminal Appeal Act 1912*, there was little scope for challenging a conviction. That Act enabled appeals against conviction on specified grounds, including the broad ground of miscarriage of justice, but Rule 4 of the Criminal Appeal Rules attempted to confine the scope for raising on appeal points that were not taken at the trial. A practical issue with criminal appeals is that people who have been convicted often want to change their lawyers for an appeal. New lawyers may see the case differently. There may also be an attempt to blame the original result on some form of misjudgment or error of trial counsel. The rules about the reception of fresh or new evidence in civil

and criminal appeals, or raising new arguments, seek to find a balance between the interest of providing an appellate court with all the information necessary for a correct decision and the interest of efficiency and fairness. In an appeal, a just outcome is one that reflects the way the case was framed and conducted at first instance, or in an intermediate court. It reflects the fact that what is going on is an appeal, not a re-trial.

Many other examples could be given to demonstrate the proposition that our system of civil and criminal appeals, both in the legislation that creates and limits rights of appeals and in the judge-made law governing their conduct, reflects a judgment about the weight that ought to be given to the interest of finality as one element of our idea of justice. This in turn reflects the consideration that what we call justice according to law, and might also call justice as it can be delivered by a fair and efficient court system, is not a cosmic ideal. It is justice of a human and necessarily imperfect variety. And it is systematic.

It is essential to an appreciation of the interest of finality, and the weight to be given to it, that it be understood that we are concerned with a system of public administration of justice, which is heavily constrained by its own limitations. Civil justice is administered through an adversarial process, in which the parties and their lawyers frame the issues to be decided, and present the evidence and argument upon which the decision is to be based. The reasons why such a process may produce an outcome that is less than ideal are too many, and too obvious, to require explanation. Similarly, criminal justice is administered as a contest, and the capacity for the outcome to be affected by some form of accident, or mistake, a simple bad luck is plain. In either case, when we speak of miscarriage of justice our concept of justice is related to the process by which it is administered. An important part of the process involves control of the natural desire of a losing party to use every available means of overturning an adverse decision. Ill-considered criticisms of what is claimed to be a lack of concern, on the part of lawyers and the legal system, with truth commonly disregard the systematic nature of human justice, and the necessary limitations on the capacity to uncover in every case the ultimate

In the criminal area, a striking example of the collision between the interest of finality and the need to recognize, and where possible, remedy a miscarriage of justice is a case where, after rights of appeal have been exhausted or time for appeal has elapsed, there is evidence that a conviction was wrongful.

reality. Courts base their decisions upon the issues raised by the parties to litigation and the evidence which the parties place before them. This high level of party autonomy may often dictate an outcome that would be different if other techniques were used. This may not be the way the recording angel goes about gathering information, but all forms of human justice have their own limitations, and it is idle to observe that decisions based on issues raised, and evidence advanced, by the parties to cases may not correspond to some form of ideal reality. They may not even correspond to the outcomes where different parties raise different issues or rely on different evidence. It is a commonplace of our justice system that this can occur, and that what is sometimes called the scandal of inconsistent decisions is shown, upon closer examination, to be no more than the consequence of the party autonomy referred to earlier. Subject to that, however, settling disputes or quelling controversies requires respect for finality.

In *The Amptill Peerage*¹⁴, Lord Wilberforce said:

Any determination of disputable fact may, the law recognizes, be imperfect; the law aims at providing the best and safest conclusion compatible with human fallibility, and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry.

In the criminal area, a striking example of the collision between the interest of finality and the need to recognize, and where possible, remedy a miscarriage of justice is a case where, after rights of appeal have been exhausted or time for appeal has elapsed, there is evidence that a conviction was wrongful. In past times, the only available course was to invoke the prerogative of mercy; a pardon was an act of Executive clemency often done after a judicial inquiry. Pardoning a person for an offence which he did not commit was incongruous and likely to bring

less than full satisfaction to the beneficiary. Modern procedures are better tailored to the needs of justice in such a case. Most importantly, convictions can be quashed. It is in the context of alleged wrongful convictions for criminal offences that the law is least ready to treat the book as permanently closed.

*Rogers v The Queen*¹⁵, which concerned an attempt to tender, in later criminal proceedings on a different charge, a confessional statement that had been rejected as involuntary in earlier proceedings, is an example of an application of the concept of abuse of process in a case where issue estoppel would not run. Deane and Gaudron JJ said:

Clearly, the present case is not concerned with the plea of autrefois acquit, the unassailable nature of an acquittal or the need to avoid inconsistent verdicts. Nor is the case one which calls for any consideration of the rule against double jeopardy: the offences with which the accused is charged are distinct offences, unrelated to those on which he was indicted in 1989. The only question is whether the principle which ensures the incontrovertible character of judicial decisions precludes the tender of the records of interview as proposed by the prosecution.

That question was answered in the affirmative. That case appears to me to be a striking example of the use of the concept of abuse of process to achieve a form of finality.

In the civil area, a plain example of the law's preference for finality over an attempt at unattainable perfection is in the assessment of damages in a civil action. The general rule is that damages are awarded in the form of a lump sum on a once-for-all basis. There are obvious reasons why this method is likely to result in over-compensation or under-compensation in a particular case, if by those expressions is meant an assessment based upon assumptions or predictions that later turn out to be wrong.

In an ordinary action in tort for damages for personal injury, the damages awarded to a plaintiff with a substantial life expectancy are based upon

calculations of such items as loss of future earning capacity, cost of future care, and returns on money invested which may represent a prediction that is reasonable at the time but that is inconsistent with later events or circumstances. As a general rule, and subject to the limited possibility of introducing further evidence so long as the appeal process continues, we accept that as part of the system. The system itself is modified from time to time, but insofar as it provides for a lump sum award, it does not even attempt to ensure that, for example, when a plaintiff at last dies, he or she will be found to have been put in the same position financially as if the injury had not occurred. Achieving that sort of just compensation is not part of the system. Lord Wilberforce said, in *Mulholland v Mitchell*⁶, 'a successful plaintiff is awarded a lump sum which is fixed once and for all and it is not revised upwards or downwards in the light of subsequent developments'. Why not? It is commonplace for subsequent developments to falsify an assessment of damages if by that is meant to show that the plaintiff ultimately suffered greater or lesser harm than was the basis of the award. Moreover, since by 'subsequent developments' his Lordship meant developments subsequent to the legal process, it is self-evident that the assessment of damages may be affected by the random factor of the time taken by the litigation. That can be rationalized in terms of justice only on the basis that justice is a practical system and not a cosmic ideal.

In the New South Wales case of *Doherty v Liverpool Hospital*⁷, the Court of Appeal refused to admit, on appeal, evidence of the death of a man who had been injured at work in middle age and then, after trial and an award of damages, had died unexpectedly from another cause. His award of damages had been based on an assumption of normal life expectancy. The court pointed out that so much of what is involved in medical evidence about the future of an injured plaintiff consists of uncertain prognostication that it is probably the rule, rather than the exception, that something happens after a trial which, if it had occurred before the trial, would have altered the assessment of damages. The interest in finality in this context is not merely an influence; it is an integral part of the system by which a plaintiff's rights are determined.

The same can be said of awards of damages for

many breaches of contract. Especially in cases where there is a quantification of future financial loss over a long period, calculations are likely to be based on assumptions about exchange rates, rates of interest, prices, market conditions and all manner of expectations which are later found not to accord with what happens. Consider how the Global Financial Crisis of 2008 would have affected the assumptions that went into an award of damages for financial loss that was made in 2007. Yet because of the finality that is built into the system by which damages are assessed that kind of over-compensation or under-compensation is not treated as a form of injustice.

In a different context, a change in circumstances following a court order may be accepted as an occasion for intervention. In *Barder v Caluori*⁸, a husband had been ordered, in divorce proceedings, to transfer the matrimonial home to his wife. Soon afterwards, she killed the children of the marriage and committed suicide. The House of Lords held that a fundamental assumption on which the original order had been based had been invalidated and that the order should be set aside.

The contrast between that case and an assessment of lump sum damages in a contract or tort case illustrates the importance of context in determining the impact of finality.

To return to the subject of advocates' immunity, in *Giannarelli v Wraith*⁹ and *D'Orta-Ekenaike* the High Court stressed the adverse consequences for the administration of justice that would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings. The judicial power is directed at quelling controversies, and it is part of the judicial system that controversies, once resolved, are not to be re-opened except in narrowly defined circumstances, the most obvious of which is the appellate process. In the English case that overturned advocates' immunity, *Arthur J S Hall v Simons*²⁰, three members of the House of Lords would have retained the immunity in relation to criminal proceedings. The majority said that since a collateral challenge in civil proceedings to a criminal conviction was prima facie an abuse of process, no immunity was required.

More recently, English courts have swept away expert witness immunity²¹. It is difficult to imagine

a more fertile source of collateral challenges to the outcome of a civil or criminal case than a claim in negligence against a witness. Often, of course, there would be practical difficulties in proving causation, especially if the decision-maker, perhaps a judge or perhaps a group of jurors, could not be called to give evidence in the civil action. However, there may be cases in which, if negligence were shown, causation would be easy to infer.

In 2008 the Court of Appeal of New Zealand (where advocates immunity now does not exist) said²²:

Those who give evidence to a court . . . enjoy immunity from suit. The purpose of this immunity is not to encourage dishonest or defamatory submissions or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation.

The difference between expert and non-expert witnesses is not always clear-cut, and non-expert witnesses may have as much capacity to cause harm through careless mistakes as experts. Some experts are paid to give evidence, but some are not. And if a non-expert witness is compensated reasonably for the time required by the case a contract may exist. It will be interesting to see how courts hold the line between witnesses who are immune from suit and those who are not.

So far, however, there is one matter on which judges are unanimous. Judges are immune from suit. I am sure this rule is sound. There is, however, one small cause for regret. If judges could be sued, the distinction between negligence and mere error of judgment would regain its proper place in the law of tort.

Another context in which the interest of finality has always been important, but in which its impact has varied, is that of commercial arbitration. An accurate understanding of this context is assisted by the decision of the High Court in *TCL Air Conditioner (Zhongshan) Co. Ltd v Judges of the Federal Court of Australia*²³ in February this year.

In order to put this matter into perspective, it is necessary to revisit, and it was necessary for the High Court to revisit, some basic principles. There is a tendency on the part of some lawyers, and perhaps even some judges, to regard litigation as the normal

method of dispute resolution, and the only method that is capable of giving appropriate recognition to the rule of law. In truth, civil litigation is not the normal method of resolving commercial disputes. The most common method of resolving commercial disputes is by agreement of the parties, without any outside intervention. Such agreements are usually based upon the parties' appreciation of their own interests, and bargaining strengths, which may or may not reflect their strict legal rights and obligations. An agreement to settle a dispute on that basis creates its own rights and obligations, which may replace the original contract in whole or in part. Sometimes a new agreement is reached between the parties with the assistance of outside intervention by a mediator or facilitator or some other third party who may or may not be a lawyer.

A long-standing technique for resolving commercial disputes is the process of arbitration which, once again, may or may not be aimed at an outcome that reflects the strict legal rights and obligations of the parties under their original contract. It is the cases that are aimed at such an outcome that are most likely to involve lawyers as advocates and as arbitrators, although when I first came into legal practice most arbitrators I appeared before were engineers or architects or builders. That was because at that time in New South Wales the typical arbitration concerned a dispute arising out of a building or construction contract. Courts did not relish building cases, and the system of referees that is now common as an adjunct to civil litigation in such matters had not been developed. London, at the same time, was a flourishing centre of commercial arbitration by lawyers, partly because insurance and shipping contracts written in London provided for arbitration there.

Commercial arbitration, both international and domestic, received a strong impetus from the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration). The Convention is implemented in Australia by the *International Arbitration Act 1974* (Cth). Over 140 states have adhered to it, and undertaken obligations to enforce foreign arbitral awards. This international enforcement regime gives arbitral awards much

more extensive recognition and enforceability than court judgments. Some of Australia's most important trading partners, who have perhaps understandable reservations about committing themselves to enforcing the decisions of foreign courts no matter where they are situated, have bound themselves to the recognition and enforcement of arbitral awards made in a contracting state.

Domestic legislation, in Australia and in comparable jurisdictions such as the United Kingdom and the United States, has historically supported arbitration in a variety of ways, including empowering courts to enforce arbitration agreements by restraining parties from litigating in breach of such agreements, to make orders to facilitate the arbitral process, and to enforce arbitral awards. Arbitration is a process which has its foundation in the agreement of the parties to a contract to submit a dispute to the decision of a third party. The process may be ad hoc, or it may be administered by an arbitral institution. It is normally governed by a body of rules identified in the agreement to arbitrate. By submitting their dispute to arbitration the parties confer on the arbitral tribunal power conclusively to determine it, and the award imposes new rights and obligations in substitution for those the subject of the dispute. The plurality in *TCL* said that the former rights of the parties are discharged by accord and satisfaction.

Arbitration statutes provide for judicial supervision of arbitrations. The capacity for judicial review of awards in international arbitrations has always been relatively limited. For example, the UNCITRAL Model Law, which has been picked up by the Commonwealth legislation in Australia, provides a much narrower scheme of curial intervention than, until recently, had been provided by state laws that were concerned mainly with domestic arbitration. Originally, the general rule was that an award was final and conclusive and could not be challenged on the ground that an arbitrator had made an error of fact or law. As the Privy Council pointed out in a 1979 New South Wales appeal, state legislation in Australia, and United Kingdom legislation, which provided for setting aside awards on the ground of error of law was historically exceptional. Their Lordships said²⁴:

One of the principal attractions of arbitration as a means

of resolving disputes arising out of business transactions is the finality that can be obtained without publicity or unnecessary formality, by submitting the dispute to a decision maker of the parties own choice . . . England and other Commonwealth jurisdictions, including New South Wales, whose arbitration statutes have followed the English model are exceptional when compared with most other countries, in providing procedural means whereby the finality of an arbitrator's award may be upset, if it can be demonstrated to a court of law that his decision resulted from his applying faulty legal reasoning to the facts as he found them.

Because a question of contractual interpretation is regarded as a question of law, and because many commercial arbitrations involve such questions, if a court could be persuaded to take a view on interpretation different from an arbitrator, perhaps in a case where either view was fairly open, then the award would be found to have been based on an error of law. As a matter of public policy, the historically exceptional approach of permitting the setting aside of awards on such a ground was controversial.

The *New South Wales Commercial Arbitration Act 2010* has now substantially brought domestic arbitration in this state into line with international arbitration, and the Commonwealth legislation, by adopting the scheme of the UNCITRAL Model Law, and has gone a long way to restoring the finality that commercial arbitration was originally intended to have.

One of the features of international commercial arbitration that distinguishes it from commercial litigation, apart from the important matter of privacy, is that the parties are often seeking a neutral forum for the resolution of their disputes. Courts have had a good deal to say in recent years about the significance of identifying a natural forum for litigation. It is usually the home jurisdiction of one or other of the parties. That is exactly what many parties to international commercial transactions do not want. They may distrust, or at least not have complete confidence in, litigation in the home jurisdiction of the other party. They seek out, not a natural forum, but a neutral forum. Procedures for appointing arbitrators who are independent and impartial also reflect this emphasis on neutrality. In a typical case dealt with by the Singapore International Arbitration Centre, for example, the parties, the

arbitrators, and some or all of the lawyers, are likely to be from somewhere other than Singapore, and the contract out of which the dispute arises will have no connection with Singapore other than that it has been selected as the place of arbitration. The main reasons why parties to an international transaction may prefer arbitration to litigation are, first, privacy; secondly, the neutrality of the forum; thirdly, the capacity to choose their own decision-makers; fourthly, the regime of enforcement provided by the New York Convention and, fifthly, the comparative finality of the arbitral process.

When parties to an international transaction include an arbitration clause in their contract they sign up to a dispute resolution regime of comparative finality. Of course, after an award has been made, the loser's enthusiasm for finality is likely to diminish. The disputes are almost always about money, often in large amounts, and where money is concerned there are not many good losers. However, if an arbitral process is treated as if it merely adds one layer to the hierarchy of potential decision-making then the system is self-defeating. Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court. There could be a number of reasons for that. The policy of Commonwealth and New South Wales legislation is to help them achieve that objective. This is regarded, both here and abroad, as a means of encouraging and facilitating international trade.

The idea of justice according to law has a number of elements such as procedural and substantive fairness, reasonable access to independent and impartial courts, openness of process, and an absence of unnecessary cost and delay. Another element is reasonable finality. This reflects the public interest in a manageable system by which disputes, once raised, may be put to rest, and the private

interest in avoiding unfair vexation. Finality is closely related to accessibility. Without it, the system would collapse under its own weight. Some of the ways in which the system respects the interest of finality are clear-cut, such as the principles governing appellate review, the method of assessing damages in tort and contract cases, and the rules relating to *res judicata*, issue estoppel and double jeopardy. In some other respects, such as in the concept of abuse of process, the principles are more open-ended. Either way, finality has a powerful influence on the shape of the legal system and the content of legal principle.

Endnotes

1. (2005) 223 CLR 1.
2. [2002] 2 AC 1 at 31.
3. [2002] 2 AC 1 at 27.
4. *Barrow v Bankside Agency Ltd* [1996] 1 SLR 257 at 260.
5. (1843) 3 Hare at 115, 67 ER at 319.
6. [2002] 2 AC 1 at 31.
7. [1981] HCA 45; (1981) 197 CLR 589.
8. *Eg. Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42.
9. [1992] HCA 61; (1992) 175 CLR 621.
10. (1988) 164 CLR at 434-435.
11. (1986) 162 CLR 1 at 7.
12. As to the difference between an appeal by way of re-hearing and a re-trial or hearing de novo see *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 208-209 per Windeyer J and *Builders Licensing Board v Sperway Constructions (Syd) Ltd* (1976) 135 CLR 616.
13. (2002) 213 CLR 635.
14. [1977] AC 547 at 569.
15. (1994) 181 CLR 251.
16. [1971] AC 666 at 680.
17. (1991) 22 NSWLR 284.
18. [1988] 1 AC 20.
19. (1988) 165 CLR 543.
20. [2002] 1 AC 615.
21. *Jones v Kaney* [2011] UKSC 13.
22. *New Zealand Defence Force v Berryman* [2008] NZCA 392.
23. [2013] HCA 5.
24. *Max Cooper & Sons v University of NSW* [1979] 2 NSWLR 257 at 260.

On deployment to Afghanistan

James Renwick SC writes, in a personal capacity, about his tour of duty in Afghanistan

The 2002 *Bar News* records that Slattery QC (as His Honour then was) had recently deployed on active service with the Australian Defence Force to the Gulf of Arabia. In 2013, having succeeded to his Honour's role as head of the NSW Navy Reserve Legal Panel (founded by Sir Laurence Street nearly fifty years ago), I deployed to Afghanistan for a short time in April this year. I am not the first member of the New South Wales Bar to deploy to that country: Lieutenant-Colonel David McLure of 7 Wentworth deployed for six months with the Special Operations Task Group in 2010. This note sets out some brief details of the deployment.

Getting ready to deploy

Nothing fully prepares you for the experience, but the Defence Force leaves little to chance. Before leaving Australia, there is a week-long course, and at the Middle East staging point in the United Arab Emirates, there is further preparation. Some is definitely targeted at the twenty-somethings who make up the bulk of those on active service. The message to not overdo body-building substances was probably wasted on me, and when I asked, only half joking 'What's Facebook?' the response was 'Sir, I just noticed - you've got gray hair - you can sit this session out.'

But other sessions were deadly serious. Although arming lawyers seems to me - in my capacity as a barrister - to be asking for trouble, no-one except the Padre is exempt from bearing arms on deployment to Afghanistan. In my case this meant being sufficiently competent to use a Steyr rifle and a Browning pistol. We also had sobering but invaluable briefings on the types of threats we might face including rocket attacks and the threat of 'green on blue' insider attacks, lessons on how to recognise improvised explosive devices, a hands-on practical on how to treat catastrophic injuries in the field while under simulated attack, as well as sessions on how to try to cope with being taken hostage.

I had spoken to everyone I could about the experience of being an ADF lawyer on operations. I also did some general reading and in particular read William Dalrymple's *Return of a King: The Battle for Afghanistan, 1839-42* about the First Afghan War, which he contends has much to say about current



events, and Chris Masters' *Uncommon Soldier: The Story of the Making of Today's Diggers* which is certainly about current events in Afghanistan.

The ADF has detained a number of Taliban insurgents and others suspected of offences against Afghan law since 2001. My role was to assist in the periodic audit of all aspects of that detention against the requirements of the Australian Government, which were explained by the defence minister to parliament on 7 February this year as follows:

Australia approaches its responsibility for treating detainees with dignity and respect with the utmost seriousness and is committed to conducting detention operations in accordance with our domestic and international legal obligations. Australia's detainee management framework for operations in Afghanistan has two priorities: firstly, removing insurgents from the battlefield, where they endanger Australian, ISAF and Afghan lives; and secondly, to ensure the humane treatment of detainees, consistent with Australia's domestic and international legal obligations.

The audit team had disparate specialities, but all made me, as a reservist deploying for the first time, very welcome.

Deployment

After all of this preparation, it was a relief to finally board the RAAF Hercules aircraft and fly to Tarin Kowt where the main Australian force is presently located. Kevlar helmet, body armour and ammunition



The Australian Special Operations Task Group (SOTG) commemorated ANZAC Day with a solemn dawn service held at The Memorial, Camp Russell, Tarin Kowt. Photo: Australian Government Department of Defence.

weighing all up about twenty-five kilos, are worn on the flight, and weapons are carried. The pilots were kind enough to invite me up to the flight deck, and from there you appreciate, as you fly past Iran and then over Pakistan into Afghanistan, that you are in a particularly volatile part of the world.

Our presence in Afghanistan dates back, intermittently, to 2001. But the stated legal basis for our presence there has changed over time. It will be recalled that the United States treated the events of 11 September 2001 as an armed attack upon it justifying invocation both of the inherent right of self-defence enshrined in Article 51 of the United Nations Charter and for the first time, the ANZUS Treaty.

That marked the start of Operation Enduring Freedom for the USA and Operation Slipper for the Australian Defence Force. Both operations continue but in about 2003 NATO control of the mission emerged, and Security Council Resolution 1510 under Chapter VII of the United Nations Charter authorised the use of force for the maintenance of security and supporting security and stability, initially in Kabul,

and then later throughout the country to maintain that security so that reconstruction and humanitarian efforts could continue. The resolutions have been renewed as necessary.

The flight into Tarin Kowt is spectacular. It sits at the base of the Hindu Kush, which extends from there north for about 800 kilometres to the Himalayas. Tarin Kowt itself is in a river valley with snow-covered mountains, with much greenery around the river. Afghanistan itself appears to have ample water supply and, at least in the river plains, fertile soil and healthy crops.

In Tarin Kowt itself there are mainly Australian and United States troops and the Australian forces are concentrated on Camp Holland, the general base, from where Combined Team – Uruzgan, and an Infantry battalion operate, and Camp Russell, the special forces base from which the Special Operations Task Group conducts operations to disrupt insurgent operations and supply routes. There is a large airfield and much aerial activity.

Except for those going ‘outside the wire’ we lived

Except for those going ‘outside the wire’ we lived and worked in reinforced shipping containers which occasionally, although fortunately not in my case, are hit by rockets fired in by the Taliban.

and worked in reinforced shipping containers which occasionally, although fortunately not in my case, are hit by rockets fired in by the Taliban. The work ethic is impressive, particularly given how young most soldiers are. Everyone works seven days a week. There is no alcohol. Relaxation takes the form of going to the gym, where as you would expect there are some very fit people: a colleague suggested a special forces soldier come for a run, he declined as he had already been on the treadmill for two hours that day!

Everywhere there is dust, and the extremes in temperature go from snow in the winter to considerable heat at the height of summer. Local life is very different from our own life: one local prosecutor with whom we had a 'shura' or consultation, said that the Taliban had tried to blow him up three times that month.

From Tarin Kowt we flew to Kabul, where there are about 6,000 NATO and other troops on the base adjacent to the Kabul International Airport. Kabul is about 1,800 metres above sea level and there was much more snow visible on the mountains. There is a kaleidoscope of uniforms, some very stylish.

Inevitably there were gripes: given the cuisine his country is famous for I asked one French officer, while waiting in line at the canteen, what he thought of the deep fried and double deep fried food, to which he replied 'for ze first evening it was quite amusing, but ze next five months were not amusing at all!'.

I returned home early on ANZAC morning. It took about 10 days to get over not carrying a firearm all the time, and to get used again to privacy rather than barracks life, and not worrying about threats or the unexpected. What remains, though, is enormous pride in the professional work being done by the ADF in difficult conditions and in having played a brief, small, part in that undertaking.

... one local prosecutor with whom we had a 'shura' or consultation, said that the Taliban had tried to blow him up three times that month.



Marriage equality before the US Supreme Court

Jonathon Redwood reports on *United States v Windsor* and *Hollingsworth v Perry*

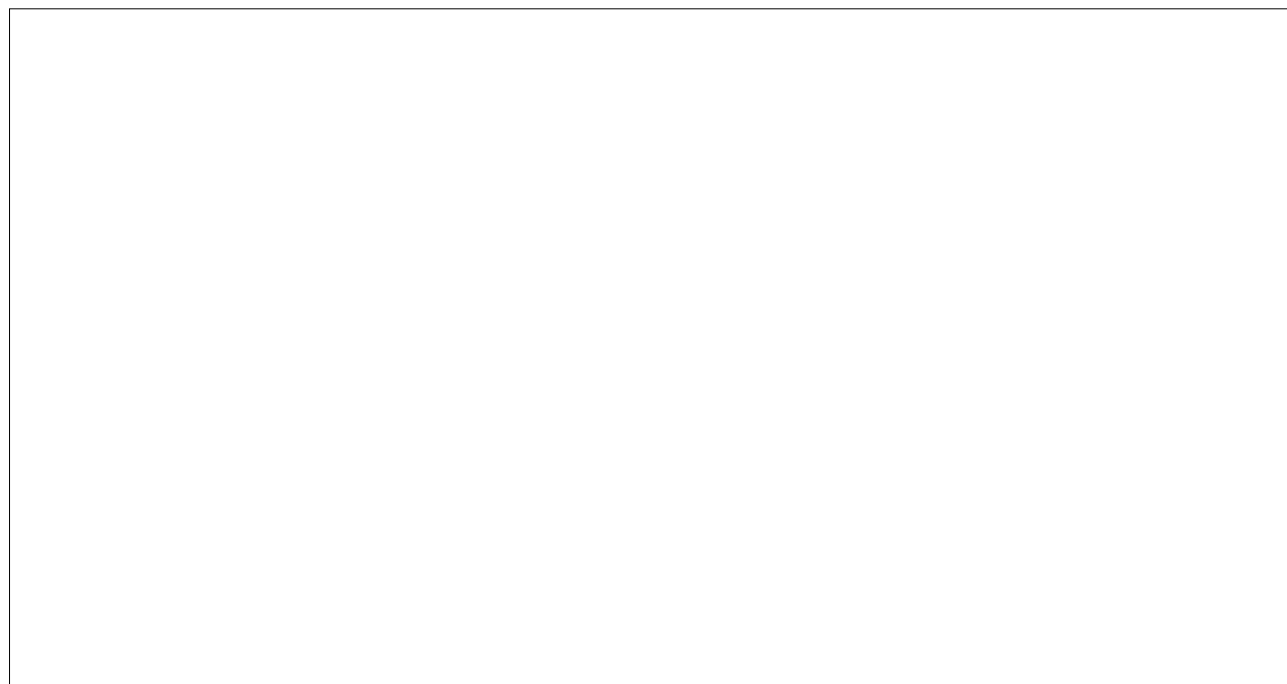


Photo: Mark Wilson / Getty Images

Introduction

In the nineteenth century de Tocqueville observed, ‘Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.’¹ And so, perhaps sooner than expected, on 26 June 2013 the Supreme Court handed down two decisions that, taken together, have important consequences for the resolution of the gay marriage debate in the United States. Apart from its topical significance, to the constitutional lawyer, the decisions address significant issues of federalism, equality and due process and the nature of judicial power.

In *Windsor* a majority of the court (5 to 4) struck down the federal Defence of Marriage Act which denied a wide range of federal benefits to gay couples lawfully married under state law. The court split on largely entrenched ideological lines with the majority opinion authored by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor and Kagan), so often the court’s decisive ‘swing vote’ on constitutional issues of great importance.

The *Hollingsworth* decision was more prosaic in its holding but had the important consequence of leaving in place the decision at first instance striking down California’s ban on same-sex marriage. The vote in the California case was also 5 to 4, but with

a different and unusual alignment of Justices. Chief Justice Roberts wrote the majority opinion and was joined by Justices Scalia, Ginsburg, Breyer and Kagan.

Whilst the decision in *Windsor* turned upon unique features of the U.S. constitutional law, both decisions address important issues about the scope and legitimacy of judicial power that should be of interest and relevance to Australian constitutional lawyers.

Background

As noted by Chief Justice Roberts and Justice Alito, the public in the United States, as in Australia, is currently engaged in an active political debate about whether same-sex couples should be allowed to marry. At its core, that debate is about the nature of the institution of marriage. In the United States, that political debate has resulted in some states, whether by legislative action or community plebiscite but in either cases through democratic political processes, deciding to extend the institution of marriage to gay couples. Others have acted to confine the institution to its traditional understanding as exclusively between a man and a woman. Along the way, there have been various judicial decisions that have struck-down as unconstitutional, as in violation of equal protection, state laws denying the institution of marriage to gay couples. Until recently, however, the

Supreme Court has not been thrust into the vortex of this controversy.

United States v Windsor

The facts in *Windsor* may be briefly stated. Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act (DOMA), which excluded a same-sex partner from the definition of 'spouse' as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of that provision. The United States District Court and the Court of Appeals ruled the statute unconstitutional and ordered the United States to repay Windsor a refund.

The majority opinion by Justice Kennedy

Justice Kennedy, joined by Justices Ginsberg, Breyer, Sotomayor and Kagan, held DOMA unconstitutional. The constitutional basis for striking down the federal law appears to combine an amalgam of constitutional rationales: elements of federalism, equal protection and due process.

The Article III separation of powers issue

Before addressing the merits of DOMA's validity, Justice Kennedy had to overcome a threshold Article III objection to the court deciding this issue. This arose because the Obama administration continued to enforce the federal law, but it urged the justices to strike it down as unconstitutional. This promoted House Republicans to step in and defend the law. It was this unusual procedure posture that raised a basic objection that the 'case' and 'controversy' requirement of Article III of the U.S. Constitution had not been met. Article III requires 'concrete adverseness' between the parties to enliven a federal court's jurisdiction and authority to decide. There are clear parallels, yet differences, between this requirement and the notion of 'matter' under Ch III of the Australian Constitution.²

Justice Kennedy was satisfied that this requirement

was met for three reasons. First, he said that the U.S. Government retained a stake in the case because an order directing the national Treasury to pay money is a real and immediate economic injury, even if the Executive may welcome the order to pay the refund. Secondly, the adversarial presentation of the issues was ensured by the participation of *amici curiae*, renowned constitutional scholar, Professor Vicki Jackson, to vigorously defend DOMA's constitutionality. Finally, Justice Kennedy relied on so-called 'prudential' considerations of 'judicial self-governance'. Because the 'rights and privileges of hundreds of thousands of persons' were at stake, Justice Kennedy wrote, it was urgent that the court act. The cost in judicial resources and expense of litigation for all persons adversely affected would be immense. Federal courts throughout the nation, said Justice Kennedy, would be without precedential guidance in cases involving over 1,000 federal statutes. He also considered it would undermine the separation of powers and the court's emphatic duty to what the law is (citing *Marbury v Madison*) for the Executive at any moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the court.

The validity of DOMA

Justice Kennedy commenced his analysis on the constitutionality of DOMA by noting that until recent times marriage between a man and a woman had no doubt been thought of by most people as essential to the very definition of that term and its role and function throughout the history of civilization. However, reflective of a 'new perspective, a new insight', some states had concluded that same-sex marriage should be given recognition and validity to those same-sex couples that wished to define themselves by their commitment to one another. New York, for example, 'after a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage,' decided to enlarge the definition of marriage to remedy the contemporary injustice of denying marriage to same-sex couples. The State of New York had thus acted to give further protection and dignity to that bond by granting it an important lawful status. Justice Kennedy emphasised:

This status is a far-reaching legal acknowledgment of the

intimate relationship between two people, a relationship deemed by the state worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

Importantly, and in sharp contradistinction to Australia, Justice Kennedy noted, as a matter of federalism, that by history and tradition the definition and regulation of marriage and domestic relations had been treated as virtually the exclusive province of the states. Against this background, DOMA rejected the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each state, though they may vary, subject to constitutional guarantees, from one state to the next. Rather, DOMA operated to deny recognition of the state's definition of the class of persons entitled to marriage to impose a set of restrictions and disabilities on a sub-set of the class. This constituted a deprivation of the liberty and due process protected by the Fifth Amendment because '[w]hat the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the state seeks to protect.'

Turning to the equal protection analysis, central to Justice Kennedy's reasoning was his conclusion that DOMA was motivated by a desire to harm gay couples and their families thereby demeaning the 'moral and sexual choices' of such couples and treating their lawful unions under state law as 'second-class marriages for purposes of federal law.' Under U.S. constitutional law equal protection doctrine has adopted a three-tiered standard of review of laws that have disparate treatment of a group: rational-basis review, intermediate scrutiny and strict scrutiny. Laws subject to heightened scrutiny under a strict scrutiny or intermediate standard a compelling or important state interest to justify differential treatment. Justice Kennedy, however did not analyse DOMA along this settled framework of analysis. Rather, as with the Texan law proscribing homosexual conduct struck down in *Romer v Evans*,³ he concluded DOMA violated a more basic precept of U.S. equal protection jurisprudence: a law which is motivated by a bare desire, an improper *animus* or purpose, to harm a politically unpopular group

cannot justify disparate treatment.

Justice Kennedy concluded that was 'strong evidence' the purpose and effect of DOMA was to disapprove of same-sex couples as a class. What was this strong evidence? He pointed to the title of the Act itself and made selective reference to certain congressional reports expressing moral disapproval of homosexuality.

It followed that the avowed purpose and practical effect of the DOMA was to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states. It identified a subset of state-sanctioned marriages and made them unequal by writing inequality into the entire United States Code of over 1,000 statutes. It thereby burdened them in a visible and public way by, for example, preventing them obtaining government health care benefits and special bankruptcy protection to denying them and their families tax benefits. He concluded:

DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

The dissenting opinions

Chief Justice Roberts wrote briefly only to emphasise that the majority's decision was based on federalism and does not decide whether states may validly

enact laws denying the institution of marriage to homosexuals consistently with the Fourteenth Amendment and the Fifth Amendment. He and Justice Thomas otherwise joined in Justice Scalia's dissent.

Justice Scalia

Not uncharacteristically, Justice Scalia read a blistering dissent from the bench. He plainly regarded the majority's reasons for invoking the court's jurisdiction to decide the merits of the case as self-indulgent sophistry. He said:

The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the 'judicial Power,' a power to decide not abstract questions but real, concrete 'Cases' and 'Controversies.' Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?

Justice Scalia said that the proceedings had been a 'contrivance' to elevate the matter to Supreme Court because the petitioner's position, the United States, was precisely aligned with Windsor. There was, therefore, no real controversy before the court. He said that 'judicial power' is not, as the majority asserted, the power to 'say what the law is', giving the Supreme Court the primary role in determining the constitutionality of laws. Judicial power is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government of other private persons. Sometimes, Justice Scalia observed, the parties agree as to the fact but disagree as to the applicable law, and it is only in that event that it becomes 'the province and duty of the judicial department to say what the law is.' Courts perform that role 'incidentally' only when it is necessary to quell the dispute before them, so Justice Scalia explained:

The majority brandishes the famous sentence from *Marbury v. Madison*, 1 Cranch 137, 177 (1803) that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' Ante, at 12 (internal

quotation marks omitted). But that sentence neither says nor implies that it is always the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a 'primary' one. The very next sentence of Chief Justice Marshall's opinion makes the crucial qualification that today's majority ignores: 'Those who apply the rule to particular cases, must of necessity expound and interpret that rule.' 1 Cranch, at 177 (emphasis added). Only when a 'particular case' is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law... There is, in the words of *Marbury*, no 'necessity [to] expound and interpret' the law in this case; just a desire to place this Court at the center of the Nation's life.

Consequently, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded the court had no jurisdiction to hear the case and characterised the majority's decision was an impermissible assertion of judicial supremacy.

As to the merits of the constitutional attack on DOMA, Justice Scalia took aim at the majority for assigning an unjustified animus and 'hateful' collective motive to Congress based on 'snippets' of legislative history and the 'banal' title to the Act. He said:

To defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement... All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.

He rebuked the majority for simplifying a complex question that should be decided democratically, and not by judges. According to the majority, wrote Scalia, the story is 'black-and-white: Hate your neighbor or come along with us.' 'The truth is more complicated', he said.

Justice Alito

In Justice Alito's view the Constitution was silent on the issue of gay marriage and did not dictate Congressional choice on the nature of the institution of marriage. Same-sex marriage 'presents highly emotional and important questions of public policy' and any change on a question so fundamental should be made by the people, where ultimate sovereignty rests.

The court was being asked to resolve a debate between two competing views of marriage. The first or 'traditional' view, which views marriage as an intrinsically opposite-sex institution created for the purpose of 'channeling heterosexual intercourse into a structure that supports child rearing'. Justice Alito observed that 'throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.' He described the competing and 'newer' view of marriage as one that defined marriage as the 'solemnization of mutual commitment'. He said that popular culture is infused with this understanding of marriage and that, so understood, gender differentiation is irrelevant making the exclusion of same-sex couple from the institution of marriage 'rank discrimination'. He said that the Constitution does codify or enshrine either view and leaves it to the people to decide through their elected representatives.

Hollingsworth v Perry

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution.⁴ Later that year, California voters passed the ballot initiative, known as Proposition 8. That proposition amended the California Constitution to provide that only marriage between a man and a woman is valid and recognized in California. The California Supreme Court subsequently observed that Proposition 8 was validly enacted pursuant to California law and did not disturb the constitutional requirement that same-sex couples enjoy the same rights, protections and benefits of marriage but reserved the official 'designation' only of the term 'marriage' to the union of opposite-sex couples. The respondents, same-sex couples who wished to marry, filed suit in

federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and naming as defendants California's Governor and other state and local officials responsible for enforcing California's marriage laws. The officials refused to defend the law, so the District Court allowed petitioners—the initiative's official proponents (private citizens who had acted under the voting initiative process provide for by California law)—to intervene to defend it. After a bench trial, the court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but the petitioners, who initiated Proposition 8, did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have authority to assert the state's interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California Supreme Court answered in the affirmative, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8's constitutionality. On the merits, the court affirmed the District Court's order. The Ninth Circuit concluded that 'taking away the official designation' of 'marriage' from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the state. Proposition 8, in the court's view, violated the Equal Protection Clause because it served no purpose 'but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships.'

Majority opinion by Chief Justice Roberts

Chief Justice Roberts authored the majority opinion holding that the petitioners did not have standing to appeal the District Court's order.

Chief Justice Robert's commenced his opinion by emphasizing the importance of the 'case' and 'controversy' requirement in ensuring that the courts only decide real controversies and act as judges and not engaging in policymaking properly left to the elected representatives. For the case or controversy requirement to be satisfied, the party must have standing which requires that they have suffered a concrete and particularised injury.⁵ According to Chief Justice Roberts, the petitioners had no 'direct

stake' in the outcome of their appeal. Their only interest in having the District Court decision reversed was a generalized one concerned with the validity of generally applicable California law. They had no interest in defending the law that was distinguishable from every citizen of California. That was a not a sufficiently particularized injury necessary to engage the 'case' and 'controversy' requirement of Article III.

He also rejected the petitioners' argument that their ongoing participation in the proceeding was authorised by state law. The petitioners held no political office and had always participated in the litigation solely as private parties. The petitioners were also plainly not agents of the state. The basic features of an agency relationship were missing. Agency requires more than the mere authorization conferred by California law to assert a particular interest in the subject-matter of the litigation. They were not subject to the control of any principal and they owed no fiduciary relationship to anyone.

Dissenting opinion by Justice Kennedy

In a respectful dissent, Justice Kennedy, joined by Justices Thomas, Alito and Sotomayor, would have found standing was satisfied and answered the question of whether Proposition 8 is constitutional. He acknowledged that 'the court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject' but, said Justice Kennedy, 'it is shortsighted to misconstrue principles of justiciability to avoid that subject'. He concluded that the majority had failed to respect the California initiative process, a process which embodies the very essence of democracy that the right to make law rests in the people and flows to the government.

Comment

The distinguished former Solicitor-General for the United States, Archibald Cox, observed:⁶

Constitutional adjudication depends, I think, upon a delicate, symbiotic relation. The Court must know us better than we know ourselves. Its opinions, may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves. In such cases the Court has an influence just the reverse of what Thayer feared; it provides a stimulus and quickens moral education. But while the opinion of

Court can help to shape our national understanding of ourselves, the roots of its decisions must already be in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. The legitimacy of great constitutional decisions rests upon an accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command consensus.

The decisions, no doubt, will play an important role in shaping the 'national understanding' and moral debate on the divisive issue of gay marriage. And whether those decisions, ultimately, like previous seminal rulings of the Supreme Court on equal protection, command an enduring acceptance will likely depend upon the extent to which the court has captured what Dworkin has described as 'ethical attitudes that are widespread in the community' reflective of a 'deep and dominant contemporary opinion',⁷ as well as whether it has acted within the structural restraints imposed on the exercise of judicial power by Article III of the US Constitution.

Several other brief observations may be noted. First, as Chief Justice Roberts was at pains to emphasise, the decision did not address the central question of whether states may pass laws that confine the institution of marriage to a man and a woman. As Justice Scalia observed, much of the reasoning though could readily be transplanted to that question which is likely to be before the court in the next Term.

Second, recourse to the decision in *Windsor* can have no footing under Australian constitutional law where the federalism issue on marriage is the inverse of the United States and where the Australian Constitution has no explicit guarantee of equal protection and an implied doctrine of legal equality of the kind advanced by Deane and Toohey JJ in *Leeth v the Commonwealth*⁸ has not been accepted.⁹ For better or for worse, the issue of gay marriage in Australia is a question that can only be resolved by the Australian Parliament.

Third, the reasoning of Justice Scalia, notwithstanding its caustic tone, on the separation of powers issue in *Windsor*, has force. For the court to have decided such an important issue on the back of such an illusory controversy is ultimately damaging to

the court's institutional integrity which hinges on deciding real controversies impartially and within the institutional constraints of judicial power. The majority's invocation of 'prudential' considerations, appears opportunistic and inverted. As Justice Scalia rightly observed, to the extent such nebulous considerations have any role to play, they are institutional considerations for declining to exercise jurisdiction where a real controversy exists, not the other way around.

Fourth, the legal recognition (or non-recognition) of marriage, and by parity of reasoning divorce, in a federal structure such as the United States presents difficult issues of choice of law and full faith and credit.

Fifth, it is initially tempting to be persuaded by Justice Alito's reasoning that the issue of gay marriage is a complex issue of social policy with reasonably arguable competing viewpoints that should be resolved through political processes by the people; *a fortiori*, where the Constitution is conspicuously silent on the issue. Yet this reasoning overlooks that the open-textured language of the Fifth Amendment and Fourteenth Amendment do not specifically address *any* concrete issue of equal protection. It says nothing about racial discrimination, denying women the vote or proscribing homosexual conduct. Rather, it establishes a broad principle of equality to be applied to a myriad of circumstances across time in an evolving society. There is assuredly room for degrees of judicial deference to the political branches in answering questions provoked by the equal protection clause, yet it is no answer by the judicial branch to avoid the question of gay marriage because it involves assessments of moral judgment, as if the universe between moral and legal judgments is hermetically divided.¹⁰ Every decision by the court about equal protection is a decision necessarily requiring moral judgments for the equal protection clause itself lays down a deeply moral principle and, therefore, invites judgments as to the conformity of governmental conduct with that broad principle of natural law origins.

Finally, the majority in *Windsor* arguably overreached in ascribing a hostile animus to Congress in enacting DOMA. The evidence of such an animus, by Congress *as whole*, was not strong, as the majority concluded.

Such a sweeping and damning conclusion should not be lightly attributed to the legislature and is calculated to fan division within the community rather than persuade the competing protagonists that a principled, dare I say moral, alternative is to be preferred. The majority may have been driven to this line of reasoning because its established doctrine otherwise provided no straightforward path home. As Justice Alito observed, it is difficult to see how the right of gay couples to marry can be characterised as a 'fundamental right' because settled doctrine requires the right to be 'deeply rooted in the Nation's history and tradition'. And rational basis review is a standard of review that is otherwise deferential to the political branches.

But it is open to contend that denying gay couples the institution of marriage cannot be sustained on any rational basis, or more precisely, no state legitimate state interest can justify the differential treatment. After all, it is avowedly the objective human characteristic of being homosexual that is the predominant explanation for *why* gay people have historically, and continue, to be denied the status of having their union described and treated as marriage. The court would be on a more principled and enduring course were it to address, and persuasively refute, the competing explanations (historical, traditional, practical or otherwise) that seek to justify this ongoing differential treatment in contemporary society, instead of condemning those with a competing viewpoint as just mean-spirited.

Endnotes

1. De Tocqueville, *Democracy in America* (1956, reprint), p 280.
2. See *Truth About Motorways v Macquarie* (2000) 200 CLR 591 at [171]-[175].
3. 517 U.S. 620 (1996).
4. In *re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384.
5. Cf. *Croome v Tasmania* (1997) 191 CLR 119.
6. Cox, *The Role of the Supreme Court in American Government* (1976, Oxford University Press), pp 117-118.
7. Dworkin, *Law's Empire* (1986), p 388.
8. (1992) 174 CLR 455 at 484.
9. *Kruger v The Commonwealth* (1997) 190 CLR 1 at 63-68.
10. See Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries, Constitutionalism: Philosophical Foundations* (1998, Cambridge University Press), p 152.

Verbatim

In *McQuigginn, Warder v Perkins*, handed down 28 May 2013, the US Supreme Court examined a US statute, the Antiterrorism and Effective Death Penalty Act or AEDPA, which limits the circumstances in which a person can make application for habeas corpus. The court held by majority that the AEDPA was subject to an exception to allow a prisoner such as the respondent (convicted of first degree murder, serving life without parole) to bring such an application if among other things fresh evidence had emerged giving him or her a convincing claim of actual innocence. What follows is an extract from the vigorous dissenting judgment of Scalia J (references omitted), who addressed the reasoning of the majority directly. Hart & Wechsler, by the way, is a popular US legal textbook on the topic of federal courts and jurisdiction.

Congress clearly anticipated the scenario of a habeas petitioner with a credible innocence claim and addressed it by crafting an exception (and an exception, by the way, more restrictive than the one that pleases the court today). One cannot assume that Congress left room for other, judge-made applications of the actual-innocence exception, any more than one would add another gear to a Swiss watch on the theory that the watchmaker surely would have included it if he had thought of it. In both cases, the intricate craftsmanship tells us that the designer arranged things just as he wanted them.

The court's feeble rejoinder is that its (judicially invented) version of the 'actual innocence' exception applies only to a "severely confined category" of cases. Since cases qualifying for the actual-innocence exception will be rare, it explains, the statutory path for innocent petitioners will not 'be rendered superfluous.' That is no answer at all. That the court's exception would not entirely frustrate Congress's design does not weaken the force of the state's argument that Congress addressed the issue comprehensively and chose to exclude dilatory prisoners like respondent. By the court's logic, a statute banning littering could simply be deemed

to contain an exception for cigarette butts; after all, the statute as thus amended would still cover something. That is not how a court respectful of the separation of powers should interpret statutes.

Even more bizarre is the court's concern that applying AEDPA's statute of limitations without recognizing an actual-innocence exception would 'accord greater force to a federal deadline than to a similarly designed state deadline.' The court terms that outcome 'passing strange,' but it is not strange at all. Only federal statutes of limitations bind federal habeas courts with the force of law; a state statute of limitations is given effect on federal habeas review only by virtue of the judge-made doctrine of procedural default.

With its eye firmly fixed on something it likes—a shiny new exception to a statute unloved in the best circles—the court overlooks this basic distinction, which would not trouble a second-year law student armed with a copy of Hart & Wechsler. The court simply ignores basic legal principles where they pose an obstacle to its policy-driven, free-form improvisation.

The court's statutory-construction blooper reel does not end there.

Lawyers and commercialism: help or hindrance?

The following is an edited version of a speech by Chief Justice Bathurst, delivered at the Rotary Club of Sydney on 16 April 2013

I have chosen to you speak to you about the role of lawyers and the law in commercial activity in Australia. Specifically I would like to pose this question: are lawyers a help or hindrance to commercialism? Now, there are any number of lawyer jokes I could tell you that would provide a quite emphatic, though not very polite, response to the question. I will however avoid repeating them - as former Chief Justice Spigelman once remarked, it is usually best to avoid telling lawyer jokes to mixed legal and non legal audiences, because the lawyers don't find them funny, and no else realises they are jokes.

You may wonder why it is important to consider the role of lawyers in commercialism. There are at least two reasons. First, as I will go on to discuss, analysing when and how lawyers contribute to economic efficiency has implications for our attitude to legal regulation of corporate and commercial life, including questions of when regulation is appropriate and our approach to enforcement.

Second, in the absence of such a discussion, the economic importance of the legal system is often overlooked. Along with many of my judicial colleagues, I have often commented that the law is a profession not a business, and that the courts are an arm of government, whose work cannot be evaluated in purely financial terms. However, that does not mean that the legal system does not have economic value. As former High Court Chief Justice Murray Gleeson has put it:

The economic significance of an effective system of administration of justice is generally undervalued. Perhaps the system is a victim of managerial bias towards calculation: if something is difficult to measure, it is often treated as unimportant; if it is impossible to measure it is often treated as if it did not exist. Economic rationalism should be comprehensively rational. If proper attention were given to the economic importance of the institutional framework within which commerce and industry function, then courts throughout Australia might compete for government funding on better terms.¹

No doubt I have now given away that I have a little skin in the game. In any case, given that I practised as a barrister in commercial and corporate law for some 35 years before I came to the bench, it is no doubt unsurprising that I believe lawyers and the legal system play an important, indeed essential, role



in facilitating efficient business operations.

This occurs in at least three ways. At the most general level, the legal system is a necessary precondition to organised commercial activity. Without the law, for example, there are no property rights. To quote the late economist Mancur Olsen 'individuals may have possessions, the way a dog possesses a bone, but there is private property only if the society protects and defends a private right to that possession...to realise all the gains from trade...there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market.'²

Second, lawyers help to minimise the costs of commercial transactions - which is somewhat ironic given that what business calls 'transactional costs' lawyers call 'income'. Sound advice and assistance in drafting commercial agreements for example, can help businesses avoid future disputes and resolve present ones efficiently. Legal advice can also alert companies to potential pitfalls in the way they are currently operating and highlight new opportunities and ways of structuring their operations. Just recently for example, I read about a 19th century conveyancing lawyer who saved his clients from some ninety million pounds of stamp duty for which they would have been liable, had they structured a partnership deed in the way they intended.³ I can't

even compute how much that would represent in today's dollars, but I think you could safely call that earning your keep.

Third, and critically, the value of lawyers to business is evident from the complex body of regulation attaching to commercial activity in Australia: it is no overstatement to say that it would be impossible for business to navigate corporate and commercial regulation in the absence of legal advice.

Of course if this seems like a very convenient piece of circular logic to you, that is because it is: lawyers are necessary for business because so much legal regulation exists. Nifty, isn't it?

In all seriousness though, as one, if not the, primary function of lawyers in this context is to ensure and enforce compliance with the web of regulation affecting commercial activity, truly assessing the help or hindrance of lawyers to commercialism inevitably requires analysing the commercial value of regulation itself. It is on this topic that I propose to focus the remainder of my address.

Let me first make a few disclosures. I am not a total free marketeer. I am also not a person who believes that there should be regulation simply for the sake of it. In my view, regulation can only be justified in two circumstances. First, where it is necessary to protect the public and second, where it operates to eliminate or control distortions in the market, or what are sometimes described as externalities.

It would take too long, and be very unjudicial of me, to spend today pointing out regulation that does not, in my view, meet those imperatives. What I would like to do is focus on particular areas that show that regulation that is legitimately directed to these aims is desirable in the public interest and has an economically positive effect. In that context I will consider the role that legal regulation plays in three areas that threaten efficient markets: insider trading, anti competitive behaviour, and risk externalities.

My position today is not uncontroversial. While it is fairly orthodox, in this country at least, to see some positive role for legal regulation in markets, there are many people – including a significant number of Nobel Prize winning economists – who would argue that markets should be left to self regulate. That view is grounded in an intellectual tradition stretching

back to early laissez-faire industrial capitalism, which views the market as best placed to ensure resources are allocated efficiently. Consequently, what could loosely be called the 'anti-regulatory position' argues that government regulation only distorts economic activity, including for example by creating monopolies; that markets correct themselves, making regulation unnecessary; or alternatively that the cost to business of complying with regulation places a greater financial burden on users than the market imperfections themselves would. I'll apologise right now to any economists in the room – I know that was a gross oversimplification. My undergraduate economics courses were a long time ago.

...the Australian regulatory approach also recognises that markets are imperfect and therefore that complete deregulation cannot be relied on to maximise economic efficiency.

Many things can be said in favour of the view that markets should self regulate. Indeed the entire approach to corporate and commercial regulation in Australia is founded on the assumption that markets function best with minimum interference, and that focus should primarily be placed on ensuring transparency and information disclosure, so that participants in commercial activity can do so in a fully informed way.

However, the Australian regulatory approach also recognises that markets are imperfect and therefore that complete deregulation cannot be relied on to maximise economic efficiency.

First, consider insider trading – behaviour which has long been prohibited in Australia.⁴ The anti-regulatory view, which was pioneered by US economist Henry Manne, is that insider trading not only does no harm, but actually increases economic efficiency. The argument is founded on the 'efficient market' theory; namely, that the 'price of securities in financial markets fully reflects all available information'.⁵ In that context, it is argued that insider trading keeps prices honest. That is, trading done on insider information alerts the market, allowing it to adjust prices, with the result that share prices are

more likely to truly reflect the value of the relevant asset. That in turn allows creditors to stop extending credit to failing businesses and alerts investors to sell shares in failing companies.⁶

What this argument ignores is the systemic economic impact of allowing such behaviour. It may be true that overall share prices adjust more quickly due to insider trading. However, in a system where such trading is prevalent, the market becomes characterised by asymmetric information between buyers and sellers about the value of assets. Consequently investors can have no confidence that they are operating in a fair market – that they know the real value of the shares they are buying or selling. To use the economic parlance, there is a loss of market integrity. In turn, this has a negative impact on willingness to invest, and therefore on the overall stability and liquidity of financial markets.⁷

This phenomenon can be illustrated by the parable of Arkelof's lemons, which sounds like the title of one of Aesop's *Fables*, but is actually a reference to a seminal article by Nobel Prize winning economist George Akerlof. Arkelof's article, entitled 'the Market for Lemons' (which was actually about used cars) hypothesised that in a market where there are some good products and some 'lemons', but only sellers know which is which, buyers will only offer a price that takes into account the fact that they might be getting a dud product. In other words they will not have the confidence to pay an appropriate market price for a high quality product.⁸ This hinders beneficial trade and can even cause market collapse.

What the anti-regulatory position overlooks is the economic need for fairness in financial markets – something only the law can supply.

The importance of Arkelof's lemons is evident in data that consistently shows a positive association between insider trading laws and overall market efficiency.⁹ What the anti-regulatory position overlooks is the economic need for fairness in financial markets – something only the law can supply.

Legal regulation is also necessary to remedy

distortions that can arise from too great a concentration of market power. This can be seen in the context of anti-competitive behaviour.

Such behaviour can arise in a number of situations, for example where one company has a monopoly in a market – or, as is more often the case, when a small number of firms dominate the market, creating a duopoly or oligopoly. A related situation is where companies form a cartel, agreeing to cooperate with one another to, for example, fix prices or carve up the market between them. By reducing competition, cartels allow businesses to operate analogously to a monopoly. In such circumstances, dominant businesses have a significant amount of power to dictate prices to consumers and suppliers.

In Australia, both cartel conduct and misuse of market power are prohibited under the Competition and Consumer Act 2010. The anti regulatory view however, is that competition laws effectively penalise companies that have shown the 'extraordinary skill' required to acquire a significant share of the market, and that monopolies are themselves the result of government intervention.

In a 1961 essay entitled 'Antitrust', former US Federal Reserve Chairman Alan Greenspan famously described anti competition laws as reminiscent of 'Alice's wonderland'.¹⁰ Apparently he meant that as a bad thing – strange I know.

Greenspan's argument was that competition, properly understood, involves 'taking action to affect the conditions of the market in one's own favour', which could include competitors setting joint price policies.¹¹ Equally, he argued that one company having a significant amount of market control could yield efficiency gains. Greenspan's central thesis was that regulation was unnecessary to control these kinds of market power, because demand would inevitably drive new competitors into an industry, and established companies who were inflating prices would be undercut. Only if new competitors were completely barred from entering a market could a monopoly survive, and this, he argued was only possible as the result of government intervention.¹²

The reality of anti competitive behaviour shows the flaws in this argument. Legal regulation is necessary because it can be extremely difficult for competitors

to operate within, or break into, a market where one firm is dominant, and because even if the market does eventually 'auto correct', cartels and monopolies do a great deal of economic harm in the mean time.

Cartels, for example, cost billions of dollars to the global economy. That occurs both directly, in that consumers pay more than the real market value of the product, and indirectly, in that otherwise non-competitive companies are protected and innovation therefore discouraged.

The world's most infamous cartel case to date is probably the vitamin cartel, which, as the name suggests, involved pharmaceutical companies fixing the price of vitamins. Now, I'll be the first to admit that raising the price of health supplements doesn't immediately seem like the most evil of criminal conspiracies, but vitamins are actually in many more things than you would imagine, like cereal for example. All in all, it is estimated that the conduct ended up costing consumers around thirteen billion dollars.¹³ The vitamin cartel was eventually broken open by the US Department of Justice in 1999,¹⁴ but it is thought to have operated stably for some ten years before that. Even then, a key element in the investigation was that one of the companies involved came forward to whistleblow in exchange for leniency. In other words, market forces simply did not correct this anti competitive behaviour, which was occurring on a grand scale.

At the other end of the spectrum, even in cases where there appears to be intense competition between firms in an oligopolistic or duopolistic market, such a market can have a long term damaging effect on competition and economic efficiency generally. Take this hypothetical example.

Three or four companies, each having substantial market share both on the supply and demand side, decide to engage in a price war in relation to the products they sell. They do so not by reducing their profits, or as a result of increased efficiencies in their operations, but by exercising their market power to extract goods from suppliers at below marginal cost. Inevitably, the outcome must be that a number of suppliers will fail, leaving a monopoly in the supply of the particular product. In that way, an industry, which was operating efficiently, will effectively be undermined.

More simply, the long-term result of unbridled competition by competitors with significant market power must eventually be that there is only 'one man' standing. Take predatory pricing. If a corporation with market power consistently sells goods below cost price, the effect will ultimately be the elimination of smaller competitors. In other words, it will give rise to a market created monopoly, which will then allow the monopoly provider to control prices.

By prohibiting predatory pricing, misuse of market power and other anti-competitive behaviour, legal regulation therefore plays an essential role in ensuring that competition, which lies at the heart of an efficient free market, actually operates in practice.

Third and finally, I would like to consider externalities. As many of you will know, an externality occurs where the cost or benefit of a particular economic activity is not borne entirely by the parties to that activity, but rather by one or more third parties, and is therefore not fully reflected in prices. The classic example, of course, is pollution caused by factory production, which may impose costs on surrounding residents, perhaps by requiring clean up or diminishing the value of nearby land. One thing that the financial crises of the last few years have shown us is that in financial markets systemic risk is one such externality, and that the largely deregulated markets promoted by advocates of self-regulation failed to manage that risk efficiently.

I wouldn't have the hide, or for that matter the foolhardiness, to seek to explain the Global Financial Crisis. However I think that what has become apparent, at the least, is that it was not a crisis caused by an immediate event, as distinct from a long term distortion between the level of lending to fund both consumption and, more particularly, investment and the potential returns on investment to service that lending.

But more simply – or stripped of its verbosity – there was an insufficient appreciation of the risk involved, and the price for such lending, whether by way of interest coupon or other charges, did not adequately reflect that risk. While each institution may have managed its own risks, it did not factor in the cost of the risk it had undertaken to the system as a whole, arising from, for example, the inter-connectedness of banking institutions.

If financial institutions had priced their loans by reference to the risk involved and to their own capacity to meet their obligations on the money they had borrowed to make such loans, many of the loans that exacerbated the banking crisis may not have been made. The situation of course becomes all the more complicated once you add excessive sovereign debt to the equation, as is currently the case in Europe. As I am no doubt testing your patience for economic theory to its limits, and have already disclosed too much of my ignorance of it, it's probably best if I don't go there.

The failure of markets to manage systemic risk, and the devastating effects of the financial crisis on almost all aspects of an economy, most recently in Cyprus, is powerful evidence of the economic benefits of effective legal regulation in controlling market distortions - and of the lawyers who assist and ensure that companies comply with that regulation.

Now I would not want you to think from anything I have said so far that I believe the legal system should receive nothing but praise in this area - although by all means feel free to lavish it. While regulating commercial conduct is essential to a stable and efficient economic system, it is also undeniable that legal regulation imposes a cost on business - both in terms of how commercial activity is structured and in ensuring compliance. These costs are ultimately reflected in the price of the product or service. There is therefore always a cost benefit analysis to be undertaken.

Recognition of the economic importance of the law - both its positive impact and its costs - therefore also entails a responsibility on lawyers and legislative drafters, to ensure that developments in commercial and corporate regulation are economically rational.

This of course already occurs to a great extent. It is also far from simple. The financial crisis for example has led to many debates about regulatory reform, including in Australia. Some see a role for regulatory agencies such as ASIC in prohibiting or 'red flagging' the sale of certain high risk products to retail investors,¹⁵ effectively in order to protect consumers from themselves. In so far as such an approach would restrict personal choice, rather than simply assisting investors to make better informed decisions, it would of course constitute a significant

departure from the accepted underpinnings of our current system of financial regulation. On the other hand, it can be argued that the vulnerability of some consumers to unscrupulous tactics, and the social cost of bad personal investment decisions, justifies such a restriction.

At the other end of the spectrum, regulatory reforms have focused on ensuring that financial institutions insure themselves against risk better, by for example mandating that the more risk a bank takes on, the more capital and liquid assets it has to hold, in order to ensure it remains solvent and stable during economic shocks. These type of measures lie at the heart of the Basel II and upcoming Basel III accords on banking supervision.¹⁶

An individual should not need a senior counsel, junior counsel, and a small army of solicitors to tell them what the law they must comply with is. I can say that now, although I might not have been so keen to in my past life.

It is not for me to comment on the the desirability of any one regulatory reform measure. I don't have the time, or for that matter the expertise, to do so. My point is simply that the economic theory behind and likely commercial impact of particular regulatory measures is an important consideration. An appreciation of these matters is essential for all those involved in regulating the corporate and commercial sphere - whether legislative drafters, enforcement agencies, the courts, or lawyers - if the legal system is to provide the greatest possible help to commercialism.

In that context, I would like to spend the few minutes I have remaining to focus on one issue that can greatly impact on the economic benefit or cost of the law to commerce - certainty. Central to minimising the costs of legal regulation is that the rules applying to business be certain and decisive. An individual should not need a senior counsel, junior counsel, and a small army of solicitors to tell them what the law they must

comply with is. I can say that now, although I might not have been so keen to in my past life.

In the absence of certainty, costly legal disputes are more likely to occur, compliance becomes more difficult and therefore expensive and issues such as regulatory gaming arise. Lawyers, and the legal system more broadly, should therefore always be striving to improve certainty.

There are two issues I would like to mention in this context. First, it is essential that regulatory legislation and codes are drafted in a way that is clear and certain. The last twenty odd years have seen a continuing rise in the 'plain language' drafting movement. Essentially, plain language advocates argue that legislation can and should be drafted so as to be immediately intelligible to those people on whom it will have an impact, without the need for interpretation by lawyers.

While this is certainly a laudable goal, plain language drafting also contains dangers. Although it need not involve loss of precision, there are times when drafters confuse 'plain' language with simple or short language, and draft at a level of generality that generates ambiguity in application.¹⁷ Some plain language guidelines also eschew statutory definitions, preferring to give words their 'general meaning'. Far from simplifying matters, this may well create confusion, particularly in the highly technical realm of corporate regulation.

A similar criticism can be made of the increasing enthusiasm for the codification of legal doctrine. Last year for example, the federal attorney-general's department put forward a proposal to codify the law of contracts – which is mostly regulated by the common law – largely on the basis that it would increase clarity and accessibility. As I said in a submission at the time, while codification has been useful in some areas – such as the model law on international commercial arbitration – it should be approached with caution.¹⁸ A short and simple code, although accessible, will do little to help users navigate legal rules where detail is essential, while a more comprehensive code will not be accessible. Trying to simplify complex legal doctrine merely risks creating ambiguity, which the courts will then have to fill through interpreting the code. Moreover, codification is likely to come at the cost of the

flexibility and adaptation inherent to the common law – characteristics which are necessary to respond to the rapidly changing landscape of commercial and corporate life.

While this is certainly a laudable goal, plain language drafting also contains dangers.

It is perhaps an unfortunate reality that in a 'highly stratified and complex society, law cannot be anything but intricate and difficult'.¹⁹ Attempts to ignore this reality through measures such as codification may only increase ambiguity of regulation and therefore compliance costs for business. To again use the example of the law of contract, legal doctrine in this area is well established, consistent throughout Australia and generally understood by lawyers – certainly by competent ones. There is no point in creating an additional stratum of regulation, which will have to be explained by the courts, at the expense of the commercial community.

Second, there may well be scope for regulatory bodies to increase the guidance they provide in relation to potentially controversial commercial transactions, so that legal disputes can be averted. For example, the Australian Tax Office currently provides individual and class rulings, whereby parties can apply to the ATO for advice about the tax consequences of a particular scheme or circumstance. That advice then binds the ATO in dealing with the relevant party, provided that the facts on which the ruling is based can be established. The ACCC operates a somewhat similar process. A party that intends to enter into a merger or acquisition but fears breaching the legislative prohibition on acquisitions that are likely to have the effect of substantially reducing competition can apply to the Commission for clearance of the transaction prior to entering into it.²⁰

Many regulatory agencies could also improve certainty by providing legal guidelines...

In my view, other regulatory agencies could provide similar legal rulings. For example the Takeovers Panel – which is responsible for resolving disputes

about takeover bids – currently issues guidance notes of general application. However, unlike the equivalent bodies in London and Hong Kong, it does not provide advance rulings on whether there would be ‘unacceptable circumstances’ in relation to a takeover bid. Of course, in cases of doubt, an application can be made to ASIC for a modification of Chapter 6 of the Corporations Act and the Panel can then review ASIC’s decision. Nonetheless, it may well be that the London and Hong Kong model produces quicker and more efficient outcomes. No doubt the chairman of ASIC would disagree with me.

Many regulatory agencies could also improve certainty by providing legal guidelines, setting out their interpretation of the relevant legal regulations and the circumstances in which they will choose to intervene in a given commercial transaction. I have mentioned the Takeovers Panel already, and ASIC also provides such guidelines, as to an extent does the ACCC. Continuing development in this

area, including by state regulatory bodies, would further promote transparency and thereby assist commercial efficiency.

These are just two of the many suggestions that could be made in this area. The more central point is that debate and engagement over the economic impact and foundation of regulatory measures should be commonplace for all those involved in regulating commercial and corporate life. Ongoing engagement with the economic role of the legal system is important – for how we approach regulation, for how business engages with the law and for the role that lawyers will play in helping or hindering commercialism.

It remains only for me to thank you very much for your kind attention and for welcoming me as a member of the Sydney Rotary Club.

Endnotes

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Our Reconciliation Action Plan

By Chris Ronalds SC and Megan Black

It has been estimated that there are 208,364 Aboriginal and Torres Strait Islander people living in New South Wales. This represents 2.9 per cent of the overall population in New South Wales.

Recent statistics from Corrective Services NSW show that there were 5,368 Aboriginal and Torres Strait Islander people in NSW prisons. This represents 27.4 per cent of the overall prison population in New South Wales.

The challenges faced by Aboriginal and Torres Strait Islander people are serious. Policies and programs to improve health, educational attainment and rates of incarceration have had mixed success.

The Bar Association values Aboriginal and Torres Strait Islander heritage, culture and people. The approach of the association, especially through the work of the Indigenous Barristers Strategy Working Party and the Indigenous Barristers Trust The Mum Shirl Fund (the trust) reflect a strong commitment to make the New South Wales Bar more representative of the community in which we live and work.

To be consistent with the Indigenous population, there should currently be at least 62 Indigenous barristers in NSW.

While the number of Aboriginal and Torres Strait Islander barristers at the New South Wales Bar remains disappointingly low, there are some of the brightest and best currently honing their advocacy skills as solicitors in the NSW court system with plans to join the New South Wales Bar within the next five years. This new generation will make a substantial contribution to the NSW Bar in time and provide an active example of the benefits of effective reconciliation and the advantage of long term, careful career planning. To be consistent with the Indigenous population, there should currently be at least 62 Indigenous barristers in NSW.

In 2002, after a battle with the Australian Taxation Office for deductible gift recipient status¹, the New South Wales Bar established the trust to provide a pool of funds to assist Aboriginal and Torres Strait Islander people in coming to the NSW Bar. Meanwhile, the Indigenous Barristers Strategy Working Party

focused its efforts on providing pathways to the New South Wales Bar for Aboriginal and Torres Strait Islander law students studying law at NSW universities. The association maintains regular contact with all NSW law schools and provides information on its programs and conference funding opportunities when appropriate.

Programs in this area include an Indigenous mentoring program for law students. Since 2008, this program has run successfully and currently there are 31 barristers being mentors for NSW law students. There are a further 10 barristers who have continued to maintain regular contact with lawyers whom they mentored when law students. Indigenous law student part-time employment opportunities with barristers and chambers are organised with five students working for barristers in 2013.

Trish McDonald SC has been the mentor for Merinda Dutton, UNSW law student and says:

I have to confess in volunteering to be a mentor in the Indigenous law student mentoring scheme I wasn't solely motivated by altruism - there was a large element of self interest - could I possibly be matched with a relative of an Aussie Rules legend - maybe Adam Goodes' cousin or Michael O'Loughlin's sister?

Instead I was matched UNSW law student Merinda Dutton who is vibrant, confident, intelligent and a rugby league enthusiast. My initial impression on meeting her for the first time was that Merinda should be mentoring me - this has been confirmed over time.

During our mentoring relationship, we have discussed her university subjects, uni life, assignments, the pros and cons of subject options, commiserated on the difficult subjects ('Yes I never understood Real Property'), assessed possible internships, job opportunities and Merinda's future career. Another confession, I have acted on an ulterior motive in these discussions as I subtly advocate subjects or experiences that would assist Merinda ultimately in a career as a barrister ('the option Advanced Litigation would be a very good idea').

We also discuss sport, gyms, films and life in general. We share Imelda Marcos tendencies and recent shoe acquisitions are always compared.

During our relationship I have gained so much - I have learnt about Merinda's family, her culture and her background. As Merinda is very active in Indigenous affairs, I am now more knowledgeable about these issues.



Justice Joe Williams from New Zealand, Kristy Kennedy, Aboriginal solicitor, two Aboriginal barristers - Tony McAvoy and Mullenjaiwakka and Justice Michael Slattery.

Merinda has become an integral part of my life at the Bar, she comes to Chambers, has attended court with me and celebrated with me when I became senior counsel. I still have my fingers crossed that in the future I will be referring to Merinda Dutton barrister but in the meantime, my final confession, I have failed in my attempted conversion of her to Aussie Rules football.

In July 2013, Merinda Dutton was in her final semester of a Bachelor of Jurisprudence (criminology)/ Laws. She is a Gumbaynggirr and Barkandji woman, who grew up on the north coast of NSW. She says:

I have participated in the Bar Association's Indigenous Mentoring Program since my first year of uni, and was paired with Trish McDonald. As an Indigenous person, I am the first person from my family to enter the legal profession, and indeed, one of the first people in my family to study at university. Being paired with a barrister mentor offered me a unique and practical insight into a career at the Bar. Through participating in the Bar Association's Indigenous Mentoring Program, I was given the opportunity to network with various people in the legal profession, including barristers and judges. This is an opportunity which I would not have had otherwise.

Trish has been a great source of advice in both a professional and personal manner, and has been extremely generous in giving me an understanding of the practice of law. I am extremely grateful to Trish for her encouragement and for

taking the time to have lunch or coffee with me despite her extremely busy schedule.

I think that through meeting people such as Trish, I have developed a keen interest in practising law as a solicitor and to consider a career as a barrister at the NSW Bar.

The Bar Association hosts social events to build relationships between Indigenous law students and lawyers and members of the bar. In 2012, a successful night was held at Circular Quay when attendees watched the wonderful Vivid light show and listened to the journey of leading Maori judge, the Honourable Justice Joseph Williams.

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The trust has played a significant role in providing funding support for Indigenous law students and lawyers to attend national and international Indigenous conferences. The association created the National Indigenous Legal Conference and held the



Brett Marshall, Julie Marshall, Chris Duncan, Kristy Kennedy, Merinda Dutton, John Mewburn, Stephanie Bott, Mark Holden and Gemma McKinnon at the World Indigenous Legal Conference in Hamilton, New Zealand in September 2012.

inaugural conference in Sydney in 2006 and hosted the 2011 conference. This conference is now the premier Indigenous legal conference in Australia and provides an important networking opportunity and a focus on a wide range of Indigenous legal issues. The next conference will be held in Alice Springs in October 2013. The trust funded 10 students and lawyers to attend the World Indigenous Legal Conference in September 2012 in Hamilton, New Zealand.

Since December 2002, the association has hosted students participating in the Indigenous Pre-Law Course at UNSW. The course is a pathway to law school. During their visit, the students listen to some barristers' war stories, visit Chambers and sit in on a court case and then speak to the presiding judicial officer. The purpose of the day is to demonstrate the many aspects of the work of the NSW Bar and to encourage the students to consider the bar as an option further in their career.

In the next major step, the Bar Association has launched its Reconciliation Action Plan (RAP) and it commenced on 1 January 2013.

The Bar Association remains concerned about the

under-representation of Aboriginal and Torres Strait Islander people practising at the New South Wales Bar and seeks a legal profession in NSW that demonstrates equality and an absence of any discrimination, while reflecting the cultural and racial diversity of the NSW community.

The development of the RAP is important not only because it ensures that the association's efforts are consistent with national efforts towards reconciliation, but also because it documents the association's responsibility to ensure that the NSW Bar reflects the values of equity and diversity.

Reconciliation Australia has endorsed the association's RAP. Leah Armstrong, the CEO of Reconciliation Australia, has written:

The Association has a long history in engaging with Aboriginal and Torres Strait Islander communities—working with Aboriginal and Torres Strait Islander lawyers and law students since 1998 to assist them in developing and advancing their careers. In launching its RAP, the Association is continuing its commitment to improving educational pathways and the career prospects for Aboriginal and Torres Strait Islander lawyers in NSW.

I encourage all Aboriginal and Torres Strait Islander law

The RAP clearly sets out the Bar Association's goals for the coming years and the way that those goals can be achieved.

students and lawyers to make contact with the NSW Bar Association to take advantage of the opportunities available. It is through building these relationships that the Association will realise its goal of increasing the number of Aboriginal barristers practising at the NSW Bar.

Justice Michael Slattery, a long serving trustee of the Indigenous Barristers' Trust and a former association president, said:

The RAP demonstrates the leading role played by the NSW Bar in working with Indigenous communities especially in NSW to provide career development opportunities for Indigenous law students and lawyers. With barristers actively working with the students and developing close personal and professional relationships, the reality of reconciliation is reflected in the contact and benefit to all parties. Many barristers report that they fear the relationship is more beneficial for them than the student in light of the exchanges between them. Barristers can assist the student with their studies by providing guidance on essay writing, studying tips and effective ways to organise their studies. The students attend court and have an opportunity to review the brief and assist in research when they are more senior students. This means that the judgments they study at law school come to life and have more depth as they better understand the processes involved in successfully bringing a claim to court. To assist their future career development, the barrister is able to provide a reference when the student is seeking employment as a new solicitor and provide all important contacts to open the doors to future prospects.

These are just some of the practical ways that the Association continues to work with Indigenous law students and lawyers to ensure an increase in the participation rate of Aboriginal and Torres Strait Islander lawyers in the legal profession in NSW.

The RAP is an important document as it brings all the Association's programs and policies together in one coherent document and the annual review mechanism ensures that the RAP will remain fresh and relevant in the future.

The RAP clearly sets out the Bar Association's goals for the coming years and the way that those goals can be achieved. In doing so, the association is building on over 15 years' experience in creating pathways for Aboriginal and Torres Strait Islander people to the New South Wales Bar.

The RAP focuses on:

- Building relationships with the Indigenous Lawyers and Law Students Association of NSW, law schools, the Law Society, the Law Council of Australia, Aboriginal Legal Service, the association's committees and celebrating National Reconciliation Week.
- Building respect by engaging in cultural learning, acknowledgement of country, continuing professional development and participation in NAIDOC Week.
- Providing opportunities for Aboriginal and Torres Strait Islander people by supporting the Indigenous Barristers' Trust the Mum Shirl Fund, promoting participation in the Indigenous Barristers Strategy Working Party, promoting the Indigenous mentoring and employment schemes, hosting a seminar for the pre-law Indigenous students at UNSW, supporting the National Indigenous Legal Conference and engaging with Supply Nation (formerly Indigenous Minority Supplier Council).

Information in relation to the Indigenous Barristers Strategy Working Party, the trust and the association's Reconciliation Action Plan can be found on the association's website. Any enquiries can be directed to the chair of the Indigenous Barristers Strategy Working Party, Ms Chris Ronalds AM SC (ronalds@fjc.net.au) or senior policy lawyer, Megan Black (mblack@nswbar.asn.au).

Endnotes

1. *Trustees of the Indigenous Barristers' Trust v Commissioner of Taxation* [2002] FCA 1474; (2002) 127 FCR 63.



The Bench and Bar Dinner

The 2013 Bench and Bar Dinner was held on 10 May at the Westin Sydney.



L to R: Kate Traill, Ben Spurgin, Felicity Rogers, Joanne Little, Craig Carter



Left: President Phillip Boulton SC. Above left: Ms Junior, Pip Ryan.
Above: Mr Senior, Peter Hastings QC



L to R: Steve Mark, the Hon Justice Stephen Gageler, Chief Justice James Allsop AO and Kevin O'Connor AM



L to R: Laura Thomas, Stephen Climpson, Zelig Heger, Patrick Flynn



L to R: Andrew Boe and Gaby Bashir



L to R: Brett Le Plastrier, David Scully and Zali Steggall



L to R: Philip Clay, Fenja Bergland, Ian Hemmings, Anne Hemmings and Andrew Pickles



Back row, L to R: Adam Hochroth, Fiona Roughley, Sandy Dawson, Robert Yezerski, Peter Kulevski, Richard McHugh SC

Front row, L to R: Farid Assaf, Ben Kremer, Robert Newlinds SC, the Hon Justice Fabian Gleeson

The conviction of Frederick Lincoln McDermott

Caroline Dobraszczyk reports on *A reference by the Attorney General for the State of NSW under s 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick Lincoln McDermott* [2013] NSWCCA 102

In 1936 William Henry Lavers and his family had a store, to which their house was attached, on a road linking Grenfell to Forbes. It was 12 miles north of Grenfell and 30 miles south of Forbes. On 5 September 1936 Mr Lavers went out of the store to feed his horses and he was never seen alive again. On 10 October 1946 an itinerant shearer, Frederick Lincoln McDermott was arrested and charged with the murder of Mr Lavers. On 26 February 1947 he was found guilty by a jury and sentenced to death. The death sentence was subsequently commuted to life imprisonment.

This case deals with a procedure for the review of the conviction such that the New South Wales Court of Criminal Appeal in this decision, on 6 May 2013, set aside the conviction and entered a verdict of acquittal.

The case was brought under s 77(1)(b) of the *Crimes (Appeal and Review) Act 2001*. This section allows for the attorney general to refer a case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act 1912*, after the attorney general receives a petition for a review of a conviction either by the convicted person or on behalf of the convicted person.

The petition was made after the remains of Mr Lavers were found on a property and in a cave in Birangan Hill, by a farmer on 11 November 2004. The location of the remains meant there was a real question as to the conviction of Mr McDermott. It is important to note that on 14 August 1951 a royal commission was established to inquire into the conviction and subsequently found that there was a strong probability that the jury was misled by incorrect evidence on a matter of importance and recommended that Mr McDermott be released from imprisonment. He was released on 11 January 1952 and died on 17 August 1977. There had been two appeals to the Court of Criminal Appeal in 1947 which were unsuccessful and the High Court refused leave to appeal in relation to the second appeal.

The Court of Criminal Appeal in this case first dealt with the issue of jurisdiction, i.e. in particular, the issue that the minister may refer the conviction of a deceased person to the CCA and that the court may determine that appeal notwithstanding the death of the convicted person. Chief Justice Bathurst notes in particular at [23] that 'The fact that a wrongly

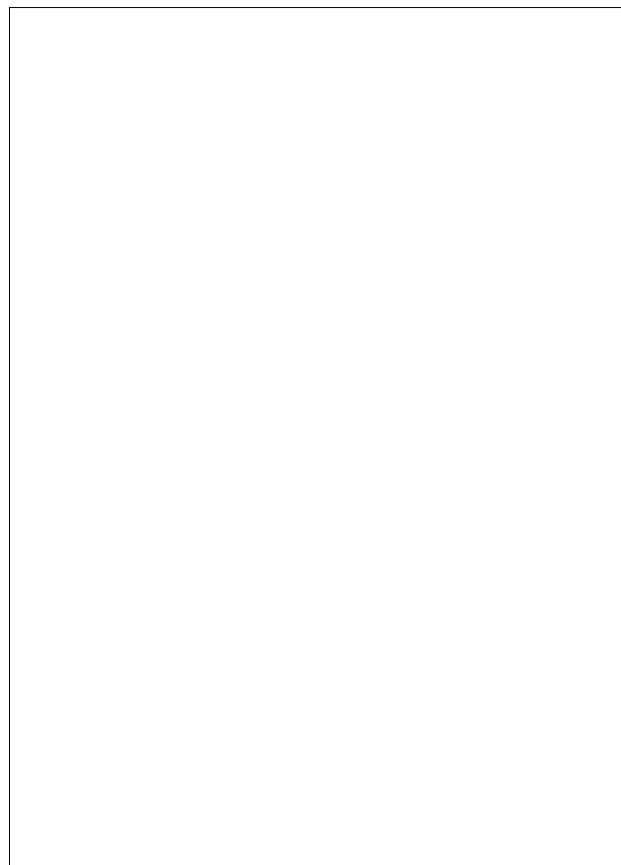


Photo: Newspix

convicted person has died does not mean an injustice has not incurred. There is no reason to limit the words of s 77 and s 86 so as to prevent a remedy in the case of such injustice.'

The purpose of such a procedure is obvious. It allows a review of a conviction or a sentence after all the usual appeal processes have been utilised, where there is a doubt or question as to the convicted person's guilt (see s 77(2) and (3)). Section 86 states in effect that the court deals with the matter and therefore has the same powers as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act and that Act applies accordingly.

The grounds of appeal fell into two categories:

1. the consideration of new or fresh evidence; and
2. a focus on what occurred at trial so as to argue that there was a miscarriage of justice due to the admissibility and/or unreliability of the identification evidence.

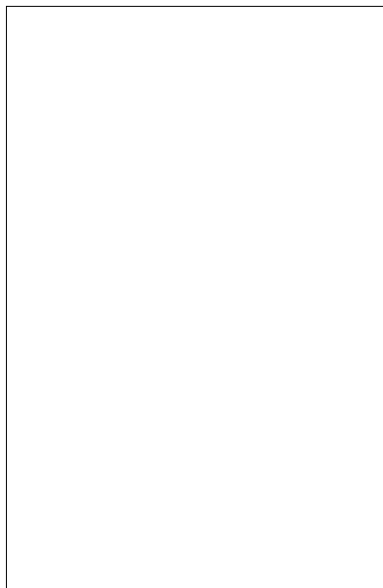
A verdict of acquittal was sought.

The Court of Criminal Appeal essentially found that the fresh or new evidence was so cogent that it did not need to consider the issue as to the admissibility of the identification evidence. What was this evidence?

Before answering this question it is important to understand what the Crown case was against Mr McDermott. There were four main points. First, the Crown relied upon the identification of a car whose tyre tracks were found just outside the store, ie that it was a Essex Tourer, about a 1924 model, belonging to a Mr Jack Parker, and there was evidence that the car was used by Mr McDermott and a friend of his Geoffrey McKay. It was alleged that they murdered Mr Lavers while using the car. Second, there was evidence which identified Mr McDermott using the car at about the time the murder was said to have taken place. Third, the Crown relied upon what was said to be a confession by McDermott. Fourth, the Crown demonstrated that a statement made by Mr McDermott that he had been shearing at the relevant time, his alibi, was incorrect.

Essentially the Court of Criminal Appeal relied upon the following to come to the decision that a verdict of acquittal should be entered: First, the 1951 royal commission had before it evidence, being fresh evidence, that the car could not have been an Essex Tourer – i.e. there was fresh evidence from the manufacturer that the tyre width of the Essex Tourer was only 54 and 7/8 inches whilst the tyre tracks outside the store were 56 inches. Accordingly the royal commisison found that the tyre tracks could not have been made by an Essex car and so could not have been made by Mr Parker's car. The NSWCCA also noted that there was evidence that a car answering the description of Mr Parker's was seen in Yass at 8.00am on 5 September 1936.

Second, the reliability of identification evidence (including based upon photographs taken nine years after the events in question), linking Mr McDermott to



Itinerant rural worker Fred McDermott (pictured) on his way to the Grenfell courthouse for the committal hearing. Photo: Newspix

the murder, was further undermined by the evidence of a Mr Kelly at the royal commission to the effect that the persons in the car (alleged by the Crown to be the Essex Tourer) he sold petrol to at the time of Mr Laver's disappearance did not answer the description of Mr McDermott.

As stated above the Crown had relied upon an alleged confession. This was to the effect that one drunken night, in a heated conversation with his companion, Florrie Hampton, she told him to shut up as he was just 'a damm murderer ...you murdered Lavers...you cut him up..' to which Mr McDermott said 'I didn't. It was we not I.' Also, that on another occasion, during a quarrel, Miss Hampton said to Mr McDermott 'You killed Lavers for seven gallons

of petrol. And put his body in the car and drove out to the old Grenfell sheeyards, cut it up with an axe and buried it' to which he said 'Yes of course I killed Lavers for seven gallons of petrol, put his body in the car and drove out to the old Grenfell sheeyards, cut it up with an axe and buried it'. In relation to this issue the court noted that the circumstances surrounding the discovery of the body in 2004, in a cave about 120 metres up Birangan Hill, and where there had been expert evidence that the body had not been cut up with an axe, bore no resemblance to the confession such that 'there was no basis for believing that when Mr McDermott made the so called confession, he was accurately recording what occurred' at [67].

In relation to the false alibi, the court said that '...the new and fresh evidence indicates that there was no material which on any reliable basis connected him with the murder.' Accordingly, it was held that if all this evidence was available at the trial the only verdict a jury could reach would be an acquittal and therefore there had been a significant miscarriage of justice. A verdict of acquittal was entered. Hall and Button JJ agreed with Chief Justice Bathurst.

Kevin Ross Murray: barrister and citizen soldier

By Philip Selth

Kevin Ross Murray was born at Casino, NSW, on 17 June 1930, the first child of William Henderson Murray and Josephine Agnes (Ford). He was a distant relative of the lexicographer Sir James Augustus Henry Murray, editor of the *Oxford English Dictionary*.

He was educated at Swansea Public School (where his father was a teacher), at the selective Newcastle Boys' High School and the University of Sydney (BA 1950). He studied Law from 1949 to 1956, but did not complete the degree. He was an active Union debater.

On 3 September 1955 at St Mary's Cathedral, Sydney, Murray married Noela Joan Drury. They had three daughters and a son. The marriage was dissolved on the application of Noela on 6 August 1978. Murray had a property, 'Norwood' at Goulburn, where he raised wethers and cattle. Here he married Lynette Jean Shannon before a marriage celebrant on 31 October 1987. She had two children from a previous marriage. It was to be a happy union.

While completing his articles with the firm Abram Landa, Barton & Company in Bligh Street, Murray undertook the Barristers Admission Board course and was admitted to the New South Wales Bar on 29 November 1957. He developed an extensive court room practice, initially in the common law and industrial jurisdictions, but with emphasis in later years on the criminal jurisdiction. He was to become 'one of the most colourful figures at the New South Wales Bar'.

Murray was a bully – to the bench when he could, his opponents and the many he considered beneath him.

'About middle height, somewhat overweight and remarkably energetic and rapid of movement for a person of his build', Murray soon became the counsel of choice for high profile defendants, and police, who had seen him, often unhappily, in court.

Contemporaries describe Murray's courtroom presentation 'as intense, passionate and sustained. He was very ready in expression, with a full, confident and relevant flow of words in a forceful vernacular



Kevin Murray in Darwin. Photo: NT News

accent. He was full of haste and energy, always red-faced and urgent, and spoke with an edge of indignation about what the police prosecutor or the opposing counsel was trying to do to his client, and a hint that the magistrate or judge whom he was to persuade was not acute in his thinking and was irrationally disposed against his client'. Murray was 'a master tactician and a consummate cross-examiner. He had the capacity to eke out the answers he wanted from reluctant witnesses. In criminal matters, he had the ability to capture, and captivate, a jury. It is fair to say he could hold a jury and, in committal proceedings, often the magistrate, spellbound!' He was 'a formidable opponent. He gave no quarter and sought no boon'. One of Murray's juniors remembers him having 'a unique capacity to cross-examine for five minutes or so in a probing way, and once he worked out the witness he would move in for the kill. He never prefaced a question with 'Do you agree?', rather, he threw statements at the witness with devastating effect, but which on the transcript appeared with question marks'.

Murray was a bully – to the bench when he could, his opponents and the many he considered beneath

him. A newly appointed equity and commercial silk prosecuting in a Petty Sessions committal in which Murray appeared for the defendants, the law clerk Brian Alexander and the Narcotics Bureau officers Richard Spencer and Wayne Brindle, charged with conspiring with Terrence John Clark concerning the importation and distribution of narcotics, had 'a very unpleasant experience'. Murray was said to be 'rude and aggressive in the worst traditions of the common law bar'. Another senior colleague describes Murray as being 'probably the rudest counsel alive (and possibly the rudest man)'.

Coroner JJ Loomes had to remind Murray who was actually conducting the inquiry.

Murray was Geoffrey Chandler's counsel during the inquest into the deaths of his wife Margaret and Dr Gilbert Bogle by the Lane Cove River on New Year's Eve 1963. Murray's brief was to protect Chandler from allegations of being involved in the death of his wife and Dr Bogle. It was not in his client's interest to adopt his usual pugnacious approach to prosecution witnesses. However, typically, Coroner JJ Loomes had to remind Murray who was actually conducting the inquiry. In other high profile cases, Murray acted for Peter Kocan, who had fired a sawn-off rifle at the federal opposition leader, Arthur Calwell, outside the Mosman Town Hall in June 1966; for the television personality Charles (Chuck) Faulkner, charged with being an accessory before the fact to a robbery at Channel 10 at North Ryde in March 1966; and in November 1967 for Leonard Cosser, a professional wrestler ('Len Holt'), charged with conspiring to defraud the public through the sale of knitting machines. Although committed for trial, Cosser was back in the ring in April 1969 against 'Murphie the Surfie'.

In 1969 Murray appeared in the Sydney Central Court for Donald Kelly, a salesman charged with stealing cash and jewellery from a Maroubra jewellery store. In June 1961 Kelly had escaped from the Russell Street Police Station in Melbourne. The police claimed Kelly had admitted the theft. Murray told the magistrate that his client denied the allegations and wished to be married that Saturday and then go away on his honeymoon. Kelly was remanded

on bail. Presumably Murray did not know that Darcy Dugan was to be his client's best man at the wedding (or that he had committed a string of hold-ups and other crimes with Dugan and others).

Murray was counsel assisting the Public Service Board inquiry in September 1969 held into the compulsory transfer of Denis Freney, an English and history teacher, from Pittwater High School to Mosman High School because of the 'manner and timing' of his Teachers' Federation activities. Murray appeared in the Flemington Court for Leslie Lewis, a strapper charged with conspiring to administer a substance with intent to defraud to the racehorse 'Big Philou' before the 1969 Melbourne Cup and to 'King Pedro' in the Duke of Norfolk Stakes at the 1969 VRC autumn carnival at Flemington.

Murray, appointed a queen's counsel on 14 November 1973, was aptly described by one court reporter as being a 'stocky figure', a 'little florid of complexion and utterance'. Unlike other leading silks of his time, Murray was not one of soaring rhetoric (Tom Hughes), earthy appeal (Ian Barker), charm (Murray Gleeson) or of meticulous cross-examination (Alec Shand).

In 1974 Murray appeared for the Croatian crane driver Angelo Maric, charged with having placed bombs in two Sydney shops in September 1972, one of which caused serious injury to the proprietor. In 1977 Murray successfully represented Kevin Humphreys, secretary-manager of the Balmain Leagues Club (and president of the NSW Rugby League and chairman of the Australian Rugby League) at his committal for fraudulently taking moneys from the club for gambling. Murray represented Humphreys before the 1983 Royal Commission into Certain Criminal Proceedings Against KE Humphreys (the 'Wran Royal Commission'), which followed the ABC's *Four Corners* broadcast 'The Big League', which alleged that the then Premier Neville Wran had intervened in the prosecution of Humphreys. Murray was himself a witness before the royal commission concerning his instructions for the defence of Humphreys at the 1977 committal proceedings. In October 1983, represented by Murray, Humphreys was found guilty by a jury of various charges concerning his taking money from the Balmain Leagues Club.

Murray appeared for Kenneth Nugan when he and

his brother Frank were charged in May 1978 with conspiracy to defraud and (not for the last time) for the former NSW police officer Murray Stewart Riley, who pleaded guilty to a charge of conspiring to import 1.5 tonnes of cannabis from Thailand. Murray appeared for 'The Big Fellow', Arthur Stanley (Neddy) Smith, when charged in November 1978 with having goods in custody (cash), allegedly the proceeds of heroin sales. In January 1979 Murray represented some of those allegedly involved in a conspiracy to defraud the Department of Social Security (the so-called *Greek Conspiracy Case*). He appeared for the Narcotics Bureau officer Richard Spencer in 1980 on charges of conspiring to give information to the 'Mr Asia' drug syndicate boss Terrence John (Terry) Clark. In September 1984 Murray, appearing at committal for Choo ('Chinese Jack') Cheng Kui, the Bangkok/Singapore connection for the 'Mr Asia' drug syndicate, unsuccessfully applied to the Full Federal Court for review of the magistrate's decision in the committal proceedings to deny further access to a prosecution witness statement. Murray's junior recalls that watching the prosecutor, Frank McAlary QC and Murray was 'like watching two gladiators from ancient Rome. Battle honours were even.'

In 1988 Murray acted for the Annetts family at the WA inquest into the deaths of the teenage jackeroos James Annetts and Simon Amos whose bodies had been found near their abandoned utility in the Great Sandy Desert in April 1987. Murray was 'always willing to quip with members of the media, but with an arrogance which was obvious to all'. Although permitted to examine and cross-examine witnesses, the coroner declined to permit Murray QC to make a closing address covering the whole of the evidence. Murray, determined to 'follow every rabbit to the very end of its burrow', took the matter to the High Court. The High Court held that the coroner should reconsider the question whether the parents should be heard in respect of any matter arising out of the inquest, and pending that reconsideration should not make any finding or publish any rider. The case is a leading authority on natural justice.

In July 1989 Murray acted for the property developer Tibor Balog, managing director of Dainford Limited, before the NSW Independent Commission Against Corruption inquiry into the relationship between Balog, Dainford Limited and the Waverley Council

and its engineer/ planner. This was ICAC's first investigation. The *Sydney Morning Herald's* report noted that 'the brilliant and always combative silk' 'had put on more histrionics'. Nor had Murray endeared himself to the residents of the 220 units in Eastgate Towers at Bondi Junction, comparing their home to 'a vertical anthill' and 'a commune'.

Murray appeared in the 1990 Blackburn Royal Commission for Harry Blackburn, a police officer charged with a series of sexual assaults and other crimes. By this time Murray was dying of cancer, but nonetheless carried most of the burden of cross-examination. The commissioner exonerated Blackburn. Murray loved the English language. As one report put it, he 'positively throttles the native tongue'. Murray's flamboyant language was evident at the Blackburn inquiry. He told the commissioner, Justice JA Lee, that it was clear that Blackburn, a man of fourteen years unblemished service, had been 'treated like dirt'. He would not have been treated worse if he had 'piddled in the pickles at the Police Boys' Club Christmas Party'.

...he came to court each day with a cannula in his arm. Clearly he was dedicated to the cause of his clients'.

In July 1990 the president of the NSW Police Tribunal, Judge JH Staunton, commenced an inquiry into the shooting of the naked and unarmed Darren Brennan during a raid on his Glebe house by a Tactical Response Group police officer. Brennan, alone in the house (except, as Staunton noted, 'for his little pup'), was shot in the face by a police shotgun. Government criticism of the raid had led to the Police Association considering industrial action and TRG officers demanding the resignation of the premier, Nick Greiner, the minister for police, Ted Pickering, and the deputy police commissioner, Tony Lauer. Murray represented the TRG officers. Murray, who was to die before Staunton reported, was undergoing chemotherapy treatment. As one of those present noted, 'he came to court each day with a cannula in his arm. Clearly he was dedicated to the cause of his clients'.

Murray had strong views about individuals' rights,

and unlike many of his peers was happy to make those views public beyond the Bar Common Room. In 1974 he took the then unusual step for a barrister of writing a letter to the *Sydney Morning Herald* expressing concern about criminal law legislation which eroded 'civil rights' of the citizen. In May 1987 he wrote criticising the Labor government for 'attacking the rights of the community to judicial assessment' of compensation for injured workers. He instigated the extraordinary general meeting of the New South Wales Bar Association in March 1989 which led to it issuing a press statement critical of the failure of the federal government to appoint Justice Jim Staples to the newly created Industrial Relations Commission, which the association saw as interference in the independence of the judiciary.

One could fairly say that there was more than a touch of Henry VIII about Kevin. The chambers that he dominated had all the noisy rough and tumble of the Tudor court in which the sun shone if the king was in a good humour and dark clouds blocked the sun for all if he was not.

One of Murray's juniors remembers Murray being 'something of a nightmare to manage both in and out of court. This was the primary task of any junior sufficiently robust to last beyond one brief. Apart from keeping between Kevin and airline, hotel and restaurant staff there was the more crucial matter of his appearances, or lack thereof in court. A favourite practice once he got to know one, was for Kevin to wander off from a case for a day or so. One might regard this as a mark of trust but he would then reappear without warning at one's elbow and enquire, 'well, have you fucked up the case yet?' To be Kevin's junior was definitely a young man's pastime (and I emphasise both 'young', as in needing the money and experience, and 'man', as Kevin was certainly not all that understanding of the feminist winds of change starting to sweep through the profession). One could fairly say that there was more than a touch of Henry VIII about Kevin. The chambers that he

dominated had all the noisy rough and tumble of the Tudor court in which the sun shone if the king was in a good humour and dark clouds blocked the sun for all if he was not. He was a highly intelligent man and a particularly skilled advocate, with a great talent for cross-examination. He was capable of grasping black letter law when required but his forte was as an actor in the high drama of the jury. At a personal level, he was capable of being sensitive, sentimental and kind but also of being crude and even quite brutal with his friendships. He was a brilliant jury advocate of a stamp and style that suited the times, not least of all the practices of some investigators and a somewhat complicit attitude on the part of trial judges who were unwilling in particular to confront the abuses of the verbal'.

A newly briefed junior was called up to Murray's chambers one evening, expecting to be involved in research and discussion of relevant legal issues. Instead, he was offered a glass of champagne, and when he declined the offer was told 'that's your first mistake'.

A newly briefed junior was called up to Murray's chambers one evening, expecting to be involved in research and discussion of relevant legal issues. Instead, he was offered a glass of champagne, and when he declined the offer was told 'that's your first mistake'. Murray enjoyed 'a cool drink' on occasions. 'The danger sign was when his bottom lip would start to pout a bit – then he was in a state of social unpredictability'. He used to boast, accurately, that he had marvelous recuperative powers. After a night of hard drinking, he would be in court the next morning; quick witted, scaring witnesses, the bench and opposing counsel. Floor colleagues recall that each year Murray would organise a weekend and members of his chambers and wives were bidden to his country property: 'Saturday afternoon and evening drinks and BBQ and a bit of a 'recovery' on Sunday. Many 'floor wives' looked forward to the fixture with dreadful foreboding - the host was

known to develop roaming hands and an uninhibited vocabulary'. 'Whilst he was keen to offer financial advice, it was best to avoid taking it. He and a number of his colleagues got into all sorts of ill advised commercial ventures. As far as his professional fees were concerned, he felt that a fee should be spent three times: when the brief arrived, when the trial concluded, and finally, when he was actually paid. Financial management was not his strongest point.'

Murray had enlisted in the CMF's Sydney University Regiment on 14 March 1949, a year after the volunteer Citizen Military Force in Australia was re-formed. He had been a sergeant in his school's cadet unit. (Murray's father had served in the regiment's predecessor, the Sydney University Scouts, in 1921 while attending teachers' college.)

Murray was commissioned as a lieutenant in December 1952. In 1953 he went on full-time duty for two years with the Australian Regular Army to help ease the officer shortage during National Service and hoping to serve in Korea. The Korean War ended in July 1953, but Murray 'gained valuable experience in man management and in administration as a full-time soldier' before returning to the SUR in June 1955. In 1960 the regiment vigorously campaigned for undergraduate volunteers. Hundreds of newly enrolled students were circularised, care being taken to contact only the eligible cases. 'But', said Murray, now the 2IC and co-ordinating recruiting, 'man is but fallible'. The letter he had received shows it: 'I am afraid there has been a slight misunderstanding concerning your letter inviting me to join the University Regiment. Much as I would like to do so, I regret it will be impossible. I am a girl.'

On 1 July 1964, the newly promoted Lieutenant-Colonel Murray began duty as commanding officer of the regiment he had joined as a private in 1949. The regiment's history notes that as 'Murray grew up militarily in the regiment, he earned a reputation as a skilful tactician'. He envied men who had been old enough to fight in World War II, and found it galling to see young men of his own age wearing ribbons of the Korean War and later those issued for service in Vietnam. Murray had a name as a disciplinarian. 'I could be accused, I suppose, of being an authoritarian. I've been accused of that in a

variety of circumstances. If a fellow was weak I had no regard for him.'

Murray was 'a colourful, sometimes abrasive figure' in the regiment. But he gave SUR 'three vigorous, successful years'. He preached initiative and innovation, to get more realities into military training. He had 'the ambition to just literally train the arse off those fellows - to extend them'.

The start of Murray's period as the regiment's CO coincided with the introduction of the Second National Service Scheme - conscription - to strengthen the Regular Army and to build up a reserve of trained troops in the CMF. The rapid expansion of the regiment meant more officers and NCOs were needed. Murray achieved this by 'a significant innovation', the SUR Vacation Training Camp for Officers. Murray's aim was 'to make the standard of training of all officers produced by SUR as close as possible to that of the regulars. After all, we may be required to serve side by side with our regular colleagues at any time'.

Murray, disappointed at missing out on going to Korea, was not going to miss out on Vietnam.

In 1965, acting initially without the approval of either the army or the Australian National University, and in competition with the CMF's Canberra-based 3rd Battalion, which had a drill-hall on the campus, Murray established an ANU Company of the SUR. Murray's term as CO SUR ended on 30 June 1967 when he was posted to Eastern Command's Staff Training Wing. In January 1971 Murray was awarded the OBE for his work in building up the strength of the SUR and promoting interest in military service in other universities and colleges. He developed strong links with overseas armies, in particular with the SUR's 'sister' regiment, The King's Royal Rifle Corps (later The Royal Green Jackets).

Murray, disappointed at missing out on going to Korea, was not going to miss out on Vietnam. Lieutenant-Colonel Murray, Officer Training Group, Eastern Command, CMF served in Vietnam as a CMF observer

between 17 February and 2 March 1968, attached to 2nd Battalion, The Royal Australian Regiment, based at Nui Dat. After the maximum period of sixteen days, he was asked to stay on temporarily and help out with a serious backlog of court-martial work. But Army Office refused permission, and instead sent up an officer from Australia. Murray claimed that there was 'quite a bitchy, almost jealous approach' towards CMF men by the regulars, who did not want them to be in Vietnam long enough to qualify for repatriation benefits and campaign ribbons.

His style was probably more like Major-General Ritchie-Hook in the works of Evelyn Waugh.

A former member of the SUR, and later a barrister, remembers Murray being referred to by the soldiers as 'the pig'. He was in command, and 'all jumped when he required it. In fact, I have never seen a CMF or reserve commander who was as effective as he was. He was not tall. He was plump, and bore a remarkable similarity, both physically and in temperament, to Napoleon and General Patton. If Kevin had ever had the chance to command a military force in war, he would probably have become as well-known as Pompey Elliot, and others like him. This opportunity however was to avoid him; he had to content himself with preparing for war, but never actually waging it'. A passionate reader of military history and biography, a lover of good jazz, he was not 'the sort of general who ponders gravely over maps and reflects at length on the best course to take. His style was probably more like Major-General Ritchie-Hook in the works of Evelyn Waugh'.

On 1 May 1972 Murray was promoted colonel and appointed to the Command Staff Training Unit, teaching and preparing officers for the examination at the Canungra Jungle Training Centre. On 30 June 1973 he was appointed chief of staff (CMF), 2nd Division. On 1 July 1974, promoted temporary brigadier, he took command of the 5th Task Force, serving in that role until 1976 when it was disbanded as a result of the reorganisation of the CMF, which was renamed the Australian Army Reserve. Promoted brigadier as of 26 January 1976, on 1 December 1976 Murray became commander of the Royal NSW

Regiment, which had all Army Reserve infantry battalions of the 2nd Military District [NSW] under its command - except the SUR and the University of New South Wales Regiment, which were in the Training Group.

On Murray's service file there is an intriguing handwritten note written on chambers letterhead:

Assistant Comd

Dear John

Cesar's [sic] Legions revolted for one basic reason

NO BLOODY PAY

For Christs [sic] sake this is intolerable

Yours as a mercenary

Kevin Murray

Comd RNSWR

On 1 July 1978 the newly promoted Major-General Murray assumed command of the Second Division [the Army Reserve in NSW]. On 1 January 1982 Murray was awarded the AO (Mil.) 'for service to the Army Reserve' and posted to Army Office for duty in the office of the chief of the Army Reserve. On 1 April 1982 Murray was appointed chief of the Army Reserve. Murray was not well suited to the political and diplomatic milieu of Canberra; 'he was better suited to command jobs than staff jobs'. Murray retired at the end of March 1985 and on 1 July took up the position of honorary colonel, SUR, succeeding Sir Roden Cutler. To his and the regiment's dismay, Murray's term was extended, after a fuss, by only a year, and in July 1990 he was succeeded by Chief Justice (and Lieutenant-Governor) Murray Gleeson. Murray's forceful views against the 'neglect' of the Army Reserve, the causes for which lay 'squarely on the shoulders of many of the senior officers of the army', and the appointment of Regular Army officers to command Army Reserve formations, had been held against him. WV Windeyer, who commanded the SUR in the period 1973-1976, noted that 'General Murray remains the regiment's most distinguished peace time soldier; he had a great love of the regiment often remarking what it had done for him. The refusal of those in charge of such matters to reappoint him was a most unfortunate mistake.'

While dying of melanoma, Murray lived life to its fullest, giving a curry lunch party for all his friends at his home in Newtown when he should have been in hospital, to the amazement of his treating oncologist

While dying of melanoma, Murray lived life to its fullest, giving a curry lunch party for all his friends at his home in Newtown when he should have been in hospital, to the amazement of his treating oncologist who attended the party.

who attended the party. Murray died at home on 31 March 1991, survived by Lynette, two daughters and a son.

In the funeral eulogy given by Barry O'Keefe QC, Murray was fairly described as 'a dominant character ...whose presence was always felt'. Murray had a 'gift with words, a sense of fun, an ability to laugh at himself and the world. ... He was big and tough, yet at the same time gentle and soft hearted. In court he could be a bruising cross-examiner, a Nemesis who would pursue a witness until he got the admission he was seeking. Yet he was gentle and generous to a fault even with those, perhaps especially with those, whom the world would judge as undeserving.... He did cases that won him the headlines and earned for him an enviable reputation ... and substantial fees. ... He was exuberant, extroverted and gregarious. He shared the good times, his successes, with all. He loved the limelight ... He loved his uniform. He loved the silken gown. He revelled in the trappings of the mess and of the court But, he was also a very private person. Family life was removed from the public arena and shielded from the glare of the arclights.'

After a military funeral at St Mary's Cathedral, Sydney, on 4 April, which he had meticulously planned, Murray was buried at the Northern Suburbs Lawn Cemetery.

Endnotes

I am grateful to Lyn Murray for graciously lending me several boxes of Kevin Murray's private papers.

I also acknowledge with thanks the help given me by a number of Murray QC's colleagues, some of whom are quoted in the note above, as well as the assistance given me by past and current members of the Sydney University Regiment. I am also grateful to the assistance given me by Lisa Allen, The Bar Association's librarian, for her help in tracing unpublished judgments for cases in which Murray appeared.

In addition to the press, royal commission records, law reports and other sources, I referred especially to:

New South Wales Bar Association records.

Murray's service file: 'Murray, Kevin Ross' NAA B2458, 279192: 9844997.

Ivan DE Chapman papers, ML MSS 7043.

Ivan Chapman. *Sydney University Regiment: The first 80 years*, Sydney, 2001 reprint.

Janet McNaught, *And so they came The history of the Haning Murrays from Roxburghshire, Scotland*, Lismore, 1986.

Kevin Murray QC, 'Fears on criminal law changes', *Sydney Morning Herald*, 27 March 1974, p.6.

Kevin Murray QC, 'Compo: decades of effort down the drain', *Sydney Morning Herald*, 25 May 1987, p. 14.

Brigadier AR [sic] Murray OBE, ED, QC, 'The Reserve and the Core Force', *Pacific Defence Reporter*, June 1978, pp. 54-56.

Obituary: 'Lawyer, soldier and raconteur', *Sydney Morning Herald*, 1 April 1991, p. 2.

Evan Whitton, 'The courtroom life and varied times of Kevin Murray, criminal lawyer', *Sydney Morning Herald*, 3 April 1991, p.13. Although I used this article as an aid to find information about Murray, I have not quoted from it – I do not agree with Whitton's assessment of Murray.

John Mortimer: an appreciation

By Emily Pender

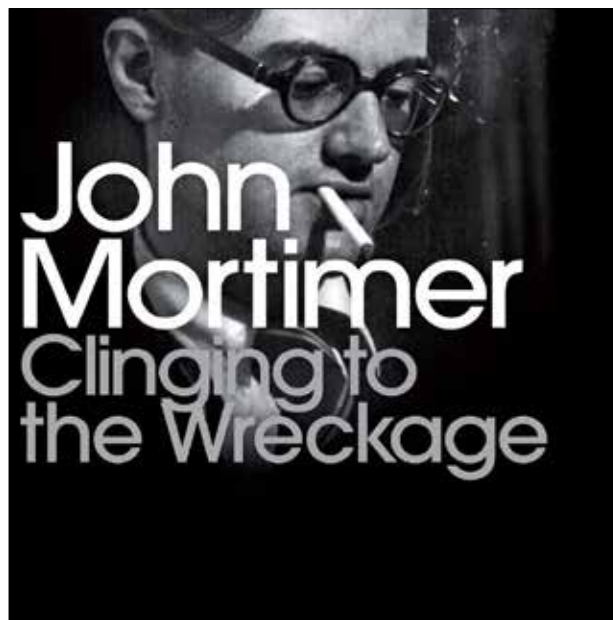
As someone who has admired John Mortimer since watching the first episodes of *Rumpole* on television and reading the stories in the seventies, I find myself in the virtual company of many others, particularly lawyers; and as I have grown older in the law (like *Rumpole*) I have found that the pleasure of the comedy of Mortimer's writing is enhanced by the depth of his understanding of life and of people.

But trying to understand and appreciate the real life John Mortimer is like acting in a criminal trial, where the defendant has one story of what occurred, the prosecution have another, the police have a third that they are saying and a fourth (or even a fifth) that they are not. The reality may be in some yet undeveloped combination of the various versions, independent of what actually happens in court. John Mortimer is hard to understand and one of the interesting things about the exploration of his character is that a man famously keen on publicity and unable to resist the chance of an interview, was in fact deeply reluctant to reveal or discuss the truth about himself.

Re-reading the two biographies of John Mortimer, the *Devil's Advocate* by Graham Lord and *A Voyage Around John Mortimer* by Valerie Grove, reminded me of a story told about the Reverend Sydney Smith, who on a visit to Edinburgh in the late eighteenth century heard two women screaming at each other across the street from their rooms on the top floor of opposite tenements. Smith said to his friend, 'They will never agree, because they are arguing from different premises.'

Even the titles of the books indicate their different approaches, Grove's indicating that she understood the limits of what she had learnt about her subject; whereas Lord's title and contents assert that he has grasped the essence of his subject, and didn't like what he saw. His biography of a man who was brilliant, funny, subtle and compassionate is written by someone who appears devoid of these qualities, and worse, unable to understand them. Grove's writing shows her to have a deeper understanding of the complexity of her subject and his relationships.

It is an irony that Mortimer himself might have appreciated, that Lord's unrelenting vituperative attack on him leads one to sympathise with and instinctively defend his subject, whereas Grove's much more affectionate and reasoned portrayal



leads one to a deeper understanding of Mortimer's flaws (such as his compulsive infidelity) and their impact on the people who loved him. When Lord has a page of illustrations labelled 'Mistresses in the seventies' with a picture of three beautiful women, one of them married to Denholm Elliott at the time—you can't help suspecting a note of envy underlying the censure.

One of the things that one has to wonder at in reading about Mortimer is how he managed to get so much done. He was married twice, had nine children, (including the four step children of the novelist Penelope Mortimer, his first wife, and an illegitimate child with Wendy Craig, the actress); he supported eight children and his wives; he ran a busy and successful practice at the bar; he wrote novels, stage and radio plays, film scripts, articles and reviews; he worked on numerous boards of theatre and arts bodies; he gave interviews constantly but appeared always to have time for a long lunch. The members of the *Rumpole* association of distinguished lawyers from America charmed JM on their visit to London with their cry (à la *Rumpole*) of 'Lunch! I'm particularly fond of lunch'. Mortimer obviously lived life to the full, he loved women, wine, food and friends, the theatre, music and writing, inter alia. His enjoyment and relish for life pervade his work. Lord quotes his children's and first wife's derision at Mortimer's often quoted assertion that he got up early to write before

breakfast. 'He gets up at 10 to go to the Caprice'. But for anyone who has tried to bring up children while running a practice at the bar, the immediate thought is, 'Where did he get the time to write? And even if he found the time, where did he get the energy?'

I suspect this energy was one of the keys to the second question about John Mortimer, which is, how did a man who bore more than a passing resemblance to Toad of Toad Hall, manage to seduce so many women? Again, Lord, in his scathing denunciations, appears to miss the point. He describes Mortimer as 'fawning over women' because of his failed relationship with his mother. I think the assumptions underlying this description reveal more about Lord than his subject. The kind of women who loved and admired JM as wives and lovers and friends aren't the kind of women to admire someone who 'fawns'. I think one clue to Mortimer's success is the story about him visiting her told by Shirley Anne Field, a beautiful young actress and one of the 'mistresses of the seventies'. She had been in one of his plays but at the time of this visit a few years later was married, not working and alone a great deal with her baby as her husband was away in the airforce:

One Friday morning John rang-'Darling! We haven't seen you, the sun's not shining when you're not around'-and arrived to whisk her out to lunch, just as she was about to feed her baby. John took over, cooked the spinach, mashed it and fed it to the baby on the kitchen table. He improvised a carrycot from a vegetable box, draped the box with a shawl, put the baby in it, and took mother and baby to the Baroque and Bite in Regents Park, a floating restaurant on the canal. (Lord, p220-221).

A man who will take a woman out to lunch when she is feeling low is a pearl, but a man who will feed and take her baby as well, is a pearl beyond price. Mortimer liked women for what they were and he enjoyed intimacy. For him women were a subject not an object. And I think this, apart from his energy and humour and generosity, may have been the clue to his success.

This attitude of acceptance and understanding of people as they are, is also characteristic of Mortimer's writing. One famous example of this is his second book of autobiography, called *Murderers and other*

Friends. One of my favourite stories in this book is about him doing a bail application for a murderer, whose instructions to Mortimer in the cells of Brixton prison were that he needed to get out because the tea was weak and they had taken away his copy of the Savoy operas. Mortimer felt that these were somewhat slight grounds for a bail application but put them to the judge, who, unexpectedly, was deeply sympathetic to his client's plight. Mortimer's writing is full of the wonderful contradictions of law and life but also of the tragedy of unhappiness and injustice in people's lives, both rich and poor.

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Lord dismisses Mortimer's writing as facile and shallow. But apart from Rumpole, and Mortimer's other novels, *A Voyage Around My Father* is a fine play which I believe will stand the test of time. One reason that Lord fails to grasp Mortimer's work is that a great deal of the power of his writing comes from what is unsaid. Mortimer himself said to Lord:

I'm very English. England is very beautiful and at their best the English people are admirable. They're very interesting to writers because they never say anything they mean. Americans say what they mean and it's boring. With the English you have to deduce what they mean from what they don't say.

But Lord, like the president of the US whose lips were seen to move when he came to a stop sign, can't understand this, and his failure leads him to misread and misunderstand not only what Mortimer said and did and wrote but also what others say about his subject.

Mortimer wrote very fast and fluently. The first Penelope Mortimer said that he had wasted his talent by being driven to make money (in the early stages

of his career, to support her and their family). Peggy Ramsay, Mortimer's famous literary agent, whose client list in the seventies looks like a *Who's Who* of English literature, said that she believed that he had been seduced by success and had sacrificed his real talent as a writer to it. Perhaps the need for success and admiration and approval, as well as an inability to communicate directly what he felt, were the results of his being sent to boarding school at an early age, or the emotional repression of the society he grew up in. But perhaps too, some of his best writing is about what is unspoken; it may stand the test of time better than some of the explicit savagery of English theatre in his time.

Lord's biography is more detailed than Grove's about Mortimer's cases as an advocate but again he is keen only to disparage his work. His political stance is so different from Mortimer's that perhaps it is impossible for him to appreciate Mortimer's work e.g. in the Oz trial, defending freedom of speech.

Another key to Mortimer's success in his work and writing may have been his detachment, which allowed him to write fast and to handle big cases with panache, whilst perhaps relying on the diligence of his juniors for the detailed preparation. And his detachment on a personal level could be hurtful. Grove explores this in a sensitive and interesting way, particularly in regard to the first Penelope Mortimer,

who like John Mortimer, used their marriage and lives and family as fuel for her writing. I hadn't realized until I read the biographies, that the classic sixties book and film of *The Pumpkin Eater* was based on their marriage. Grove also remarks perceptively on the heroism of John Mortimer's second wife, also called Penelope, who was the organizing genius enabling Mortimer's life of work and writing and family and friends (including regular weekend lunches for twenty) particularly as he grew older and more infirm.

Mortimer didn't spell out the pain of life he saw, he made a joke of it and celebrated stoicism, survival and the ironies and comedy of existence. His belief in justice and the law as the tattered standard of individual liberty and freedom of speech make him an inspiration to many of us for whom these things are also important, especially lawyers. His character may have been flawed, but whose is not? In his life and writing he chose not to judge people for their flaws but to celebrate them for their individuality and to understand and sympathise even with those he most disagreed with.

In the end, his life and work seem to me to embody the slogan of Amnesty International, for whom he also worked, 'Better to light a candle than curse the darkness'.

Judges, barristers and NT reminiscences

Ian Barker QC delivered the following address at a Northern Territory Bar dinner in Darwin on Friday, 26 July 2013

During the few intermittent moments of rational thought allotted to me, I sometimes ponder the relationship of barristers with judges.

Quite obviously, the system assumes respect and courtesy and reasonable conduct from both sides, and, generally speaking, it so works. As the NSW Court of Criminal Appeal put it, it is the duty of counsel and judicial officers to conduct themselves in a temperate manner (*Toner v Attorney General* (1991) NSW CCA p.8). This was in the context of a somewhat entertaining case which produced the catch words 'Barrister Shouts at Judge'. The judge convicted the barrister of contempt. The Court of Criminal Appeal quashed the conviction, holding in effect the shout was not loud enough to constitute contempt.

You may think that my theme of the relationship between barristers and judges is really a pretext in order to tell you about some of my favourite anecdotes. You may be right. You may well have already heard some which have been distilled from other papers of mine. Some are recounted in Dean Mildren's excellent book. If you have heard them, just sit back and think of Kevin Rudd. I won't be long. But when thinking about what to say, my interest was reinvigorated by a recent report from Queensland telling us that a judge there, having invited submissions from counsel, proceeded to say to the barrister, a little unkindly, 'You're an idiot. Do your clients know you're an idiot?'

Judicial disapprobation when it happens, is usually cast in less direct terms. But the disposition and prejudices of judges can have a significant bearing upon both the conduct and the result of litigation. Most judges retain civility and follow the same reasonable conduct they displayed whilst at the bar. Of others, it is sometimes said there was a speedy metamorphosis from judge hating barristers to barrister hating judges. Some, I have observed to my sorrow, quite quickly assume a mantle of almost terminal pomposity.

Contempt of court is a subject of endless prolixity in law reports and has been around since the

13th century. For example, it was contempt to draw a sword to strike a judge. It probably still is. Speaking very generally, a test whether conduct amounts to contempt is whether it interferes with the administration of justice. There was a rather unusual example in Alice Springs in 1962. Before then, criminal trials were by judges alone, without juries (except in capital cases). In arranging the first criminal sittings with jurors, the Attorney General's Department, true to form, forgot to revise the jury list so we had about 20 men from which to draw 12 jurors for about 10 trials (it was some time before women were allowed on juries).

Lawyers in Alice Springs were not thick on the ground, and I finished up appearing for the defence in, I think, 7 of the cases, in 6 of which the accused were acquitted. Clearly, I should have retired then and there. The seventh person was convicted.

What happened then infuriated Justice Bridge. The *Centralian Advocate*, published in the early afternoon after the conviction contained a blistering indictment of the jury system, saying (and I speak from memory):

Being tried by an Alice Springs jury is like buying a lottery ticket. They acquit 6 people then find a person guilty'. (And other comments in like vein.)

But the comments infuriated not only the judge. The jury panel sent the judge a note saying they would not sit any more until the newspaper's editor apologised. The judge had him hauled into court, where he did apologise, after receiving a scathing lecture. Part of the lecture was directed to the need for accuracy in reporting, and it was quite wrong to suggest the judge ate tomato sandwiches for lunch (as the editor had reported).

Personally, I doubt that falsely accusing a judge of eating tomato sandwiches is contempt, but Bridge J referred the whole matter to the Department in Canberra to consider charging the editor with contempt. That was in 1962. I understand the issues are still under consideration.

My earliest contact with the judicial arm of the

As his evidence progressed, Dunphy J began to exhibit indicia of considerable stress, including an alarming reddening of the face and some foaming at the mouth. Finally he could stand it no more: 'What nonsense' he proclaimed, in front of the jury, 'everybody knows cows don't hop'. Well, apparently not, for the jury acquitted.

government of the Northern Territory was with a magistrate in Alice Springs in 1961. Quite a nice man but a little over-steeped in the rich traditions of the law.

He once floated the idea that the Alice Springs Bar should observe the beginning of the legal year by parading robed along Todd Street, to the John Flynn Memorial Church, led by him. As the Alice Springs Bar at the time consisted of two practitioners, and as such a parade would inevitably have attracted to its ranks several drunks, a lot of children and fourteen or fifteen dogs, the idea was abandoned. At least, we managed to keep it suppressed. Alice Springs was not then ready for the law's majestic panoply. Certainly not in 40°C in February.

It was in those early days of my professional education that I met, or rather collided with, an extraordinarily short tempered judge from Melbourne, sitting in Alice Springs as the Supreme Court of the NT. He was a remnant of the old Industrial Court, regrettably appointed for life. The Commonwealth kept him where possible in the far north or at Christmas Island or in courts of marine inquiry sitting in the Arafura Sea, or at the very least north of the Tropic of Capricorn. That is not precisely accurate because Alice Springs is about 16 miles south of the line 23° 26 minutes south of the Equator. It used to be marked by a sign on the Stuart Highway saying 'Tropic of Capricorn. Drink Penfolds Wine'. I was never sure whether this was some sort of entry requirement, or an administrative mandatory adjuration or a mere invitation. At all events the ambiguity was cured by the present imposing stone edifice. The point of all this is that the judge in question, Justice Dunphy, sat in Alice Springs on an occasion in the early 1960s at a criminal sittings of the court. I was in the first of the trials.

Unfortunately the judge's associate, the Crown prosecutor and I lost track of time while having a cup of tea with the court clerk. The judge did not lose track of time. He kept a rigid hold on it and at precisely 10.00am he got on the bench and spent some minutes glowering at an empty court. Then some time was consumed in a thundering denunciation and a lecture about dignity owed to the court. Being young and naturally respectful, I apologised several times for the inexcusable and wholly disruptive five minutes delay, but it seemed to be of little avail. It all stopped when I inquired did he want me to grovel as well as apologise.

But I thought the judge's conduct in a trial in 1962 was instructive. My client was charged with killing a heifer, cattle killing being a serious offence (even though half the NT lived by the practice). He was a cook at the Warrego mine near Tennant Creek and one night went into town for a few beers. On his way back to the mine he says he saw what he thought was a kangaroo on the road ahead and shot it. To his horror, on closer inspection he discovered the animal was more bovine than macropod. But, the remains should not be wasted, so he butchered them then and there and took the meat back to the mine.

So he said in evidence. It was an honest and reasonable mistake (although I don't know what he had against kangaroos). As his evidence progressed, Dunphy J began to exhibit indicia of considerable stress, including an alarming reddening of the face and some foaming at the mouth. Finally he could stand it no more: 'What nonsense' he proclaimed, in front of the jury, 'everybody knows cows don't hop'. Well, apparently not, for the jury acquitted.

I scored the same judge in 1970 in a murder trial in Darwin. It was a strong case. Knowing the

At all events my client was tried and convicted of murder and I have the distinction of having acted for the last person in Australia sentenced to death.

relationship between counsel and judge was, well, awkward, I was apprehensive of the effect this would have on the trial. I suggested to my client that he should consider pleading guilty to manslaughter. Is there anybody, I asked, who could attest to your good character?

He thought for awhile and said 'I have a mate in Brisbane who would help if he could' and then produced a letter from his pocket, from a home for the Criminally Insane. 'Why is he there?' I inquired 'Oh', he said, 'he murdered a sheila'. I said I didn't think this would be helpful. I mean I was really looking for a character witness, not an expert. I notice in Dean Mildren's book the client said 'murdered a sheik' which, if factual, would these days have added a terrorist dimension to the case. I am not often at odds with the former judge, but it was either my indistinct speech or a typo which caused the error.

At all events my client was tried and convicted of murder and I have the distinction of having acted for the last person in Australia sentenced to death. When asked how the day had been, I said it was pretty average, three bonds and a death. Fortunately a benign High Court quashed the conviction and substituted a verdict of manslaughter.

It was all a bit unnerving, particularly having to seek from the governor general monthly remissions of the death penalty.

Jury verdicts are, I think, usually arrived at without physical violence. However, I did once see a sort of sequel to *Twelve Angry Men*; it was less time consuming but a little more robust.

The old court house at Alice Springs was a converted house, in which the jury room was close to the library. I was sitting in the library one day waiting on a verdict. I was browsing through a book the Commonwealth had thoughtfully provided to the

Central Australian Bar, being Marsden's *The Law of Collisions at Sea*, when suddenly the foreman punched another juror through the jury room door, then dragged him back and slammed the door shut. Shortly after that they acquitted my client. I think it was a murder trial. The processes of reasoning by jurors are sacrosanct and I saw no reason to report the incident, to the detriment of my client. No doubt it could be argued that a juror may have acted under duress and therefore did not return a true verdict, but an examination of that proposition would have required evidence from the juror after the verdict. On the face of things we were entitled to retain the acquittal.

I may have seen things differently if the verdict was guilty.

As we all know, the rulings of judges have had a profound effect on the reception of evidence. Take expert evidence. Qualifying the witness was once a tolerably easy task, until Justice Heydon made it well nigh impossible to qualify anyone as an expert. But I like to think I made a modest contribution to the developing law, long before *Makita v Sprowles*.

...the foreman punched another juror through the jury room door, then dragged him back and slammed the door shut. Shortly after that they acquitted my client.

In the 1960s Central Australia was hostage to a lengthy drought. People forgot what rain was. Many children had never seen it. So watering regulations were enforced, one of which was you couldn't water your garden except by a hose held in the hand, and then for a limited time at night.

I had a client tried before a magistrate for watering outside the allowed times. He said his water meter was faulty and showed watering when there had been none. The prosecutor said the meter worked normally and called a government inspector to say so. I objected, on the ground that the workings of water meters were matters for expert evidence. The magistrate said, in effect, this was nonsense. If he



Government House after Cyclone Tracy. (Photo by News Ltd / Newspix)

wasn't an expert he would not have been called. 'You are an expert aren't you' he put to the witness, who answered in the affirmative. It seemed to me something was missing, and after debate the magistrate reluctantly allowed me to ask a question on the voir dire. It was, 'in what area of endeavour are you an expert'? He replied 'I am a tailor'. The magistrate finally gave in and rejected the evidence.

A little later a Tennant Creek man was indicted for forging and uttering cheques. He was one of Tennant Creek's professional alcoholics, a pensioner, an Irishman who found a cheque book in Paterson Street obviously left for him by God. He managed to sign and cash several cheques before he was arrested. Being honest, in an Irish way, he signed them all in his name with his signature.

A tolerably clear case, I thought, speaking from the perspective of counsel for a legally aided client who would rather be engaged in a more fruitful pursuit. But, clear or not, the Crown wanted more, so they called in an expert. He was a police sergeant who had convinced the commissioner of police that the NT police force needed a forensic science branch. He was then sent to Melbourne where he undertook a course in forensic science for three months and returned to Darwin an expert in ballistics, fingerprints,

handwriting and the behaviour of cold steel under stress.

We were presented with myriad charts of samples of handwriting, all of which did no more than point to the bleeding obvious, which is that the signatures were written by the accused. Justice Blackburn let it all in, over objection. An argument was that the witness had never before given such evidence. The judge's response was 'if that is the case he will never be qualified'. I said I didn't know about that, but I would prefer he didn't experiment with my client.

We lost the argument. Post *Makita v Sprowles* we would have won but I think my client by then had long died from cirrhosis of the liver.

A history of what counsel wear and why is beyond the scope of this paper, except perhaps to justify an anecdote or two. Dean Mildren talks about the issue, for example, the criticism of Wells J for permitting counsel to remove wigs and gowns in 1933.

In my time fashions in court dress changed when progress came to Darwin. Before 1964, the Supreme Court building was a Sydney Williams hut in the Esplanade left over from the war. Somehow it had escaped the Japanese bombing. The building was nice enough, with bougainvillea trailing past the



Alan Stretton (back of picture) takes control of relief following Cyclone Tracy. (Photo by Bruce Howard / Newspix)

louvres, but it was not air conditioned, and during the rain no one could be heard, which meant that in the Wet court cases tended to proceed more or less intermittently. In those days one wore a robe over a shirt, with no bar jacket. When the second court building was opened in 1964, the late Justice Bridge decreed that because it was air conditioned, bar jackets would henceforth be worn. It was just as well really. The judge had very firm views about what the Darwin climate ought to be, quite ignoring what it was, and the temperature in the building required not only bar jackets, but jumpers and mufflers also. Litigants occasionally sustained frost-bite, but the advantage of the system was that you could chill a carton of beer simply by leaving it on the bar table. The need to leave the building during the morning adjournment was thus obviated. The present courts are pleasantly cool and who wants to drink beer in the morning?

I think the practise of law in Darwin has never been quite the same since Cyclone Tracy. The house of the chief judge blew over the cliff into Darwin Harbour; never to be retrieved. Justice Muirhead lost both his house and his Volvo car, the latter turning up some days later in Adelaide to where it had been driven by some people who stole it in Darwin on Christmas Day. They collected free petrol at Alice Springs on

the way, having apparently determined that pillage was part of the natural order of things. It may have been: I think we all teetered for a while on the brink of anarchy.

I went into the court building on Boxing Day 1974. It was flooded. Court 4 contained a large and exceedingly dead turkey; I never learned why. It was clearly not sheltering from the storm.

I went into the court building on Boxing Day 1974. It was flooded. Court 4 contained a large and exceedingly dead turkey; I never learned why. It was clearly not sheltering from the storm. I sloshed my way upstairs and looked into the chief judge's chambers. Two young people were copulating on his desk, so I left again. I think I was the only one of the three prepared to withdraw. It was not something of which Sir William Forster would have approved, so I didn't ever tell him. I suppose it was another manifestation of anarchy, although it may have been the only dry place in Mitchell Street. At some stage some people had taken shelter in the robing room. For a long time there remained in one of the cupboards a large collection of dead butterflies, which the owner

had not thought to remove, although at the time it must have seemed important to safeguard them from the elements. For a long time there was a bottle of chloroform with them, but it disappeared eventually, to be used for purposes I dare not contemplate.

A bit of Australian history vanished in the cyclone, namely the wig once worn by Herbert Vere Evatt. It had somehow come into the custody of Tom Pauling, I think by honest means, but disappeared in the wind. Someone somewhere has a wig once worn by two erudite constitutional lawyers one once a High Court judge. So please return it. No questions will be asked except why did you want it in the first place?

The profession survived Cyclone Tracy. Lawyers may not be well-loved, but they are durable, and pillaging brought with it the necessity for people so accused to be legally represented. So work went on. For awhile there were no rules about court dress. I remember appearing before a magistrate for a man charged with stealing several trolley loads of goods from a supermarket on Christmas Day. I forget how I was dressed, but my instructing solicitor wore shorts, sandals, some sort of T-shirt and a baseball cap. His right to wear a baseball cap in court whilst instructing counsel went unchallenged.

The first such pillager was an enterprising man who, along with 10,000 others, took refuge in the Casuarina High School when the houses blew away. Representing himself as a Commonwealth police officer, he divested a man of a bottle of whiskey, informing him that alcohol was prohibited. The owner of the whiskey parted with his bottle without a fight, an unusual circumstance for Darwin. One can only conclude that after the cyclone he had no fight left. The impersonator was arrested and sentenced by a magistrate to nine months imprisonment, which was seen at the time, by some anyway, as a manifestation of emerging anti-Aboriginality. Whatever else, he showed himself to be a man of considerable enterprise. The case sparked a bizarre conflict between the magistrate and Darwin's de facto Executive, when General Stretton confronted the magistrate and attempted to assert some sort of authority over the court and its sentencing policies. He was ignored. The legality of the authority Stretton

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purported to exercise was always cloudy, to say the least, but he added a lighter dimension to a major human tragedy, and we all needed a laugh. I think he saw himself as a latter day King James in his feud with Sir Edward Coke about the powers of the Crown.

In 1978 I tended to see things a bit differently, being solicitor-general. It was an interesting office to have, because no one quite knew what a solicitor general did, beside prosecuting in poisoning trials. Such trials in the NT were, I think, a rare event. Subsequent solicitors-general, Brian Martin, Tom Pauling and Michael Grant, added learning and lustre to the office.

I do remember prosecuting one of Sydney's 'colourful identities' along with a police officer, for conspiring to possess large amounts of cannabis.

There are two anecdotes deriving from that case more or less relevant to my talk, which, as the bureaucrats would say, I would like to share with you. The first involved defence counsel from Adelaide who was given permission by the deputy sheriff to park his car on the court house lawn.

One morning I was sitting at the bar table wondering how I could best stuff up the day, when counsel complained to me that the Crown's principal witness was, as he said, 'having it off' with a young woman who was a court official.

Clearly, neither defence nor prosecution should have intimate contact with a court officer, at least until the trial is over. It is unlikely that such occasions of lust would occur in circumstances such as to infect the deliberations of the jury, but it may *look* bad.

'Well' I said 'I understand. Do you want to have the jury discharged?' 'Christ no' he responded, clearly believing he was on a winner. 'Just use your authority

to stop them doing it.' So I tried. I summoned the deputy sheriff, who marched in. He had a curious habit of standing at attention when I addressed him. I sometimes wondered whether he believed an invasion was imminent. I put the problem. In a sort of bark he said he would attend to it, and he and his powers marched off. I think he may have saluted.

The next day the parade returned. 'I have investigated the complaint' he barked. I sat expectantly. 'It's bullshit', he continued, 'the bastard is bonking her himself'.

I sat speechless. But he went on. 'I'll tell you something else. I've withdrawn his parking privileges'. He turned, saluted and marched off. I heard nothing more of the affair. The trial continued. The jury remained untainted and some sort of justice looked as though it was being done. The complaining barrister parked, in the public car park, with the common man.

But something else happened during the trial, a possible crisis handled by Justice Forster with considerable aplomb. He was probably the calmest judge I have ever seen.

The trial was about a large cannabis plantation out near the Queensland border, with a manager who lived at the plantation.

One day defence counsel said to me that he wanted to see the judge in chambers. So up we went: three barristers and three solicitors. 'Hello' said Sir William, 'what can I do for you?' The barrister said 'I want to put an accusation to this present witness but I thought I should raise it with you first.' 'I understand' said the judge, 'what is the accusation?' 'Well' he responded, 'I want to put to him that out there in the plantation at night he used to have sexual congress with his border collie'. Justice Forster remained imperturbable. 'I see' he said, 'to what issue would the questions be directed?' He responded 'they would go to his credit'.

Justice Forster said 'I suppose if the witness answered in the negative, you could not call evidence in rebuttal – the answer would really be the end of the issue'. 'That's right' said counsel.

Forster J gazed at him and said 'well, it seems to me

that if he affirms the allegation, his credit is forever established. I think no.'

So, this interesting bit of history to this day remains unexplored.

Let me return to the subject of the judiciary and the disposition of judges.

For a long time in Australia there has been a debate about freedom of speech, including the limit to which a journalist may go in stridently criticising a judge. It seems to me that journalists these days are all a little timid when appraising judgments they don't like. Back in 1890s the famous John Norton, founder of *Truth*, disapproved of the conduct of a NSW District Court judge called Docker, frequently referred to in the press of the day as Dingo Docker.

Norton also disliked the Supreme Court judge, Justice Windeyer, for his conduct in a rape trial, which included having a witness flogged.

Norton also disliked the Supreme Court judge, Justice Windeyer, for his conduct in a rape trial, which included having a witness flogged.

In 1886 11 youths were tried for the rape of a young woman at Moore Park, before Windeyer J. The trial was widely regarded as farcical because of Windeyer's bias against the prisoners and the oppressive manner in which he ran the trial. Two were acquitted, four hanged and the rest served ten years after being reprieved. The *Truth* on 29 November 1896 reminded readers of the trial judge's morose and murderous will. The editorial went on to say:

The facts of the trial, together with WINDEYER'S conduct in keeping the jury sitting all night, after a protracted trial of four days, and compelling counsel to commence their addresses to the jury after midnight, and to continue them until nearly 4 o'clock in the morning; his monstrous summing up and almost diabolical determination to prevent as far as possible, the exercise of the Royal prerogative of mercy are too indelibly engraved on the public mind to call for recapitulation.'

But Norton aimed his main salvo at Docker J.

On 7 November 1896 Norton's the *Bulletin* observed that Docker (obviously sitting in quarter sessions) had caused juries to sit for 18 hours continuously and not rising until 3.45a.m. The *Bulletin* went on:

After the gross scandals incidental to the reign of the unspeakable Judge WINDEYER, surely the people of N. S. Wales do not contemplate setting up a tinpot imitation of the man from Tomago!...

Judges know, or should know, that the hearing of a criminal charge is not for the convenience of the jurors, is not for the convenience of the judge, but is for the extension of a fair trial to the accused. There are three courses open -

- a) to dismiss or otherwise regulate Mr. Docker;
- b) to pass an eight hour sitting Bill with regard to criminal trials;
- c) to enact that in cases where juries are being Dockered, they shall, at intervals of four hours during every night-sitting, receive hypodermic injections of cocaine sufficient to brace them up for the occasion.'

And during 1896 to 1898 *Truth* had such bylines as:

'Docker's Doings ... Quarter Sessions Scandals. BY A

TINPOT IMITATOR And Unworthy Successor of Sir William Windeyer.

DOWN WITH DOCKER! THAT'S how we speak of this subsidiary judicial snob and tin-pot autocrat...

DOWN WITH DOCKER. MORE JUDICIAL MADNESS. Crazy Crankiness from the Bench. Derogatory Dodderings by Docker.

DINGO DOCKER.. MAKES HIMSELF MORE KINDS OF AN ASS. His Zoological and Entomological Eruption.'

The most direct attack was probably in *Truth* on 17 April 1898 when Norton devoted an entire page to an open letter to Judge Docker. It included:

I propose to prove circumstantially and without circumlocution, that you are ... utterly unfit for your position ...

Your consistent conduct on the subordinate Bench has been alternatively that of an idiot and a brutal, bewigged

bully. Some of your judicial *obiter dicta* - the obstreperous observations of an ignorant, irascible jury ranter - would seem to indicate that a padded-room at Callan Park would be a fit and proper abiding place for you ...

You are one of the opprobrious spawn of the old Convict System; and would, had not Providence delayed your advent to this world in order to curse our Courts, have made an admirable member of the military rum-selling mob of martinets who mercilessly murdered, by the mockery of judicial process, men and women at the triangles and on the gallows. Your bullyings of counsel defending prisoners, your browbeatings of juries, your brutal behaviour towards prisoners, innocent and guilty alike, but more often towards the innocent, mark you out as a man devoid of all decency, and as a Judge whose vagaries would disgrace a Jack-Pudding.'

And so on.

The 1811 *Dictionary of the Vulgar Tongue* tells us that a Jack Pudding was a jester to a mountebank.

Those were the days.

Personally, I would hesitate to publicly call a judge a brutal bewigged bully fit for confinement in an institution for the insane.

This is not because I sometimes don't want to, but I don't see such statements as benefitting my practice or strengthening my hold on my practising certificate.

By the 1960s, disrespect of judges in NSW (publicly anyway) was largely limited to the bestowal of nicknames.

For example, who could forget the chief judge in Equity in the 1960s, known affectionately as Old Funnel Web. Then another Supreme Court judge, gracious and dignified, was called the 'stately galleon'. Another was 'the mechanical mouse'. Then there was the District Court judge, commonly called 'chook on speed'.

I have tried to limit my discourtesy to occasionally shouting at judges, but quietly. The applicant in *Toner v Attorney General* is now a District Court Judge. He may now and again shout at barristers. I wouldn't blame him.

The Hon Justice Fabian Gleeson

Fabian Gleeson SC was sworn-in as a judge of the Court of Appeal on 29 April 2013.

His Honour grew up in Denistone then Strathfield and attended St Patrick's College Strathfield and the University of Sydney. He began his career in law in 1980 as a solicitor at Freehill Hollingdale & Page, as it was then known. He quickly developed a reputation for being an excellent and very gifted lawyer, particularly in the area of commercial litigation and was involved in some of the most high profile corporate cases at the time, including Spedley Securities and Equitcorp.

He was called to the bar in 1991 and continued along the path of legal excellence in commercial law and being involved in high profile cases including the James Hardie inquiry and a significant number of matters arising from the collapse of HIH insurance. Speaking on behalf of the bar, Attorney General Greg Smith SC said that solicitors noted in particular his 'encyclopaedic knowledge of corporate and commercial law.'

The attorney continued:

Regarded by your peers as a leading company law practitioner, your preparation for matters has been detailed and meticulous, aided by a mercurial ability to master a brief quickly. Solicitors recognise your key strengths as being that you are extremely numerate, and possess a deep understanding of commercial activities, along with an encyclopaedic knowledge of corporate and commercial law.

...

Other strengths for which you are renowned amongst solicitors, include the clarity of your written work which is considered to be unsurpassed at the Bar, and your instances about where a case may or may not lead. Commercial litigators used to trudge up to your Honour's chambers with dubious and hopeful arguments, encouraged by their enthusiastic clients. Your Honour's fearless and incisive advice about those arguments has often led to a long trek back to the office where the unfortunate but always correct advice is delivered to the client. Even more difficult for commercial litigators has been the humbling experience of your Honour surgically dissembling dubious arguments of the client.

Although it is said that your Honour's bedside manner with respect to the giving of bad news has mellowed, there is finality and crispness to your Honour's advice which leave little room for reasoned dissent other than for the foolish and the brave. I am told the only things as unfailingly crisp as your arguments are your shirts.



Solicitors attending conferences with you have learnt to take provisions with them as you are disinclined to offer coffee or water for fear that it encourage people to stay too long. This is probably best understood in the context of your reputation for being notoriously busy.

In 2005 his Honour took silk. He was involved in the Oil for Wheat Inquiry and appeared in court matters relating to the failure of Lift Capital Partners and international derivative trader MF Global. He was also involved in some criminal work, including as junior counsel for the accused in the prosecution of Simon Hannes, a very large insider trading prosecution. His Honour has appeared in relation to a number of disputes involving international arbitrations, he has written for a range of legal publications and worked as a part time lecturer at the University of Sydney, teaching insolvency and business finance law.

His Honour was also a founding member of Banco chambers where he was a great mentor to junior members.

Outside the law his Honour loves early morning swims, travel, Deep Purple and all things Rugby, especially rugby union. When describing his playing days, the attorney general said that there was a rumour that he was '...one of the hardest, most vigorous, most ruthless first grade rugby players of the 1970s'.

The Hon Justice Mark Leeming

Mark Leeming SC was sworn-in as a judge of the Court of Appeal on 3 June 2013.

His Honour was one of three children; his brother and sister are both now officers in the police force. He attended Sydney Grammar School, where he discovered classical music, which became an abiding interest. He then attended the University of Sydney, from which he graduated in 1992 with first class honours in law.

After law school, Leeming JA became an associate to the Honourable Justice WMC Gummow, then to the Honourable Sir Anthony Mason. While in Canberra he met his future wife, Professor Anne Twomey, with whom he has a son, James. At about this time he also found time to obtain a PhD in pure mathematics.

After completing his two associateships, Leeming JA came directly to the bar – he did not ever practice as a solicitor. He joined the Eighth Floor of Selborne Chambers. He quickly established a diverse and busy practice, specialising in commercial, administrative and constitutional law matters.

Despite a heavy workload as a barrister his publications during his eighteen or so years at the bar were prodigious. He produced a large number of legal articles, reviews and case notes; two books on his own account, *Resolving Conflicts of Laws* and *Authority to Decide – The Law of Jurisdiction in Australia*; and, in conjunction with the Honourable JD Heydon QC, editions of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* and *Jacobs on Trusts*.

In addition Leeming JA has been Challis Lecturer in Equity at the University of Sydney since 2004, a member of the editorial board of the *Journal of Equity* since 2005, a director of the Federation Press since 2011, and a member of the editorial board of the *Australian Bar Review* since 2012.

He also found time to be a convivial and popular member of the Eighth Floor, and a great support to junior members of the floor – to whom he was always inordinately generous with his time and advice, not to mention a great provider of work.



In his speech at Leeming JA's swearing in on 3 June 2013 the attorney general, the Honourable Greg Smith SC MP said:

I am confident that you will make a marvellous addition to the Supreme Court.

Your vast legal knowledge, your desire to contribute to the development of the law, your even temper and your reputation for integrity are the hallmarks of a fine judge.

You are indeed a model of what the people of NSW might hope for in a judge.

The Hon Justice Francois Kunc

Francois Kunc SC was sworn-in as a judge of the Supreme Court on 8 April 2013.

Francois Kunc is a Renaissance judge, fluent in six languages, who was once given the choice between becoming conducting assistant to Sir Charles Mackerras or becoming associate to Justice Lockhart.

Justice Kunc attended Sydney Grammar where he developed a love of music.

Speaking on behalf of the New South Wales Bar, Attorney General Greg Smith SC said:

Music was a significant part of your education and I understand that before becoming a legal practitioner you seriously considered a career in classical music and had ambitions to become an opera conductor. You studied piano, violin, voice and conducting. As a treble you sang solo and chorus roles with the Australian Opera, beginning what has been an almost lifelong association with that company.

His Honour worked as a solicitor at Allen Allen and Hemsley before being called to the NSW Bar and joining 11 Wentworth Chambers in 1992, taking silk in 2007. He had a wide ranging commercial and equity practice at the NSW Bar, which included acting for the Commonwealth government and major public companies, and cases involving an international dimension.

His Honour delivered a speech in reply, during which he expressed his deep gratitude to his colleagues and staff from the Eleventh Floor:

I will not even try to articulate what being on the Eleventh Floor has meant to me. ... One does a lot of living in twenty one years. Deep friendships are formed, joys and successes shared, tragedies and vicissitudes endured. Every member of that floor, including its newest recruits, holds a very special place in my heart.

His Honour was the president of the Law and Literature Association of Australia, and serves on the Editorial Board of the Journal of Equity.

He continued his passion for music and his faith whilst at the bar – he was the long standing secretary of Sir Thomas More society, was a cantor at St Mary's Cathedral, and is on the board of the Opera



Australia Capital Fund and deputy chair of the Archdiocese of Sydney Liturgical Commission. He is also involved with the Layne Beachley Aim for the Stars Foundation.

In his closing remarks, Justice Kunc invited the audience to reflect on the importance of Australian legal and political institutions. He said:

When my parents became Australian citizens, I believe in the 1950s, they each received a copy of the King James version of the Bible with a picture of the Queen inside the front cover. It would be wrong to think of that gift as the quaint or risible gesture of a politically incorrect or naïve era. It meant a great deal to them precisely because it symbolised, particularly in the person of the Sovereign, the stable institutions of government and respect for the rule of law which drew them, and hundreds of thousands like them, to a country like Australia. Because of the generally fortunate times in which we live, there may be a temptation to take the rule of law and the integrity of our institutions, of which this Court is one of the greatest examples, for granted. The stories of my parents, their contemporaries and others who continue to arrive on our shores, remind us that we should resist that temptation at all costs.

The Hon Justice Stephen Robb

Stephen Robb QC was sworn-in as a judge of the Supreme Court of New South Wales at a ceremonial sitting on Thursday, 20 June 2013.

His Honour grew up on the New South Wales Central Coast and attended Gosford High School before studying at the University of Sydney. He attained a Bachelor of Arts in 1974 and a Bachelor of Laws in 1975.

He was admitted as a solicitor of the Supreme Court in 1976 and in March 1980 he began practising at the New South Wales Bar. He built up a thriving practice in insurance, corporations and appellate cases. Many were long and complex, such as the liquidation of the Bond group of companies. His Honour took silk in 1992.

Speaking on behalf of the New South Wales Bar, Phillip Boulten SC said:

To briefing solicitors, you were admired for being an approachable, reliable and focussed advocate. To junior barristers, you were an inclusive leader and a valued mentor. To your opponents, you were calm, collected and unerringly precise, with complete mastery of the law and facts in your case.

Outside of the law, his Honour is known to be a committed and capable yachtsman and has taken part in a Sydney to Hobart race.

Justice Robb spoke in reply. Like many judicial appointees before him, Justice Robb acknowledged the importance of a Commonwealth Scholarship in making his career in the law possible. He said:

I am the grateful beneficiary of the advance in social conditions in modern Australian society where a young boy, born into the Australian working class, to whom at that time the Great Depression still spoke keenly, should, by the grace and generosity of his fellow Australians, be given a Commonwealth Scholarship which has opened up to me the possibility of the professional life that I have been able to live and have led to this great day.

Justice Robb also spoke of his articles of clerkship under the Hon William Gummow and when he read with the Hon Robert Hulme.

To the Honourable Bill Gummow, I owe the most profound debt as my effective master solicitor, mentor and



teacher. Towards the end of my law degree, the long established practice of practical training by articles of clerkship, which in my case has correctly been called onerous, was passing into history. Imagine the benefit of receiving direct personal practical training as a novice from a person who I then thought would be and has since proved himself to be, a master of the profession. There is no time for me to explain or elaborate the lessons that I have learnt while under Bill Gummow's tutelage. No doubt, I was not the perfect student and did not learn every lesson. However, I believe that I can truthfully say that the source of all the rigour that I have always attempted to apply in my professional life, was his teaching and example.

I also acknowledge my debt to the Honourable Robert Hulme, my pupil master. Robert taught me exactly how busy a busy junior barrister could be but notwithstanding his great work, he managed to set me on the road to an understanding of what was required of a person to be a barrister.

His Honour Judge Peter Whitford SC

Peter Whitford SC was sworn-in as a judge of the New South Wales District Court on 24 June 2013. Michael McHugh SC spoke on behalf of the bar.

Judge Whitford was born in Perth. As a young boy he was an accomplished gymnast and in 1975 was selected for the Junior National Squad. After leaving school he worked briefly with Hamersley Iron at Dampier and Mt Tom Price as a trades assistant and lab technician. Over the ensuing years he travelled throughout Australia and South East Asia, employed as a farm hand, bar attendant, truck driver, hospital orderly and worker at Hobart's Shoebridge Street Youth Shelter.

He began a law degree in 1986, and soon excelled academically. In 1988 he graduated with a Bachelor of Laws with first class honours from the University of Tasmania. He was awarded a medal for the James Backhouse Walker Prize for being first in the degree. There were other prizes – two Butterworths prizes, the Walker Prize, the Sir Herbert Nicholls Common Law Prize.

In 1988 his Honour arrived in Sydney and began work as a solicitor in Clayton Utz, doing mainly commercial litigation. Then, in February 1990, he became the associate to Sir William Deane.

He began practising at the New South Wales Bar in February 1991. He read with James Allsop and David Catterns, as they were then, but also had the privilege of appearing with Peter Hely QC in a number of important matters in the Federal Court and High Court, such as *Carnie v Esanda Finance* and *Kettle Chip Company v Apand*. He was held in very high regard by Hely QC.

McHugh SC said:

Your Honour took on readers, all of whom describe you as the ideal tutor: convivial, informal, generous with your time, and always willing to introduce them to briefing solicitors.

Indeed, these admirable qualities extended offshore. Your Honour was master and commander of the yacht *Wirajurnd*, which, I believe, you have skippered in the waters around Hamilton Island and, of course, in Great Bar Boat Races. Friends and colleagues were invited aboard, and all agree that your Honour was remarkably tolerant of hapless landlubbers who didn't know the difference between port and starboard; a halyard and a sheet.

By the late 1990s his practice was going from strength to strength. He appeared in many complex, landmark



cases, especially those pertaining to professional negligence, competition, trade practices law, and of course, appellate work. None were more complex than *Seven Network Ltd v News Ltd*.

In 1999, led by Tony Meagher SC, he was counsel for Dyson Heydon QC in *NRMA v Morgan*. In 2000 he was led by Allsop SC, as his Honour then was, in *Yates v Boland*, and by Roger Gyles QC in *Ampolex*. In addition to these seminal cases there was a series of important competition cases, most often on behalf of respondents such as Woolworths.

In September 2004 his Honour took silk.

McHugh SC concluded:

Now, in the most recent tack in your career, your Honour took on challenging cases in the Court of Criminal Appeal and enrolled to study psychology at university. It would seem obvious by our presence here today that your Honour sensed a new and refreshing intellectual and personal challenge was in the offing and your acceptance of an appointment to this court is both understandable and logical.

His Honour Judge Stephen Hanley SC

Stephen Hanley SC was sworn-in as a judge of the New South Wales District Court on 15 July 2013. Attorney General Greg Smith SC spoke on behalf of the bar.

His Honour was born in Glen Innes in northern NSW and went to school at De La Salle College at Armidale. He graduated from the University of New England in 1973 with a Bachelor of Arts, with honours in modern history. He transferred to Sydney Law School and attained a Bachelor of Laws in 1975.

His Honour was admitted as a solicitor in 1977 and two years later he established his own practice. His main area of practice was criminal law, and he appeared as an advocate in committals and defended hearings in the local courts, sentences and bail applications in the Local, District and Supreme courts.

His Honour was admitted to the New South Wales Bar in 1986 and practised mainly in criminal law, specialising in complex and serious cases before the superior courts. In 1987 he established the NSW Criminal Lawyers Association.

In 2003 his Honour completed a Master of Laws degree, majoring in public international law and since 2005 he was often briefed in transnational criminal cases, such as drug trafficking, money laundering and people trafficking for sexual servitude.

Since 2003 his Honour has represented the Bar Association on the board of Legal Aid NSW.

His Honour took silk in 2010. Speaking on behalf of the bar, Attorney General Greg Smith SC said:

You were briefed and respected by most of the major and well-reputed specialist criminal law firms in Sydney and throughout NSW, directly by the Serious Indictable section of the Legal Aid Commission, and on a pro bono basis by the Aboriginal Legal Aid Service.

You have also appeared in ICAC, Police Integrity Commission and Royal Commission hearings, having been selected in 2005 to the panel of barristers to be briefed by the Legal Representation Office to appear on behalf of witnesses summonsed to appear before these bodies.

You also regularly appeared on a pro bono basis in criminal courts on behalf of Aboriginal clients of the Sydney Regional Aboriginal Corporation through the Bar



Association's Aboriginal Legal Aid Pro Bono Scheme. The Aboriginal Legal Aid Service in Sydney has also used written sentencing submissions, which you prepared, as a guideline for principles to be addressed in sentencing Aboriginal offenders.

...

You are renowned for being an excellent trial lawyer, with old school advocacy skills and a deep insight into people and their motivations. You also never show agitation regardless of pressure or stubbornness from others. You always remain polite.

The ability to maintain authority and inspire respect is to a great extent attained through the exhibition of judicial qualities such as integrity, independence, impartiality, firmness, patience, courage and courtesy to all parties. These same qualities that you have displayed in your daily practice will enable you to uphold the dignity and authority of the court in a way that maintains public confidence in the administration of justice.

Douglas John Barry (1946 - 2013)

Douglas was born in Bundaberg not long after his father, Dr. David Barry, was discharged from the RAAF as a squadron leader. His mother, Hazel, was a former Latin teacher from Mountain View Station near Parkes. With older siblings David and Kay, the family relocated to Brisbane after Dr. Barry became gravely ill. He died in 1954. From then on, Hazel worked full time to give her three children the life and education she knew their father wanted for them.

Douglas attended St Joseph's College, Gregory Terrace and then enrolled in an Arts/ Law degree at the University of Queensland. At this point, he was already enthralled by the theatre and soon joined The College Players, a group of student actors. He had discovered a like-minded community who remained dear friends. The Players travelled throughout Queensland with productions of Gilbert and Sullivan and Shakespeare.

After graduating from university, Douglas did a stint as the Assistant Manager of the renowned Coliseum Theatre in London. It was during this time that his great love of opera began. This remained with him for the rest of his life.

At some point during his time away from Australia, Douglas took a job as a sports' instructor at a resort in Spain. Of course he knew nothing of things mechanical or water sports in general, but he was nonetheless a great hit.

Douglas returned to Brisbane in the early 1970's, hoping to establish himself as an actor. He made his mark at Twelfth Night Theatre, then under the direction of Joan Whalley, in plays including David Williamson's highly controversial 'Don's Party'. It was at Twelfth Night Theatre that he met Marcia, and they married in 1974. After working together in Brisbane, they moved to Sydney and set up a tiny home in Darlinghurst, at that time a highly disreputable locale.

In 1976, Douglas was called to the New South Wales Bar, being proposed by the late John Kenny QC.. He took up a readership in what was then Mena House Chambers, now Windeyer, in Macquarie Street. One of his great mentors at this time was the late Justice David Opas. Douglas later moved to Edmund Barton Chambers in the MLC Centre. During all of this time, he developed a successful practice in Family Law which continued for sixteen years.

Douglas's first daughter, Anna, was born in 1977, followed in 1982 by Genevieve. There were many happy years in the family home in Woollahra in Sydney before ill health forced him to leave the Bar. Undeterred, he spent some of his recovery time writing a novel and planning his return to the workforce. He secured a position as a policy officer with the Privacy Commission. At the same time, he was very active with a number of community organizations. For this, he received public recognition at Parliament House at the Law and Justice Society Awards.

Douglas took great pride in seeing his daughters graduate from university and not to be outdone, he returned to study himself, completing a Master of Arts from the Catholic University and a Master of Laws from the University of Sydney. There were many long lunches to celebrate all these successes.

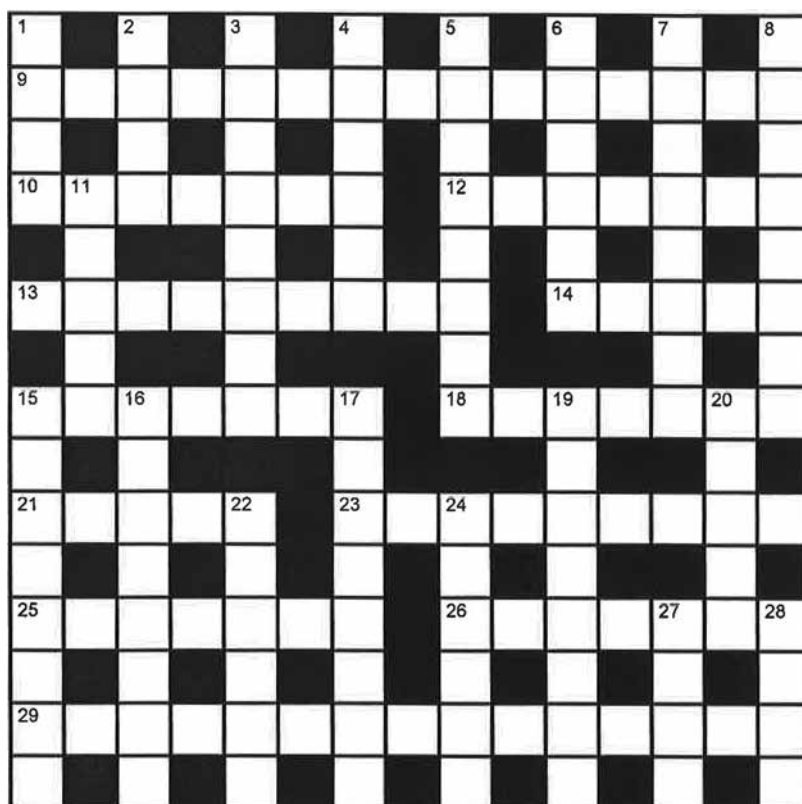
In 2006, Douglas was devastated by the death of his mother, Hazel. Soon after, he decided to return to the Bar and he began his practice in Frederick Jordan Chambers in Martin Place. Here, he was noted for his advocacy on behalf of marginalized and disadvantaged persons very much in need of compassion and support. He is also remembered by many as a generous mentor who respected the traditions of the law.

Along with a love of classical music, literature and theatre, Douglas never lost his passion for opera and often travelled to Vienna and Berlin to see the 'right' soprano. To say he was a Wagnerian is an understatement. His specific knowledge of productions in various locations around the world and his seemingly encyclopaedic recall of detail always impressed. He had an opinion about everything. He and Marcia planned to see 'The Ring' cycle in Melbourne in November, book ending a year which began with Douglas walking Anna down the aisle for her marriage. This event brought him great joy.

Douglas died unexpectedly in St.Vincent's Hospital, Darlinghurst of complications following heart surgery. He is survived by his daughters Anna and Genevieve, his son-in-law John, his sister Kay and her children and grandchildren, and Marcia.

Crossword

By Rapunzel



Across

- 9 Victoria's Basement was Hilary's? (5,10)
- 10 Moral 'letterdrop' deadly around the old Italian 99? (7)
- 12 Cleaner A-1 sound. (7)
- 13 Lawfully, DIY baling out? (9)
- 14 Knight each northeast (ie Queensland) judge?(5)
- 15 Current AG uses surf dye? (7)
- 18 Do me out of endothermal 'hold spellbound!' (7)
- 21 Lurking in borsch was a central vowel... (5)
- 23 Moving riding can make a moveable feast? (6,3)
- 25 Plane inclining to 'culture fortification'? (7)
- 26 Kind of a clever chopper? (7)
- 29 Green comprised Victorian stones. (15)

Down

- 1 Is the French island? (4)
- 2 Agitate ache apiece. (4)
- 3 Hand off tissue replacement, in a tissue's stead. (8)
- 4 Depression after descent? (Black gap.) (3,3)
- 5 Serious injury a player's horror. (8)
- 6 Saint about an Oz knight? Not if he does this. (6)
- 7 Elegant maiden's live launch. (8)
- 8 Outtake from the real thing, or floating above it all? (8)
- 11 Growth sounds brass. (5)
- 15 Late princess's 'three-court' area? (8)
- 16 Digging out huge minx? (8)
- 17 Relaxing dates I've addled. (8)
- 19 Cut angles to citrus hybrids. (8)
- 20 Lower a bottom? (5)
- 22 'Eyes open!' (aka new break up). (6)
- 24 Pleasant tense ponytail, a precise point. (6)
- 27 Unmask evil mask. (4)
- 28 Pace about around at... (4)

Solution on page 98

Bullfry at the swearing-in

By Lee Aitken

Gaily bedight, and 'full-bottomed' in every sense, Bullfry wandered harmlessly towards the portals of the court. What was the point of all this security? Did it aim to provide mere psychical reassurance? What was to stop the mad, or the malevolent, from wrecking the joint with some explosive *before* the 'iron curtain', and any jobs-worth 'searcher', was reached? (Thank goodness, or so it seemed, that the possible malefactors did not thus far include men with the guile and cunning of ageing recusants from South Armagh).

In former times, presiding jurists were more robust – Bullfry recalled the 'Smiler' at a lunch telling the old Bar Common Room table how Jack Slattery had once stopped the prisoner, who was attempting to reach him from the dock, with a water jug! Now, of course, even the most contumelious conduct would not result in any summary imprisonment on view – you could throw paint, or oranges, at the Court of Appeal and expect no more than a reprimand – someone would have to take out a summons so that the miscreant might be dealt with by an impartial tribunal for 'contempt in the face of the court'. That was the modern way – dispense with all prompt and vigorous informality in order to give a vain pretence of impartiality.

The lift was very crowded – Bullfry looked around hoping to emulate that jurist who had discovered a new prospective spouse in the elevator – could he afford another matrimonial adventure? His accountant had suggested not. The second Mrs Bullfry was wearing well enough, although the morning sun did show her age. His own

lack of need for 'personal space' made Bullfry a dangerous lift companion – thank goodness Alice had managed to restore some semblance of freshness to his robes with a liberal application of Dettol, and eau-de-cologne. A throng of young juniors surged in as the door was closing, their bright, expectant faces full of hope. How little did they know?

Bullfry sometimes addressed callow law students in their late teens who were always agog with life's prospects, and possibilities – a dream of an 'international arbitration', or 'war-crimes' practice in Geneva, or London, or Montevideo exploring complex issues that involved the law of fishes, or treasure trove, or genocide while travelling in high estate between First Class

Departure lounges, and illustrious multi-national tribunals. But then later, in fact, mugged by philoprogenitive reality at 32, strap-hanging in an odiferous, dawn, carriage on the Circle Line for fifty minutes before spending the entire rainy London day redrafting, on a 'leveraged' basis at a Magic Circle operation, a Royal Bank of Scotland debenture, and the subsequent late-night return to the small flat in Rotherhithe, where the cat had been sick on the carpet, and the spouse with dandled infant had resorted to the bottle!

And the young barristers? It seemed to Bullfry that the amount of 'training work' available to the neophyte had substantially diminished. Seeking *ex parte* service, calling on subpoenas,



extending a caveat, putting in an early plea, cross-examining a mendacious plumber – all this was bread and butter for the new barrister. Without such basic advocacy training a junior could progress on the back of ‘big firm’ work by doing nothing more than typing diligently on a computer in a large Part IV case for two years or more. Why had things changed? Partly because there was less litigation in general and, what there was of that left, the firms, large and small, clung to their bosoms. Mediation had a lot to answer for.

The comparative economic efficiency of the bar as an expert, and valuable, source of timely legal advice was not brought home to the clients themselves since any ‘instruction’ was usually intermediated by the firm – no wonder a client was reluctant to go to Court when opening the smallest file cost several thousand dollars in transferred ‘overhead’ (the large, lavishly decorated office, the huge HR and other ‘divisions’ of non-fee earners, the guaranteed ‘draws’ of partners in an international business). Even the smallest matter seemed to provoke the arrival in chambers or at Court of two trolleys of documents, and a partner, and two Associates.

The bar as a business entity, with its tired website, and its general reluctance to engage in any form of ‘direct’ advertising to clients, sometimes appeared overwhelmed by the contemporary challenge. No doubt those counsel at the ‘top’, who enjoyed considerable market power, still fared reasonably well (although much less lavishly than most modestly successful entrepreneurs engaged in a ‘discount for cash’ business). But for the hoi polloi? Every youngster had a possible Court of Appeal

appointment in her blue bag, but the cruel reality remained that of the 100 plus commencing each year, only 20 to 30 would still be in practice after five years – but, like an infantry subaltern at Ypres, that fate would only befall someone else.



Another swearing in – who was it today? Another Daniel (Danielle?) come to judgment. At least they had improved the lighting in the court, even if the old portraiture remained. Bullfry struggled to find a seat in the second row – the regular crowd sauntered in – on come the bench (‘mice in oakum’) with the new appointee – you know that you are getting old when the latest recruit to the Court of Appeal looks like she could be your younger sister, or your niece, or you had led her when she first came to the bar.

The usual shivaree – why was it always necessary to read two Commissions rather than roll it all into one? Some high principle of constitutional law must be involved – never an area of expertise for Bullfry. Then, the speeches – a jocose reference to the appointee’s skill, and skulduggery, at lacrosse, or netball, followed by encomiums

from all who had never met her. Last, the appointee’s reply, in which she thanked old instructing solicitors, clerks, secretaries, school principals, and sundry collateral relatives.

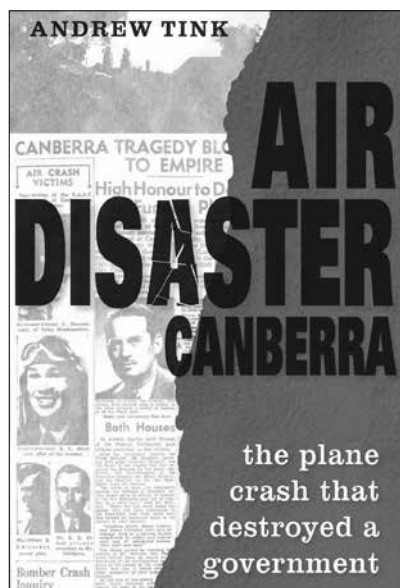
Then, off immediately to commence ascending that long

judicial road and to explore the entrails of the Civil Liability Act, or similar legislation. What was the ‘half-life’ of a distinguished jurist? As the judges trooped out, Bullfry thought back in silent reverie to the great names of the past – where was Knox, where was Menhennitt, nay more and most of all, where was Barwick? – entombed in the urns and sepulchres of mortality. *O iuris consulti senes, quam multa meminerunt.* ‘No memory of having starred atones for later disregard.’

I have wasted time and now doth time waste me! Was it time for him to reconsider the ‘Patonga option’, and to sit on the dock of the bay in a battered Panama while demolishing a cask of red, and to burley for leatherjackets? ‘Control-shift-N’ – ‘clear all browsing data’ – if only memory, and life itself, were so simple.

Air Disaster Canberra: The Plane Crash That Destroyed a Government

By Andrew Tink | New South | 2013



Andrew Tink had the highly original idea of recounting two events from Canberra in 1940 – an air crash followed by a number of inquiries and the fall of the UAP/ Country Party government shortly afterwards. The link between these two events was the presence on the doomed aircraft of three ministers in the government, all of them strong supporters of the then prime minister, Robert Menzies.

The crash occurred on 13 August 1940 when a Hudson bomber, converted for passenger travel, dived into a ridge near Canberra aerodrome. All on board were killed. In addition to the three ministers – Sir Henry Gullett, Geoffrey Street and James Fairbairn – there were the chief of the general staff, Sir Cyril White, another soldier, one of the minister's private secretaries and four crew members.

A UAP government had come to office in January 1932 with Joseph

Lyons as prime minister and became a coalition administration with the Country Party in 1934. Menzies was attorney-general during this period when the first law officer still had the right – and the time – to take private briefs. When he went to the Privy Council in 1936 on a s 92 case – *James v Commonwealth* – Menzies did not charge the Commonwealth a fee but sent a bill to the State of Victoria, for whom he also appeared, for two hundred guineas. When this was raised in the Commonwealth Parliament, Lyons wrote to Menzies, warning him that he was a likely future leader of the UAP and should be careful about giving his opponents an opportunity to 'dim the lustre of your reputation'.

Menzies spent most of the first half of 1941 in London where he attended meetings at the British war cabinet. He returned to Australia in mid-year but in August was forced to resign by his UAP colleagues. If three of his strongest supporters had not been lost a year earlier, this vote might have taken a different course.

The book sets out small biographies of all those who were killed in the crash. It is a striking illustration of a different social and political world that Street, Fairbairn and White were all graziers. All three ministers had fought in the Great War and the book underlines the long shadow that this conflict cast over almost every aspect of Australian life in the 1920s and 1930s. Menzies had not, of course, fought in the war and this was a source of suspicion

and sometimes hostility towards him by those who had.

On the day of the crash the sky was clear and there was little wind. The plane appeared to stall and burst into flames after hitting the ground. The crash was followed by three rapidly convened inquiries – an inquest by the ACT Coroner, a RAAF court of inquiry and then a judicial inquiry presided over by Mr Justice Lowe of the Victorian Supreme Court, with Arthur Dean as counsel assisting, who was later appointed to the same court. The judicial inquiry was held in the High Court's No 2 courtroom in its Melbourne premises in Little Bourke Street. Both inquiries, as opposed to the inquest which did not consider the question, essentially found the

cause of the crash to be pilot error. In one sense the author agrees, although he considers that James Fairbairn who was an experienced pilot himself, was probably at the controls and caused the plane to stall.

Menzies resigned from the Cabinet in early 1939 but, when Lyons died in Easter of that year, he was elected leader by his UAP colleagues and became prime minister, although in a government that no longer included the

Country Party. At the general election in September 1940 Labor and the UAP/Country Party tied with thirty six seats each. There were two independents who initially supported the government but the political landscape was highly unstable. On the UAP side the Country Party had refused to serve under Menzies and on the Labor side there were still two separate groups, the official ALP and Lang Labor from New South Wales. At a time when Europe had been overrun by the German armies and Britain was fighting for its life, Canberra remained as

detached from reality as it is in many ways today.

Menzies spent most of the first half of 1941 in London where he attended meetings at the British war cabinet. He returned to Australia in mid-year but in August was forced to resign by his UAP colleagues. If three of his strongest supporters had not been lost a year earlier, this vote might have taken a different course. In any event, Country Party leader, Arthur Fadden took over as prime minister but in early October the two independent

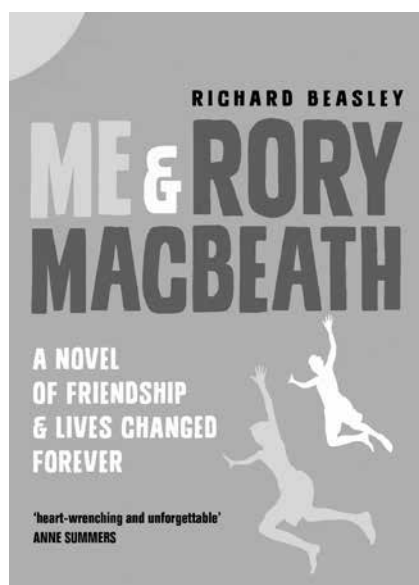
members withdrew their support from the government and John Curtin became prime minister in a Labor administration which was to survive, albeit without Curtin himself, until December 1949.

This book provides a fascinating interplay of law and politics and the author's extensive research has not inhibited his highly readable style. It is simply an excellent piece of work.

Review by Michael Sexton SC

Me and Rory Macbeath

By Richard Beasley | Hachette Australia | 2013



The seemingly endless summer holidays of our childhood: there are surely few periods in our lives that we remember with more nostalgia. Australian summer holidays, idled away with other

local children at the beach or in neighbours' pools, and fueled by sausage rolls and meat pies, calippos and paddlepops, seem particularly evocative in retrospect.

Richard Beasley's new novel, *Me & Rory Macbeath*, begins with a kind of homage to those summer holidays of our childhood, as its narrator, the now grown-up Jake Taylor, describes the summer of 1977 – 1978, when he was twelve years old and living on Rose Avenue in the suburbs of Adelaide. Jake's depiction of that summer is almost palpable, and is replete with games of front-yard cricket, terrifying encounters with ten-metre diving platforms, and molten roads that scold bare feet as his band of local boys walk home. It is a beautiful start to the story (which is part coming-of-age,

part courtroom drama), and also a clever one, as it lulls the reader into feeling that very sense of 'vague yet secure optimism' which Jake identifies as coming over him and his best mate, Robbie, around the time they turned twelve.

Rory Macbeath is the youngest child of the Macbeath family, who has recently arrived from Glasgow and moved into Number 1 Rose Avenue, described by Jake as the worst house in the street. It is the entry of Rory into Jake and Robbie's world which changes things for Jake, at first only subtly, with the unsettling shift in dynamic that takes place when a long-established duet becomes a trio, and then radically and irrevocably, as the Macbeath family takes centre stage on Rose Avenue. As Jake learns more about Rory and his family, the pace of the novel

picks up, moving inexorably towards the tragedy that is at the heart of the story.

It is in the novel's prologue that we first meet Harry, Jake's mother. Harry is a left-wing criminal defence barrister, who is bringing up Jake single-handedly. She is feisty and fearless, intelligent and outspoken, and a talented and tireless advocate. Jake tells us, in the prologue, that Harry's fearlessness - a quality which Jake so admires - is a quality which she shares with Rory. And as the novel unfolds, fearlessness, or more particularly, a preparedness to stand up for what one believes in, is a theme that is central to the events that take place. Friendship is another strong theme of the novel, and it is depicted in many forms. Between Harry, the single working mother, and Jake, her precocious and sensitive son, there is a singular and formative relationship; Beasley has evidently taken great care in constructing this relationship, which is not only

Beasley takes on some daring themes and explores a dark subject matter, but he does so lightly and with the humour that we have come to expect of him.

affecting, but also responsible for much of the novel's humour. We also see the blossoming friendship of Rory and Jake, at once complicated and uncomplicated, the bond that develops, by necessity, among the various women of Rose Avenue, and the evolving relationships which exist between Harry and members of her chambers.

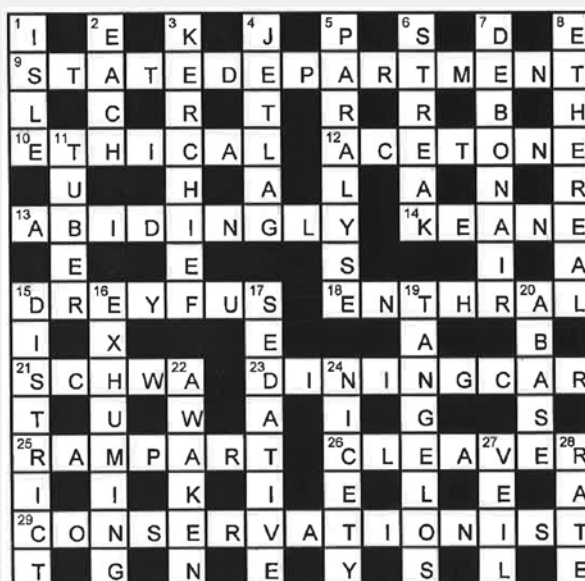
It is a murder trial which is at the core of the narrative in *Me & Rory Macbeath*, and it is the courtroom scenes in that trial, featuring the fearless Harry as counsel for the defendant, where Beasley is at his best. Unsurprisingly, these scenes ring true; they are packed with tension, but are also comical at times, and I found

myself whipping through the pages where the story leaves the courtroom, just so I could get back to watching Harry at work. It would be giving away too much to reveal here the partial defence raised by Harry but suffice to say that Beasley's treatment of the subject matter is both sensitive and thought-provoking.

Me & Rory Macbeath is easily Beasley's best book yet. Though largely told through the eyes of a twelve year old boy, it boasts a depth and maturity not quite evident in his two previous novels. Beasley takes on some daring themes and explores a dark subject matter, but he does so lightly and with the humour that we have come to expect of him. It can perhaps then be described as a coming-of-age novel in two senses - both for the author as a novelist, and for the characters he portrays.

Reviewed by Juliet Curtin

Crossword solution



By Julian Burnside

Glamour

There is no more glamorous city in Australia than Sydney. Ask anyone who lives there. It is the prestige place to live and work and have corporate headquarters. This annoys Perth, where the gravitational pull of ferrous metal is ever growing. Sydney is Tinsel-town to outsiders, but its prestige never fades.

The first paragraph of this essay is unequivocally a compliment if each word is given its current meaning, but in earlier times it would have been seen as hovering on the frontier which envy shares with malice.

Glamour has developed oddly. Its current meaning is almost entirely favourable, even if tinged with jealousy. Some recent references in the Court of Appeal give a fair representation. In *Chisholm v Pittwater Council & Anor* [2001] NSWCA 104 the court said:

...During the first part of the last century, Palm Beach was regarded as the 'epitome of the simple, unspoilt life'. Later, Palm Beach acquired a reputation for 'glamour', and was regarded as a 'place for the [very] wealthy'...

The judgment is attributed to Meagher JA, Powell JA and Ipp AJA, but that sentence bears the stamp of Meagher JA.

In *Union Shipping NZ v Morgan* [2002] NSWCA 124 at [114] Heydon JA, with laser precision said:

The defendant ... said that all that mattered was the merit or weakness of any particular argument, quite independently of which court had employed it. Yet it was noticeable that the defendant, in its enthusiasm for particular arguments favourable to its position, constantly reminded the Court of the glamorous courts associated with them, like the United States Supreme Court, or the glamorous judicial names associated with them, like those of Jackson J and Frankfurter J, or even the glamorous academic names associated with them, like Kahn-Freund, Morris, Cheshire and North.

Hodgson and Santow JJA agreed.

These references fairly catch the current sense of glamour, although the inverted commas around it in *Chisholm* suggest that the author well knew the gulf between its original and its current meaning. It's all Sir Walter Scott's fault. Glamour was originally a Scottish word meaning magic or sorcery, and its connotations were unfavourable. Burns used it in this sense:

Ye gipsy-gang that deal in glamor, And you deep read in hell's black grammar, Warlocks and witches (1789)

Bailey's dictionary (1721) does not have an entry for glamour, and neither does *Johnson's Dictionary* (1755): but Johnson notoriously disliked Scotland. Scott is credited

with introducing the word into literary use. In *Letters on Demonology and Witchcraft* (1830) he wrote:

This species of Witchcraft is well known in Scotland as the glamour, or *deceptio visus*, and was supposed to be a special attribute of the race of Gipsies.

(*Deceptio visus*, not surprisingly, is an optical illusion.)

Later in the 19th century, glamour came to signify a magical or fictitious beauty; then in the 20th century charm; attractiveness; physical allure, especially feminine beauty. It is notable that charm is the hinge around which the shift in meaning swings, since charm can refer to an appealing character or to a magic spell.

By the middle of the 20th century the current meaning was established. In Terence Rattigan's play *Flare Path* (1941) one character says:

I'm going to pour it on with a bucket. If I can't look like the screen's great lover, I can at least smell like a glamour boy.

Glamour and prestige have followed surprisingly similar trajectories. Like glamour, the current meaning of prestige can be fairly caught in recent decisions of the Court of Appeal. In *Dawes Underwriting v Roth* [2009] NSWCA 152 Macfarlan JA said:

Dawes offers insurance for a range of high performance, prestige, vintage and classic motor vehicles.

In *Fexuto v Bosnjak Holdings* [2001] NSWCA 97 Priestley JA noted that:

One element in what happened from 1988 onwards must have been Mr Jim Bosnjak's increasing prestige in the bus industry outside the family business...

(I wonder if it occurred to his Honour that 'prestige in the bus industry' was an improbable idea.) In *Citibank v Papandonny* [2002] NSWCA 375, one term of the distributorship agreement provided:

Distributor shall always use the Marks in such a manner as to maintain their goodwill, prestige, and reputation.

The sense of the word is unmistakably favourable in each case. There is no hint that, at least until the late 19th century, prestige connoted magic, trickery, or deception. The OED offers quotations from the 17th to the 19th century in support of the original meaning an illusion; a conjuring trick; a deception, an imposture. It comes from the Latin *præstigiū*: a delusion, and ultimately from *præstringere* to bind fast, thus

præstringere oculos to blindfold, hence, to dazzle the eyes. Johnson has prestiges: 'illusions, impostures, juggling tricks'.

During the 19th century, prestige acquired the secondary meaning 'Blinding or dazzling influence; 'magic', glamour; influence or reputation'. Supporting quotations in the OED include this from Fonblanque (1837): 'The prestige of the perfection of the law was unbroken.' and this from Sir William Harcourt (1898): 'People talk sometimes of prestige... I am not very fond of the word. What I understand by prestige is the consideration in which nations or individuals are held by their fellows'. It was not until the 20th century that its current sense was fully established. So this from W. Somerset Maugham (1944): 'Though she didn't much care for [modern paintings] she thought quite rightly that they would be a prestige item in their future home.'

Prestidigitation (originally prestigation) is a close relative of prestige, but has not moved socially. It still means sleight of hand or legerdemain. The first use of it noted by OED is dated 1859: the very time when prestige was beginning to shift its meaning. It filled the gap left by its upwardly mobile relative.

And tinsel? It's doubtful flattery. It originally referred to the treatment of fabric, especially satin, 'Made to sparkle or glitter by the interweaving of gold or silver thread' (not bad), but later, applied to 'a cheap imitation in which copper thread was used to obtain the sparkling effect' (not so good). But the traditional Scottish meaning was much worse. In the 14th century it meant 'The condition of being 'lost' spiritually; perdition, damnation.' In the 15th century, as a word in Scottish law it meant forfeiture or deprivation. And in Bell's *Dictionary of Scottish Law* (1838) there appears the entry:

Tinsel of Superiority, is a remedy..for unentered vassals whose superiors are themselves uninfert, and therefore cannot effectually enter them.

Glamour and prestige are examples of that exclusive club which includes obnoxious, panache, tawdry, sanction and mere. They are words whose meanings have shifted over time (that's common enough): these words have changed meaning 180 degrees. Rarer still are words which have two current meanings which are opposite. But enough for now: I will let you figure out what they are.

POETRY

By Trevor Bailey

Coincidence evidence: s 98

Jury examples from the Benchbook

- a) To music through Woolworths I wandered,
To tissues, past bread bins and bowls;
'Now who is that singer?' I wondered,
When there on the shelf were loo rolls.
- b) Two old blokes sitting on the train;
One attacks the crossword puzzle,
While the other bathes his eyestrain
Away with a water bottle:
Only one performs ablutions,
But both require solutions.
- c) For three mornings straight, at 5.33,
I've heard the first birdsong so fair;
What avian wonder allows it to see
My small kitchen wall clock from there?