

Bar News

The JOURNAL of the NSW BAR ASSOCIATION Winter 2004



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Bar News

The JOURNAL of the NSW BAR ASSOCIATION

Winter 2004

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ISSN 0817-002

Views expressed by contributors to
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Editor's note

Ian Harrison SC stirred debate in this journal when, in his first message as President, he said 'Advocacy is, at its purest, an intellectual exercise where hormones and chromosomes have no relevance. I continue to be troubled by the notion that the fight to equalise the opportunities for women at the Bar so often starts with the proposition that they are a separate group. I consider that equalising levels of representation should be a goal which drives the debate.' A substantial purpose of this issue is to open up further debate and discussion on the role of women at the New South Wales Bar.

At the risk of over-simplification, there are two rather different perspectives on the issue. The first perspective starts from the premise that there is not a great deal to debate. Women barristers should be treated like any other barristers. If they are good they will get ahead, if not then otherwise. There is no systemic or evident discrimination from other barristers, solicitors, judges or clients that requires addressing. If the percentage of women at the Bar is low, and the percentage of female silk even lower, that is simply a reflection of historical developments and over time it will change.

The second view is that the above perspective is far too superficial. For any organisation or institution to have such a low percentage of women as its members, and an even lower representation at senior levels, reflects a fundamental problem. The causes of that problem need to be identified. Solutions, even if radical, need to be pursued. There needs to be a stirring of debate and egos may need to be bruised.

A blended view would be that a number of members of the Bar Council or the Equal Opportunity Committee have worked hard over a number of years to introduce practical measures to improve the situation. Some of those initiatives are listed in Virginia Lydiard's article in this issue. In some of these areas the

New South Wales Bar has been a leader - for example, the programme introduced in 1991 for visits to chambers by final-year female law students, and the voluntary mentoring scheme, for which many male barristers have volunteered. According to this view, that hard work needs to continue, but the fruits of that labour will progressively be seen.

It seems that a sensible starting point would be to ascertain what the facts are as far as possible. Accordingly, this issue contains an analysis from the computer and other records of the Bar Association of male and female intakes, retention rates and appointments to silk over time. This is followed by the results of an investigation with quite a number of women at the Bar of various levels with their views on the reasons for the low female intake. An interview with a leading female criminal barrister, Margaret Cuneen, is followed by a series of profiles displaying the variety of female experiences at the Bar. We also have a recent address by Dominique Hogan-Doran at St James Church and a perspective from Virginia Lydiard, Chair of the Bar Association's Equal Opportunity Committee. The Editorial Committee urges members and readers might participate in a debate which could be reflected further either in the columns of this journal or by other forms of communication within the Bar.

Hopefully this issue contains other good reading for members as well. We are proud again to record the Sir Maurice Byers Address, given this year by the Hon. Justice Keith Mason AC, President of the NSW Court of Appeal on the question 'What is wrong with top down legal reasoning?' Also continuing our travels around the NSW Bar, Terry Ower brings us an article on the Newcastle Bar.

Justin Gleeson SC

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At the crossroads

By Ian Harrison SC



This edition of *Bar News* comes at a significant point in the history of the New South Wales Bar Association. In February of this year enrolments of new barristers in the Bar Practice Course were the largest at any time since the course began. This, at a time when the Bar is suffering. Further, attendance at this year's Bench and Bar Dinner was larger

by far than at any other similar function, including the Centenary Bench and Bar Dinner in 2002. This also at a time when the Bar is suffering. Despite the significant practical difficulties which confront women who wish to become barristers and develop and maintain a successful practice, the proportion of women at the Bar today in New South Wales is higher than at any time in the past and growing. This at a time when the Bar is suffering. Why should these things be so?

For reasons that are not always entirely clear barristers have been given, individually and collectively, a high profile in the media. Sometimes this has been good for the Bar but in most cases publicity has been negative. Some of this has been understandable. For example, the awful and painful experience, not to say the shame and humiliation, for all of us in having to deal with a large number of notorious bankruptcies was as close to the lowest point in the public perception of barristers imaginable. Nothing good came from the experience beyond a stark reminder to all members of the Bar Association and the wider community of our continuing, unavoidable and essential taxation obligations. In the middle of 2004 I am confident that the Bar has recovered from this period of trouble and that the likelihood of a recurrence of similar problems is small. There is no doubt, however, that the legal profession and lawyers in general, and barristers in particular, necessarily lost some credibility as a voice worth listening to. The road back will be steep.

Every so often the press recycles the old story about how much barristers earn, who are the top silks and what they charge, and why is so expensive to set up practice when first coming to the Bar. I am unable to recall an article in any paper at any time in the recent past telling the story of a person whose life was changed as the result of their having been represented by a skilful advocate. This type of story seems never to attract attention of readers in quite the same way as those which paint us in a bad light or deprecate our worth. All of us from time to time, and no doubt some more than others, will have received letters of thanks and gifts of appreciation for a job well done. Even our harshest critics at the highest level of government have had in the past, and no doubt will continue

to have long into the future, the need for wise and vigorous counsel. Perhaps the jaundiced perceptions of barristers as a group subverts or clouds the view of the good work we are able to do on an individual basis.

It is, and was, in this context that legislation having the effect of severely attenuating and in some cases completely eliminating the common law rights of accident victims to sue for damages was so easily able to be enacted. I have never been able to understand how the public at large accepted these changes without so much as a whimper when the potential personal and social implications for so many people were so obvious. A not insignificant part of the so-called debate preceding these enactments gave public emphasis to the perception that the then existing system could not continue to survive under pressure from voracious lawyers and the associated legal costs. This was wrong then and remains wrong now. The Premier has made it clear that no sympathy should be afforded to barristers whose careers have been adversely affected or in some cases totally destroyed by these changes.

So why is this a significant point in the history of the New South Wales Bar Association? As practising certificate renewal forms go out many barristers will be considering whether or not the Bar Association has served them well or whether or not they can in any event afford the non-compulsory fee for membership of the association given the not inconsiderable sums required to renew their practising certificate. These are matters upon which all individual barristers will have to make a decision soon. This edition of *Bar News* is testament to the breadth and depth of issues of social significance in which women and men of the New South Wales Bar are involved. The pages of this journal bear eloquent witness to the significance of barristers in the community. Barristers are not important people. But in my experience people who need barristers think they are important. Despite populist sentiment that barristers should work for nothing, people who need barristers and who think they are important are also prepared to pay for their services. That situation has been so since almost the beginning of this colony and will, in my opinion, continue to be so. The significance of the moment is that barristers collectively, and many of us individually, are at personal and professional crossroads. It is important therefore that we maintain the confidence and optimism shown by the new readers, and the determined resolve of our women advocates who overcome enormous obstacles on a daily basis.

The Bar may be suffering but this also will pass.

The Family Law Rules 2004

By Michael Kearney

The *Family Law Rules 2004* commenced on 29 March 2004. They replace in their entirety the previous Rules that were in force from 1984. The Rules comprise some 25 chapters (with various parts and divisions to each) and run to some 545 pages, including forms and schedules.

The *Family Law Rules 2004* provide a largely new framework and basis for the conduct of proceedings before the Family Court of Australia. Whilst a number of the old Rules are substantially reproduced (albeit renumbered) there are four particular areas of significant change, those being:

- pre-action procedures;
- non-compliance;
- disclosure and discovery; and
- expert evidence.

The main purpose of the Rules is expressed to be 'to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case'.

Pre-action procedures

The concept of 'pre-action procedures' is introduced by the *Family Law Rules 2004* and applies to both parenting and financial cases before the Family Court.

In essence, the Rules require that parties should not commence proceedings until a reasonable attempt to comply with the pre-action procedures has been made. In summary these procedures require:

- participation in primary dispute resolution (such as negotiation, conciliation, mediation, arbitration and counselling);
- the provision of notice to the other party of the intention to make a claim, the issues perceived to be in dispute, the provision of a genuine offer and allowing a reasonable response time for the same; and
- the undertaking of what has been described as 'extensive pre-action discovery' but what is in any event discovery limited to the identified issues and in compliance with schedule 1 to the Rules.

There are exceptions where the requirements for the undertaking of pre-action procedures do not apply, including cases of child abuse, family violence, fraud, urgency and certain types of applications such as divorce and child support.

Whilst untested, the Rules provide sanctions for non-compliance with the pre-action procedure requirements, including staying the proceedings until the same have been complied with, and the making of personal cost orders against practitioners who fail to comply with the same.

Non-compliance

The Rules have been amended to deal with what has been said by the court to be a 'culture of non compliance' with court Rules and procedural orders by practitioners.

The *Family Law Rules 2004* now positively provide that a practitioner attending a court event for a party must be familiar with the case and authorised to deal with any issues that are likely to arise. Further, the other party may make applications for personal cost orders against practitioners for failure to file documents on time, or to comply with pre-action procedures.

In a fundamental shift of the current practice before the court, the Rules introduce what has been called 'the nullity rule'. Rule 11.02 provides *inter alia* that 'if a step is taken after the time specified for taking a step in these Rules, the Regulations or a procedural order, the step is of no effect'. A party who is thus in default must now take positive steps to file an application for leave/extension of time to be relieved from the operation of the nullity rule.

Disclosure and discovery

The concept of full and frank disclosure is one which all practitioners in the family law jurisdiction are well aware. Rule 13.01 expressly sets out the parties' duty of disclosure and it is said to exist from the pre-action procedures and continue until the case is finalised, requiring that each party give to the other 'full and frank disclosure of all information relevant to the case in a timely manner'.

Parties are now required to swear to both their awareness of, and fulfilment of, the duty of disclosure by way of affidavits in their initiating documentation and also by the provision of an undertaking to the court prior to pre-trial conference.



The Lionel Bowen Building.
Photo: Fiona-Lee Quimby / News Image Library.

‘The Rules have been amended to deal with what has been said by the court to be a ‘culture of non compliance’ with court Rules and procedural orders by practitioners.’

The court has attempted to abolish the concept of ‘general discovery’ by, amongst other things, introducing Rule 13.07, which imposes the duty of disclosure on a party in respect of documents in the possession or control of the party that are ‘directly relevant’ to an issue. Division 13 deals with the content of the disclosure that is required in the cases to which it applies.

Expert evidence

Part 15.5 of the *Family Law Rules 2004* fundamentally alters the procedures and Rules that govern both the preparation and adducing of evidence of an expert nature.

Central to this part of the Rules are the concepts that the court will control:

- the issues on which it requires expert evidence;
- the nature of the evidence it requires on that issue; and
- the way in which expert evidence is placed before the court.

The expert evidence rules are focused upon encouraging the parties to appoint a single expert in all proceedings. Where a single expert is appointed then the parties do not need permission of the court to tender the evidence of that expert. The court may order of its own initiative that the parties obtain a report from a single expert witness.

Importantly, if a single expert witness has been appointed, a party is prohibited from tendering a report from a further expert witness without permission of the court.

In parenting cases, any expert's report that is obtained must be provided to all other parties. The Rules purport to override any legal professional privilege that would otherwise attach to an expert's report in a parenting case (15.55(4)). A party who fails to disclose an expert's report may not use that report at trial.

In relation to all expert evidence, there are strict requirements regarding the manner in which experts are to be instructed and the disclosure of such instructions.

An expert is now able to ask the court to make procedural orders to assist the expert in carrying out his or her functions. Prior to the hearing or trial a party may now put written questions to a single expert for the purposes of clarification of the expert's report.

Section 106: A source of jurisdictional conflict

The saga continues

By *Malcolm Holmes QC*

In the Winter 2002 edition of *Bar News* an article appeared which discussed the conflicts which have arisen at the interface between the jurisdiction conferred on the specialist Industrial Relations Commission under sec 106 of the *Industrial Relations Act 1996* (NSW) and the ordinary civil courts; both at first instance and on appeal in this and the other states of Australia.¹ Unbeknownst to the authors of that article, at the time of publication two members of the NSW Bar were sitting in a Colorado courthouse giving expert evidence on the operation of sec 106 in proceedings brought in Colorado by a number of American companies seeking an anti-suit injunction to restrain an American citizen from continuing proceedings in New South Wales under sec 106 of the Industrial Relations Act.

By way of background to those proceedings, it appears that some years ago an American company sent one of its employees, an American citizen, to Sydney to head up its Australian operations. He apparently worked in Sydney for

‘Common law courts in Australia: are those the guys that wear the wigs and everything?’

some time and then was to be transferred to work in the American company's European operations. It appears that at the time of the transfer from Sydney he renegotiated his employment arrangement, which resulted in a separate concluded release agreement in relation to some claims which he had made. Also, there was an understanding as to the terms of a new employment arrangement, to be formally concluded, which would operate or be entered into when he commenced work in Europe. When he arrived in Europe the relationship between the parties deteriorated and they parted company.

He then returned to Colorado where he commenced proceedings against his American employer and another company alleging that the concluded release agreement had

been entered into as a result of misrepresentation and should be set aside on the grounds of 'fraudulent inducement'. In addition, he alleged that the new employment arrangement in relation to Europe was enforceable; notwithstanding that it had never been formally documented. The Colorado court held in these proceedings that he was 'barred by the doctrine of tender back or ratification' from setting aside the release and that the new employment arrangement or understanding in relation to Europe was unenforceable. His appeal from that decision was ultimately unsuccessful.

While his appeal was pending, he returned to his place of employment in Sydney and in May 2001 commenced the second proceedings which were brought under sec 106 against a group of respondents including the two respondents to the first proceedings in Colorado. In those proceedings he alleged that the release agreement was unfair because the respondents had failed to honour a commitment in it to issue him with share options if the Australian operation were floated: which apparently later occurred.

In December 2001 the group of respondents to the New South Wales proceedings brought the third proceedings in Colorado seeking an anti-suit injunction to restrain him from further continuing with the proceedings under sec 106. It is these anti-suit injunction proceedings featuring the two members of the NSW Bar, which have prompted the current case note. However the proceedings are more illuminating insofar as the American judicial approach is concerned than on the enunciation of legal principles relating to anti-suit injunctions.

The transcript reveals an American trial judge who appears to have an admirable sense of dispensing justice in a no-nonsense manner. The following quotations are taken from the transcript verbatim:

- When counsel attempted to flatter the judge by saying that he had gone straight to the heart of the matter, the judge retorted²:

Even a blind hog turns a potato once in a while.

- When being addressed on a voluminous bundle of sec 106 decisions, texts and articles and being told that there was an opportunity for leave to appeal to the Full Bench of 'fifteen' judges before the Industrial Commission, the judge responded³:

It is more the equivalent of a social security proceeding, where it is heard before an administrative law judge and then you can appeal to the full commission.

- When being taken through the same voluminous material the judge interrupted⁴:

For Pete's sake. You all have submitted a whole volume of Australian case law?

- In relation to the suggestion that they could have sued in a common law court in Australia the judge interrupted⁵:

Common law courts in Australia: are those the guys that wear the wigs and everything?⁶

- When the court's attention was drawn to the *Reich*⁶ case in which the Industrial Commission had seemingly held that 'varying the contract can include an order that it strictly be complied with', the judge responded⁷:

Well, this court just, evidently turns language on its head. In common law courts, that's called a breach of contract by the other party, which gives rise to a law suit by the injured party to enforce the terms of the contract.

And he later, in the same vein, continued⁸:

Well, you know, the contract principles have been in existence in England, presumably in Australia and in this country for a thousand years. Why do they not call it a breach of contract and an action for breach of contract, rather than use this language which seems to me to point plainly in another direction?

- When the opening submissions had been concluded and followed by a short interchange with the respective counsel, the court noted⁹:

These were opening statements. And I allowed some liberality in argument, but this is not a tennis match.

- When one of the Australian experts was giving evidence on sec 106. The expert was asked by the judge¹⁰:

When you use the term 'have regard', does that mean that it will consider itself bound or that it will examine the decision and say; Well, that's nice, but we have a different view of the matter.

The Australian expert responded 'The latter, your Honour.'

- When the cross-examination of the expert was dragging on, the judge intervened rather bluntly and said¹¹:

You know, counsel, I think he's conceding there are cases to the contrary. He's just told you that this is what his opinion is as a general matter. I think I understand that. You will not be persuading me by sitting here and arguing cases with him all day. You're wasting time.

- When there was an objection to evidence on the basis that it required the witness to give an interpretation of the pleadings, the judge overruled the objection and observed¹²:

You interpreted his pleadings. I will allow that, under the well known rule of evidence, what's sauce for the goose is sauce for the gander.

- When the expert witness was being cross examined on the chronology of the litigation, the judge interrupted to point out that the papers which had been lodged with the court included a complete chronology and there was no need for the expert to go into it, it having been accepted as an accurate chronology. The judge then informed the parties¹³:

I already read it while you were going through some of your examination. Trying to get in touch with my feminine side by multi-tasking.

- When one of the experts was asked if the case were to go to trial in Australia how many days it would take to try it in Australia, the expert said 'The best I could do would be to say five to ten hearing days'. The judge then interrupted and said¹⁴:

You can bet that these parties will beat the case to death which then caused the witness to say 'Ten days plus then thank you', to which the court commented: 'That's reasonable.'

After both expert witnesses were examined and cross examined, the parties addressed and the court gave an *ex tempore* judgment refusing the anti-suit injunction. In the course of judgement there was one passage dealing with the question of public interest, which gave a further insight into American judicial thinking:

which brings me to the public interest here. I think an injunction would be contrary to the public interest. What the plaintiffs are asking me to do, as I told counsel in colloquy, is to jump in the middle of this litigation in Australia and put up a big stop sign and blow the whistle, not going directly to the Australian court and doing that, but by enjoining the plaintiff and precluding the plaintiff from litigating in Australia, which has the same effect.

For those lacking an appropriate religious background, the *Concise Oxford Dictionary* defines 'colloquy' as 'a conversation; judicial and legislative court in Presbyterian Church' whilst the *Macquarie Dictionary* defines it as 'a conversation, ...and (in certain Reformed Churches) a governing body corresponding to a presbytery.

The parties have now returned to Australia with the concluding words of the American judge ringing in their ears:

My assumption is the Australian courts will decide the case in accordance with Australian law, Australian procedure, and they'll decide the case as this [i.e. the Colorado] court would, hopefully, by applying principles of equity. The plaintiffs ought to at least have given them the chance to do that before they come to this [i.e. the Colorado] court on the assumption that they won't.

The anti-suit injunction was denied by the Colorado court.

As a footnote, the transcript revealed that one of the expert witnesses from Sydney gave expert evidence that 'Sydney has about two million people in it'¹⁵ which itself illustrates the practical significance of the remarks by Gleeson CJ in the High Court's decision in *HG v The Queen* (1999) 197 CLR 414 at p.427, para [39] about the dangers of experts giving evidence outside the area of expertise.

Since returning to Australia the applicant has tried to have the sec 106 case determined on the merits but without much success¹⁶ (although the writer understands that the matter is fixed for hearing in November this year) and at last report the parties were seen recently to be in the Court of Appeal arguing over 'an application for prohibition against Industrial Relations Commission or an anti-suit injunction against' the American citizen.

The passing reference by the Colorado judge to the Australian judges wearing 'wigs' and his expression of hope when sending the parties back to Australia that the Australian court would decide the sec 106 case 'by applying principles of equity', are prescient and suggests that he has a far deeper knowledge of the sec 106 jurisdiction and the procedures of the New South Wales courts than might be expected.

His reference to those judges wearing wigs could not be a reference to members of the Industrial Relations Commission, having regard to the fact that there is a longstanding prohibition on such judges (and counsel appearing before them) wearing wigs in all proceedings, not only in sec 106 (or its predecessors sec 275 and sec 88F) proceedings.

It appears that the Colorado judge might have had in mind the members of the Supreme Court if he envisaged judges wearing wigs when deciding sec 106 cases. Strange though this may seem, this has recently occurred with the Equity Division of the Supreme Court hearing and determining a sec 106 case. Briefly the facts in that case involved one set of proceedings commenced in the Federal Court relying upon several federal causes of action, another set of proceedings commenced in the Equity Division relying upon equitable and other remedies and sec 106 proceedings in the Industrial Relations Commission¹⁷. Using orders under the cross vesting legislation the Supreme Court ordered that all three proceedings be heard together in the Equity Division. Remarkably once all the proceedings had been brought under the one umbrella and heard in the Equity Division, the plaintiff informed the court that the jurisdiction under sec 106 'was so wide as to subsume every other head of action under which the plaintiff could bring his claim'¹⁸ and that the court need only trouble itself with determining the application under sec 106 of the Industrial Relations Act. As the defendants seemed to agree to this, the trial judge, the Chief Judge in Equity, adopted this course, and granted relief under sec 106. Further, the trial judge, when determining the matter, may have unconsciously followed the admonition of the Colorado judge and determined the matter 'by applying principles of equity'. When considering whether the contract was unfair in its operation as required by sec 106, the court considered the concern of the equity courts in corporation law cases and held that it could 'easily transpose this learning into the field of unfair contracts'.¹⁹

The Colorado judge's hopes of equity being applied and this recent transposition of learning are perhaps understandable given the underlying rationale of the sec 106 jurisdiction. As

was said in relation to the origins of Equity by the then Lord Chancellor, Lord Ellesmere, in the *Earl of Oxford's Case* in 1615²⁰

The Cause why there is a Chancery is, for that Men's Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances'

Likewise it has been similarly been said that the process which led to the creation of jurisdictions such as sec 106 and the *Contracts Review Act 1980* involved the Legislature coming to regard 'the common lawyer's belief in the inviolability of contract as misconceived and require that society, functioning through its courts, should supervise the contracts made between its members ... [and, this at a time when the] intellectual climate favours the examination of the justice of each individual contract rather than determining whether it was made in accordance with some fixed principle²¹.

The recent sec 106 case in the Equity Division also highlights the contradiction which exists where the Supreme Court (of NSW or another state²²) exercises jurisdiction under sec 106, in that the parties then have the benefit of a right of appeal to the Court of Appeal which does not exist when a sec 106 matter is determined in the Industrial Relations Commission.

There have always been limitations on the supervisory powers of the Court of Appeal over the Industrial Relations Commission. When sec 88F, the progenitor of sec 106 was first introduced, as was noted by McHugh QC (as his Honour then was), 'the superior courts are entitled to ensure that the case falls within these jurisdictional limitations. But once a case is within jurisdiction, the Industrial Commission is the sole judge of the merits of the case.'²³ This situation once led Meagher JA (as RP Meagher QC then was) to pithily note that a decision of the Industrial Commission was '...clearly wrong. Yet, they had jurisdiction to err.'²⁴

The privative provision now found in sec 179 of the Industrial Relations Act when compared to its predecessors has been 'strengthened' because of an apparent legislative desire to limit this supervisory jurisdiction²⁵. The Court of Appeal has recently been called upon to consider this provision in *Mitchforce v Industrial Relations Commission of New South Wales*, a decision which was discussed in the last issue of *Bar News*²⁶ and which has not been received unhesitatingly by the Industrial Relations Commission²⁷. However, this decision has led to a cluster of cases coming before the Court of Appeal including our case brought by the determined but patient American citizen whose travails led to the two members of the NSW Bar giving evidence in Colorado. The interface between the jurisdictions is clearly continuing to cause irritation and uncertainty and detracting from the great deal that has been achieved since the provision was first introduced in 1959.

In view of the fact that sec 106 provides an 'armoury of weapons (which) is spectacularly larger than that possessed by the courts of Common Law or Equity', an observation made as long ago as October 1976²⁸ by the reincarnate RP Meagher QC (as he then was and is again), it seems that the number of cases being brought under the legislation will continue to grow and continue to attract the attention or amazement of courts both here and overseas.

¹ Malcolm Holmes QC and Andrew Bell, 'Section 106 of the Industrial Relations Act 1996: A source of jurisdictional conflict', *Bar News*, Winter 2002, p.23.

² Transcript 6, ('T')

³ T9.

⁴ T10.

⁵ T14.

⁶ *Reich v Client Server Professionals* (2000) 49 NSWLR 551

⁷ T23.

⁸ T24.

⁹ T33.

¹⁰ T50.

¹¹ T102-103.

¹² T148.

¹³ T157.

¹⁴ T161.

¹⁵ T34.

¹⁶ The saga has involved an application for summary dismissal: see *McRann v United Globalcom Inc* [2003] NSWIRComm 131, an application for leave to appeal [2003] NSWIRComm 318 and a separate application for costs to be paid forthwith [2004] NSWIRComm 16.

¹⁷ Other examples of such a three pronged approach include *Johnstone v Deutsche Australia Ltd* [2003] NSWSC 933 and *Premier Sports Australia Pty Ltd v Dodds* [2001] NSWSC 707 and [2003] NSWSC 948, although in the later case, ultimately no submissions were made in support of any order under s.106 and this part of the action was dismissed.

¹⁸ *Bruning v MMAL Rentals Pty Ltd* [2004] NSWSC 60 at [36].

¹⁹ *Supra*, at [178].

²⁰ [1615] 1 W & T at 617; 1 Chan Rep 1 at 6; 21 ER 485 at 486

²¹ per Michael McHugh QC in 1981 Young Lawyers Section, Queenstown, New Zealand, 55 at p.57

²² For an example of a s.106 proceeding cross vested to Queensland, see *Tryam Pty Ltd v Grainco Australia Ltd* [2003] NSWSC 812

²³ 1981 Young Lawyers Section, Queenstown, New Zealand at p.59.

²⁴ *Rothmans Distribution Services Limited v Industrial Court of New South Wales* (1994) 53 IR 157 at 162.

²⁵ See the discussion of the earlier privative provision in s.301 in *Walker v Industrial Court of NSW* (1994) 53 IR 121 at 136 to 139, per Kirby P and at 149 to 155, per Sheller JA

²⁶ Ingmar Taylor, 'Mitchforce v Industrial Relations Commission', *Bar News*, Summer 2003/2004, p.4.

²⁷ See the judgments in the subsequent decision in *Mitchforce Pty Ltd v Starkey* (No2) [2003] NSWIRComm 458

²⁸ An observation made when speaking of the progenitor of sec 106, sec 88F in (1976) *Law Society Journal* 229 at 241.

De facto life sentences for the mentally ill

A forum on mental health

By Tania Evers

On Tuesday, 10 February 2004 the Ethics Section of the NSW Law Society, in conjunction with the Lawyers Reform Association, held a forum titled 'De facto life sentences for the mentally ill.' Tania Evers, barrister and Vice-President of the Lawyers Reform Association, who chaired the forum, provides the following overview of proceedings.

A panel of eminent speakers recently gathered at the Law Society to discuss the complex and varied issues arising from the trial, representation and detention of persons with mental illness or intellectual disability, who commit serious criminal offences. The forum concentrated on the difficulties caused by ministerial or executive discretion over the release and treatment of prisoners found 'not guilty by reason of mental illness' (forensic patients).

The forum was attended by a large number of barristers and solicitors as well as representatives of bodies such as the Mental Health Review Tribunal, the Mental Health Association, the Department of Corrective Services and Corrections Health, the Mental Health Advocacy Service, public defenders, crown prosecutors and solicitors from the DPP.

The consensus among the speakers was that ministerial discretion was inappropriate, and that the decision as to where such persons be detained and when or whether they be released, should not be politically controlled. Rather, it should reflect the informed recommendations of objective experts. Many of the speakers discussed the misconception in the community about mental illness and forensic patients in particular.

The Hon Justice John Dowd AO, Chairman of the Executive Committee of the International Commission of Jurists, and former attorney general was among the speakers. Justice Dowd's paper drew upon his experience as a judge of the Supreme Court to outline the difficulties encountered by the judiciary in dealing with mentally ill offenders. His Honour concluded that, in his view, ministerial discretion was not appropriate.

The next speaker was Robert Wheeler, Solicitor in Charge of the Mental Health Advocacy Service of the Legal Aid Commission of NSW. Mr Wheeler was very critical of the recent decline in the numbers of forensic patients to be approved for conditional release by the minister, despite recommendations by both experts and the Mental Health Review Tribunal that they be so released. Instead, the health minister's office is conducting its own internal reviews, which are not transparent and thus cannot be challenged or addressed by the patient or his/her legal representative.

Professor Duncan Chappell, President of the Mental Health Review Tribunal, presented the forum with facts, figures and outcomes for forensic patients in New South Wales. Professor Chappell's presentation used statistics to illustrate a recent

decline in the number of persons conditionally released into the community (despite the recommendation of the tribunal that they be released).

Three forensic psychiatrists also gave papers. Dr Jonathan Carne spoke about international and national standards for forensic psychiatry services, international conventions and the standard minimum rules for the treatment of prisoners as well as international and Australian practice.

Professor Greenberg, Director, Clinical Community Court Liaison, spoke about the complexities in dealing with forensic patients, issues relating to drug induced psychoses, the appropriateness of detaining forensic patients within a gaol system and questions of community safety.

Dr Stephen Allnutt, a forensic psychiatrist, gave an emotional account of the difficulties encountered by forensic patients within the prison system, the prevalence of mental illness within the gaol system and the review that has been conducted by himself and Mr Tony Butler on mental illness amongst NSW prisoners.

The final speaker was Dr Richard Matthews, Chief Executive Officer of Corrections Health Service and currently Acting Director General, Strategic Development at the NSW Health Department. Dr Matthews outlined the current government policy in relation to forensic patients and future directions of the government including a total review of the *Mental Health Act 1990*, including the Act as it applied to forensic patients (including a review of the ministerial discretion).

A resolution was moved and unanimously passed¹ by the large number of attendees (approximately 160) in the following terms.

This forum, representing lawyers, mental health workers, psychiatrists and community members, strongly recommends to the minister and the New South Wales Government that the law relating to mentally ill offenders be amended so as to transfer ministerial discretion to a specialist tribunal with ultimate judicial review, appropriately supported by mental health professionals and an adequately resourced mental health system.

In the light of the current review of this legislation by the Department of Health, it is very important that any views that barristers have on this subject, particularly in support of this resolution, be conveyed to the Minister for Health, the Hon Morris Iemma MP, as soon as possible.

Papers were produced by most of the speakers and have been posted on the Lawyers Reform Association web site www.lra.org.au The papers include a brief analysis on the law relating to the mental illness defence and the question of fitness to be tried.

¹ Dr Matthews abstained

The 2004 Sir Maurice Byers Lecture

What is wrong with top-down legal reasoning?

Delivered by the Hon Justice Keith Mason AC, President of the New South Wales Court of Appeal, at the New South Wales Bar Association on 26 February 2004



'Top-down legal reasoning' is not a term of art. In recent years it has become a term of abuse. On my researches, it entered Australian legal discourse in 1996 in the judgment of McHugh J in *McGinty v Western Australia*.¹

1996 was also the year in which the High Court delivered judgments in the last two cases argued before it by Sir Maurice

Byers QC, *The Wik Peoples v Queensland*² and *Kable v Director of Public Prosecutions (NSW)*.³ I had the uncomfortable privilege of being opposed to Maurice in *Kable*. I also had the pleasure of representing a plaintiff in similar interest to his client in the *Political Advertising Case*, his antepenultimate High Court foray.⁴ These three decisions stand as remarkable tributes to his innovative and persuasive advocacy. They also illustrate legitimate judicial creativity that surfaces from time to time in every age. It is practised by all leading jurists, however much some of them deny its universality or castigate those who admit it.

Both *Political Advertising* and *Kable* are connected with the topic of my address, although I hasten to add that Maurice was never accused of top-down reasoning - at least not to his face.

As you know (a beguiling preamble much beloved by Maurice), *McGinty* involved a challenge to Western Australian electoral laws that ensured significant disparities in the numbers of voters as between rural and metropolitan regions. The claim of constitutional invalidity was dismissed by a majority of the High Court comprising Brennan CJ, Dawson, McHugh and Gummow JJ. Toohey and Gaudron JJ dissented. Kirby J joined the court after *McGinty* was argued. One gets the impression from his remarks in the 2003 *Marquet* decision that he would have been a *McGinty* dissenter.⁵

Each justice in the *McGinty* majority declined to find any constitutional basis for a principle of 'equal value' of votes. They accepted the correctness of the *Political Advertising Case*, but regarded its implication of 'representative democracy' as too narrow a toehold to support a constitutional proscription against grossly disproportionate electorates.

*The Engineers' Case*⁶ established that Dicey's notion of parliamentary sovereignty underlay the express grants of legislative power to the Commonwealth Parliament. For a time, it seemed that the *Engineers'* juggernaut would carry all before it, with its emphasis upon the plain meaning of the constitutional text and its rejection of federal or other unstated limitations upon the powers of the Commonwealth Parliament. But, as you know, Sir Owen Dixon found implied limitations in various areas. The most notable and enduring were to be the principles expounded in *Melbourne Corporation v Commonwealth*⁷ a modified version of which was applied very recently in *Austin v Commonwealth*.⁸

Those who thought that the list of constitutional implications had closed (like the canon of scripture) upon the death of Sir Owen Dixon were surprised, even angered, by the discovery of another implied limitation upon Commonwealth legislative power, in the *Political Advertising Case*. The Samuel Griffith Society put the case on its blacklist, along with *Mabo* and other post-Dixonian heresies.

Mason CJ uttered pure orthodoxy in the *Political Advertising Case*, when, citing Dixon J, he said:⁹

It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate would protect the states but in the result it did not do so. On the other hand, the principle of responsible government ... is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution.

In *Political Advertising*, this integral element of responsible government was held to have given rise to a secondary implication that a right of freedom of political speech was necessary to ensure that elected governments would continue to be responsible through parliament to the people of Australia.

'Those who thought that the list of constitutional implications had closed (like the canon of scripture) upon the death of Sir Owen Dixon were surprised, even angered, by the discovery of another implied limitation upon Commonwealth legislative power, in the *Political Advertising Case*. The Samuel Griffith Society put the case on its blacklist, along with *Mabo* and other post-Dixonian heresies.'

The four justices in the majority in *Political Advertising* (Mason CJ, Deane, Toohey and Gaudron JJ) held that the free speech right was an implication from the doctrine of representative or responsible government. The secondary implication was drawn because freedom of communication was indispensable to the efficacy of such a system of government.¹⁰ This is the implication that attracted the hostile attention of the critics.

In *Political Advertising*, Mason CJ suggested a distinction between textual and structural implications when he said:¹¹

It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is

sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

Brennan CJ¹² and McHugh J¹³ cited this passage with approval in *McGinty*. Dawson J doubted the helpfulness of Mason CJ's distinction between textual and structural implications, but endorsed implications so long as they were necessary to accommodate the text of the Constitution.¹⁴

The *McGinty* majority included the three justices who dissented or partially dissented in the *Political Advertising* case (i.e. Brennan, Dawson and McHugh JJ). In *McGinty*, their honours accepted the correctness of the earlier decision, but were at pains to construe its *ratio* narrowly. I imply no criticism by this observation. This is common law method at its purest.

McHugh J was not one of the majority in *Political Advertising* who had declared Part IIIID of the *Broadcasting Act 1942* (Cth) wholly invalid. His Honour would have struck much of it down, but for reasons considerably narrower than those adopted by Mason CJ, Deane, Toohey and Gaudron JJ. When, in *McGinty*, McHugh J addressed the *ratio decidendi* of *Political Advertising* he therefore had the difficult task of describing a recent decision that bound the court of which he was a member, but that rested upon reasoning with which he disagreed. The epiphany of the joint judgment in *Lange v Australian Broadcasting Corporation*¹⁵ lay yet in the future.

I have already indicated that McHugh J endorsed Mason CJ's test in *Political Advertising* for deriving constitutional implications. But he drew a sharp line of disagreement with two other justices who had, with Mason CJ and Gaudron J, formed the majority in that case. He said:¹⁶

However, I cannot accept, as Deane and Toohey JJ held in *Nationwide News Pty Ltd v Wills*, that a constitutional implication can arise from a particular doctrine that 'underlies the Constitution'. Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution. Top-down reasoning is not a legitimate method of interpreting the Constitution. ... [A]fter the decision of this court in the *Engineers' Case*, the court had consistently held, prior to *Nationwide News* and [*Political Advertising*], that it is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure.

'Sir Maurice's argument in *Political Advertising*, that the court adopted, had invoked orthodox statements about necessary implications in aid of beguiling submissions that led the court into the previously uncharted waters of a constitutional guarantee of freedom of speech.'

Gummow J endorsed these remarks when he said that:¹⁷

... as McHugh J explains in his judgment, the process of constitutional interpretation by which the principle [of an implied constitutional freedom of political discussion] was derived (being an implication at a secondary level), and the nature of the implication ... departed from previously accepted methods of constitutional interpretation.

Brennan CJ¹⁸ and Dawson J¹⁹ were also critical of attempts to find any content in the concept of 'representative democracy' from sources outside the text and structure of the Constitution itself.

I should say at the outset that, in my respectful view, McHugh J did less than justice to his two former colleagues. In the passage that he cited, Deane and Toohey JJ had referred to doctrines 'which underlie the Constitution *and form part of its structure*' (emphasis added).²⁰ Furthermore, they had instanced the doctrine of representative government, which was a primary implication accepted by the entire *McGinty* court. It is also unclear why McHugh J said nothing about Gaudron J's judgment in *Political Advertising*. Gaudron J recognised explicitly that 'fundamental constitutional doctrines' could be assumed in the Constitution²¹ and she included the common law as the source of revelation about the constitutional importance of free speech.²²

There was a time when Sir Owen Dixon's views about sec 92 of the Constitution were contrary to the trend of existing authority. In this context he once remarked that:²³

It is better that I should not attempt any restatement for myself of the principles upon which the decisions rest. Probably my grasp of those principles is imperfect and, as a rule, it is neither safe nor useful for a mind that denies the correctness of reasoning to proceed to expound its meaning and implications.

We may be unsure whether Sir Owen's humility was feigned, but we know for certain that these remarks were an early gambit in a quest by that great jurist to persuade his brethren to overturn existing orthodoxy on sec 92 of the Constitution. In this, Dixon would succeed entirely - for a time.

I have digressed, and I cannot for the life of me think why Sir Owen's observation occurred to me in the context of discussing McHugh J's critique of *Political Advertising* in *McGinty*, to which I return.



AUGUST 5, 2003: Jim McGinty, Attorney General for Western Australia, outside the High Court of Australia in Canberra. Photo: Michael Jones. News Image Library.

Sir Maurice's argument in *Political Advertising*, that the court adopted, had invoked orthodox statements about necessary implications in aid of beguiling submissions that led the court into the previously uncharted waters of a constitutional guarantee of freedom of speech. His final submission, as reported in the *Commonwealth Law Reports*, contended that 'in a democracy the right to freedom of speech is part of the fabric of society. There cannot be democracy if the voters are gagged and blindfolded.'²⁴ This appeal to principles external to the text and structure of the Constitution left the justices wide leeways of choice as to the means whereby they might bridge the gap between assumption and implication.

The concept of 'top-down reasoning' proscribed by McHugh J in *McGinty* had been identified by Judge Richard Posner. In a frequently cited article,²⁵ to which McHugh J referred, Posner explained top-down and bottom-up reasoning as follows:

In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law - perhaps about all law - and uses it to organise, criticise, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory. The theory need not be, perhaps never can be, drawn 'from' law; it surely need not be articulated in lawyers' jargon. In bottom-up reasoning, which encompasses such familiar lawyers' techniques as 'plain meaning' and 'reasoning by analogy', one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there - but doesn't move far, as we shall see. The top-downer and the bottom-upper do not meet.

Posner pointed out that legal reasoning from the bottom up was the 'more familiar, even the more hallowed, type'. But, as we shall see, he was critical of bottom-up reasoning as a genuine explanation of what happens, and he strongly endorsed the inevitability and legitimacy of top-down reasoning.²⁶

Sir Maurice's advocacy was an appeal to top-down reasoning by these criteria. A political principle or theory about the importance of free speech was said to be an assumption necessarily underlying the constitutional concept of responsible government, reflected in the common law's support for free speech.

Soon after *McGinty*, anathemas against any form of constitutional top-down reasoning entered the currency.

McHugh J was not being complimentary when, in *Gould v Brown*, the Commonwealth solicitor-general's argument in favour of the validity of the cross-vesting scheme was described as involving 'a lot of top-down reasoning'.²⁷

But just as quickly, it emerged that the charge could be hurled from different quarters. One year after *McGinty*, during argument in *Ha v New South Wales*,²⁸ a submission supporting the broader view of 'excise' in the Constitution as including a tax on distribution was castigated by Dawson J in the following terms:²⁹

The majority judgment in *Capital Duplicators* simply asserts that... what was achieved was a customs union and then it asserts that was an economic union and from that it asserts that it was the purpose of that union to secure control over commodities and the taxing of commodities to the Commonwealth, but it is a perfect example of top down reasoning that we have been talking of before. A customs union is not an integrated economy.

'Posner... was critical of bottom-up reasoning as a genuine explanation of what happens, and he strongly endorsed the inevitability and legitimacy of top-down reasoning.'

The *Capital Duplicators* majority railed against by Dawson J included Brennan and McHugh JJ (admittedly in the dangerous company of Mason CJ and Deane J). But the real villain in Sir Daryl Dawson's sights was Dixon. Constitutional reasoning that moved from the idea of an Australian customs union, to an integrated economy, to 'excise' being a tax on distribution came directly from the observations of Dixon J in *Parton v Milk Board (Vic)*.³⁰

When the solicitor-general for the Commonwealth, Mr Griffith QC argued in support of the broader view of 'excise', there was the following exchange:

DAWSON J: That is top-down reasoning and you have no basis on which to support it except the assumption that Sir Owen Dixon made.

MR GRIFFITH: Your Honour, our submission is it is not top-down reasoning. It is based on the words of the Constitution itself.

DAWSON J: That is to make an assumption as to their meaning.

The Dixonian view was to prevail in *Ha's Case*, albeit that what Dixon J had asserted was now underpinned by historical references, including references to the Convention Debates that the Dixon court never openly admitted to consulting. I respectfully share Dawson J's view about this being a species of top-down reasoning, but (in light of the decision in *Ha*) am simply content to add *Ha* to the list of cases showing that top-down reasoning is not bad root and branch.

'Top-down theories that gain judicial acceptance cannot easily be returned to their stable or bridled.'

If you read the key passages from *Parton, Capital Duplicators* and *Ha* you may, I think, be forced to acknowledge the following three propositions:

- a. top-down reasoning is part and parcel of constitutional discourse and has always been so;
- b. a top-down argument consistent with the text and structure of the Constitution may take legitimate root if adopted by an authoritative jurist or in a leading precedent; and
- c. constitutional reasoning that invokes assumptions is facilitated by reference to common law cases and the modern practice of referring to Convention Debates and historical materials.

Dixon J once warned against confusing 'the unexpressed assumptions upon which the framers of the [Constitution] supposedly proceeded with the expressed meaning of [a constitutional] power'.³¹ But this was a warning against sloppy thinking, not a command to disregard all assumptions.

There is a famous passage in Dixon J's judgment in the *Communist Party Case*.³² Speaking of the power in sec 51(xxxix) to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in ... the government of the Commonwealth', Sir Owen said:

The power is ancillary or incidental to sustaining or carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating judicial power from

other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

The passage has been frequently cited, most notably in *Cheatle v The Queen*,³³ where the unanimous court pointed out that:

It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history.

I repeat, Dixon J said there are constitutional conceptions some of which are 'simply assumed'. The rule of law is one such assumption. Dixon mentioned two others in his paper on *The law and the Constitution*,³⁴ namely parliamentary sovereignty and the supremacy of the Crown as a formal concept. He wrote:³⁵

The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. They are abstract ideas usually arrived at by generalisation and developed by analysis. ... Sometimes indeed they are but instinctive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action. Further, when such conceptions have once taken root they seldom disappear. They persist long after the conditions in which they originated have gone. They enter into combinations with other conceptions and contribute to the construction of new systems of law and of government.

This surely is authoritative recognition of top-down constitutional reasoning.

Like many bedrock principles, the concept of the rule of law is protean. To recognise that it lies behind the Constitution leaves much room for movement (including further leeway for top-down reasoning). It is therefore perhaps unsurprising that McHugh and Gummow JJ recently observed that:³⁶

In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.

Yet an 'immediate normative operation' is surely the horse that bolted in the much-lauded *Communist Party Case*. Top-down theories that gain judicial acceptance cannot easily be returned to their stable or bridled.

Those who have struggled to frame an instrument hope that the hard won final text will cover all eventualities. But the best-drawn contracts, statutes and constitutions may throw up unconsidered issues. Close examination of text and context may reveal clear answers, but not always. Gaps in private contracts redound to the disadvantage of those who would enforce them. It is not so easy with statutes and constitutions that are framed as enduring instruments of governance. The language may be opaque and the area of application may become more and more removed from the original context with the passing of time. But the judicial imperative to find a workable meaning is necessarily stronger with such instruments.

Sir Owen Dixon wrote to Chief Justice Latham in 1937 suggesting that:³⁷

In [sec 92] cases relating to transport ... I think it is almost clear that we must proceed by arbitrary methods. No doubt there will be limits but political and economic consideration will guide the instinct of the court chiefly. In time the thing will work back to some principle or doctrine.

This surely was a call to road-test theories lying outside the constitutional text and structure in order to check their consistency, with a view to adoption if accepted by the court as an institution. It is a thousand miles away from a search for strictly necessary implications. It is driven by the unavoidable judicial function of resolving justiciable disputes in relation to a working instrument of government. In short, this was further recognition of an appropriate role for top-down reasoning.

McHugh J's anathema in *McGinty* stated that 'underlying or overarching doctrines... are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution'. Since he did so in the context of criticising Deane and Toohey JJ for finding that a constitutional implication could arise from a particular doctrine that 'underlies the Constitution', it seems reasonable to add 'implications' to the concepts that McHugh J said could never be sourced in underlying or overarching doctrines. I do not think that this view can stand in light of Sir Owen Dixon's compelling analysis and the case law to which I have made reference.

To that case law I would add the *Political Advertising Case* itself. The High Court unanimously endorsed its legitimacy in *Lange*, albeit underpinned by different reasoning that seems to track McHugh J's approach rather than that of the majority in the earlier case. The constitutional implication of free speech is now grounded in the interstices of the phrase 'directly chosen by the people'³⁸ as much as in the structural concept of responsible government. But I venture to suggest that the top-down theories based upon the desirability of free speech are still quite visible. There is discussion in *Lange* about

communications between electors and representatives being 'central to the system of representative government, as it was understood at federation'.³⁹ I submitted earlier that resort to history and common law are at times the way of pointing to the assumptions of the framers of the Constitution before moving quickly to finding a necessary implication. There is still a leap beyond logic - an entirely legitimate leap in my respectful view - from words such as 'directly elected' to the free speech implication.

The relevant part of the joint judgment in *Lange* concludes with the following statement:⁴⁰

To the extent that the requirement of freedom of communication is an implication drawn from secs 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.

This obliquely acknowledges that the ratio of *Political Advertising* has been completely reworked. But it does not, in my most respectful submission, reveal the processes whereby the free speech implication is found to inhere in the text and structure of the Constitution.

'There is still a leap beyond logic - an entirely legitimate leap in my respectful view - from words such as 'directly elected' to the free speech implication.'

Something more is still at work. I dare not repeat its name.

The list of underlying or overarching principles that may come to bear upon constitutional issues will not be a large one. Any that do emerge will have to be hammered out through the dialectic, collegiate processes of decision-making in the High Court. Some ideas will surface and be rejected, others will be refined over time. Those that achieve acceptance will have been tested in the fire and beaten thin like gold. Hopefully the debate will take place without sloganeering about judicial activism or attacks *ad hominem* or *ad feminam*.

One likely contender for a constitutional assumption that will develop into a constitutional implication is a rule for resolving inconsistencies between the statute laws of different states where they clash at the margin.⁴¹

I come now to *Kable's Case*. Sir Maurice's submission about the *Community Protection Act 1994* (NSW) not being a law at all was rejected. So too was a submission that a *Boilermakers*-style separation of powers was part of the New South Wales constitutional polity.

It was Maurice's third argument that succeeded. Its major premise was the proposition that state courts had to be kept pure vessels to receive invested federal judicial power. Its minor premise was that the 1994 Act sullied the Supreme Court of New South Wales by requiring it to exercise jurisdiction that would lower public confidence in the integrity of the judiciary.

I am only concerned with identifying the type of reasoning adopted in support of the major premise. In what follows, I imply no criticism of the premise itself.

In *Kable*, Sir Maurice cited the very passage from Dixon J's judgment in *Australian Communist Party* to which reference has already been made. He argued that the rule of law required that a citizen may only suffer loss of liberty upon conviction of an offence. From this, he moved to Chapter III's scheme for investing Commonwealth judicial power in state courts, arguing that no legislature, state or federal, might impose jurisdiction on state courts incompatible with the potential exercise of that federal judicial power.⁴²

This argument prevailed at least as regards state supreme courts, and with some refinements.

The Constitution's express terms provided for what Gaudron J described as 'an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth'.⁴³ This is found in the very text of Chapter III, so it was (with respect) an easy, though novel, step to imply the pure vessel requirement for state supreme courts.

But whence came the secondary implication that courts (state or federal) in an integrated system are *constitutionally* required to conduct themselves in a manner consistent with 'traditional judicial process'⁴⁴ lest they bring justice itself into disrepute? These are important and commendable values and I am not for



December 1998 Full bench of the High Court, Canberra.
Photo: Michael Jones ACT / Interior/ High Court. News Image Library.

'In my opinion, this Chapter III jurisprudence should be recognised for what it is, a species of top-down reasoning that has received legitimate acceptance through the time-honoured processes of constitutional litigation.'

a minute criticising anyone for taking them into account. Much of the burgeoning Chapter III jurisprudence proceeds from a similar proposition. My point is that this commendable notion is an assumption standing outside the constitutional text and structure. It is a principle about how judges ought to conduct themselves, how the common law sometimes required them to act and historically how they usually conducted themselves around the time that the Constitution was formed.

In *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*⁴⁵ Brennan, Deane and Dawson JJ said that the legislative power of the Commonwealth does not extend:

to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

In recent times there have been many statements by High Court justices to similar effect, some of them identifying particular matters as constituting essential characteristics of the judicial process that parliament may not infringe.⁴⁶

But these now constitutional desiderata are not to be found in the text or structure of the Constitution. They are not nestling inside the meaning of words like 'court' or 'matter'. Nor are they implications that are logically or practically necessary for the preservation of the integrity of the constitutional structure.⁴⁷ One can readily point to constitutional democracies that function without the underpinning of the entrenched principles of our growing Chapter III jurisprudence.

In my opinion, this Chapter III jurisprudence should be recognised for what it is, a species of top-down reasoning that has received legitimate acceptance through the time-honoured processes of constitutional litigation.

Recently, in *Roxburgh v Rothmans of Pall Mall Australia Ltd*⁴⁸ Gummow J cited with approval McHugh J's hostile reference to top-down reasoning in *McGinty*. Gummow J applied it outside the realm of constitutional law, when cautioning against judicial acceptance of 'any' all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment'. Gummow J continued:

To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the

theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

This is not the place for me to engage in debate about the concept of unjust enrichment. On the particular issue, I content myself with the observation that the varieties of restitutionary theory deriving from the case-based scholarship of jurists like Goff & Jones, Birks and Burrows are as entitled to compete for acceptance in the judicial market-place as property-based theories, or theories based upon unconscionability, or theories that strive to maintain at all costs the separate integrity of Equity (with a capital-E).

'For Posner, decided cases might offer material for creating or testing a theory about a field of law. But without a theoretical template to view them or to know when an analogy is close and legitimate they are no more than decided cases.'

Some scholars distinguish between 'high theory' and 'middle theory', using the latter as a description of a construct that is 'case-law-focussed'.⁴⁹ Presumably Gummow J had the former in his sights. I suggest, however, that the difference is only one of degree. No one in the real world of judicial decision-making seeks to make everything 'all tidy and four-square like the Marx brother who took shears to the bits of clothes which stuck out of his suitcase', to use a telling phrase of Professor Tony Weir.⁵⁰ Conversely, there can be nothing wrong *per se* in using a theoretical construct to criticise a precedent that does not fit: this happens frequently in appellate advocacy and decision-making.

We need theories for road maps or hypotheses and for deciding whether an existing authority is to be applied, distinguished or overruled. Even the professed incrementalist is confronted with deciding what is 'an increment too far'.⁵¹ Like Monsieur Jourdain and prose, we judges may be ignorant of any or all of the theories that shape our reasoning, but we are truly ignorant if we deny their existence. We look to scholars like Salmond, Fleming, Treitel, Birks and Stapleton to map out structures for understanding fields of law or the essence of particular causes of action. As with the grand summaries of our greatest jurists (for example Dixon J's exposition of estoppel), these theories help explain the jumble of existing case law. They also point the way towards orthodox developments and offer guidance in knowing when to distinguish or overrule apparent departures from orthodoxy.

Such assistance is prized in the modern era where 'legal coherence' is valued highly.⁵² Naturally, we must guard against theories turning into a dogma that may 'tend to generate new

fictions in order to retain support for its thesis', as Gummow J put it in *Roxburgh*.⁵³ But this problem should not be exaggerated. I suspect that all theories used by judges as working tools have exceptions and qualifications.

I do most firmly join issue with Gummow J's suggested antipathy between 'civilian' theory-based discourse on the one hand and the 'case law' system on the other; implying that it is a mark of the latter that general principle is always derived from judicial decisions upon particular instances.

Posner's famous article demonstrated roles for top-down and bottom-up reasoning outside the realm of constitutional interpretation. But a categorical assertion about top-down theoretical reasoning being alien to bottom-up common law method is as startling as it is at variance with Posner's views.

I do not suggest for a moment that Gummow J represented his views as consonant with Posner. Only Posner's definition of 'top-down reasoning' was cited. But I do respectfully submit that Gummow J's dichotomy is a startling misdescription of what happens day in and day out in the High Court of Australia, and on red letter days in inferior Australian courts.

I start by explaining Posner's thesis in a little more detail.

Posner gives as examples of familiar and hallowed bottom-up reasoning the principle that interpretation of a statute must start from its words, and the technique of reasoning by analogy from decided cases. But Posner wrote that 'there isn't much to bottom-up reasoning' and he was highly critical of those who see the top-down and bottom-up approaches as dichotomous.

Unlike McHugh J, Judge Posner did not condemn top-down reasoning.

For Posner, decided cases might offer material for creating or testing a theory about a field of law. But without a theoretical template to view them or to know when an analogy is close and legitimate they are no more than decided cases. In his words: 'But there must be a theory. You can't just go from case to case, not responsibly anyway.'

Thus, constitutional and textual interpretation will involve suppositions or theories about original intent, legislators' intent, *stare decisis*, the role of context, the relevance of international norms, presumptions against overturning deeply-held values of the common law etc etc etc. Judges must work through these and many other issues when addressing disputes presented for resolution.

It is no different in the realm of case law. To say that *Donoghue v Stevenson*⁵⁴ is canonical tells you little about when and how its principles are to be applied in later cases. And when another major planet enters the solar system (*Hedley Byrne & Co v Heller & Partners*⁵⁵ for instance), we need theories and techniques to know how to respond. The answer may differ between England and Australia, because different forces may be at work. How these are discerned and applied by judges

involves techniques at the highest levels of abstraction, i.e. theories.

In Posner's words, 'bottom-up reasoning is not reasoning but is at best preparatory to reasoning ... legal reasoning worthy of the name inescapably involves the creation of theories to guide decision'. Posner listed examples of top-down theories associated with well-known scholars, including one or two of his own. He naturally acknowledged the contestability of all theories.

Unlike scholars, judges tend not to enunciate the theoretical underpinnings of their judicial worldview. We are simply too busy deciding cases to step back and contemplate the broader patterns that underlie our words and actions. And we are reluctant to offer a broadside to scholars and other jurists unless it is really necessary. Some of us get snippets of time during sabbaticals to pursue studies in particular areas. We may open windows that show bigger pictures that help shape our understanding of the daily task. On these occasions some of us may range over wide fields of law or legal theory. For others, refreshing and occasionally useful insights may come through religious studies, history, the philosophy of the mind or probability theory.

We judges, and those whom we serve, are (I believe) the better for these glimpses into a world that is broader than the law viewed as a closed circle of self-referential ideas. That world is a reality that impacts upon the law at its every step. Why should we turn it away at the door for fear that it may enter our deliberations from the top down?

Some big picture ideas are plain wacky and others may be irrelevant or harmful to legal discourse within the confines of the judicial oath - but not all. All ideas, theories and concepts must be contestable and available for scrutiny in accordance with the processes of judicial accountability to which all are subject in differing ways.

My concern is with those who deny the universality and legitimacy of 'top-down' reasoning that is part of the common law tradition. I am not advocating a role for the judicial superman (or woman) who does nothing but bring extra-legal theories or concepts into legal discourse. I have yet to meet such a character. He or she is in the class of the unicorn, as non-existent as the legal purist who is said to bring nothing to the task but a high judicial technique that finds everything within the four corners of a revealed but closed canon of legal scripture.

Top-down and bottom-up reasoning are not converse ways of approaching a single problem. As Posner puts it, 'top-downer and bottom-upper do not meet'. Rather, the two concepts seek to capture clusters of different types of legal reasoning each of which is widely practised by everyone (including those who sometimes profess denial). If you don't believe me, I suggest that you read Kirby J's 'I told you sos' in dialogue with some of

his more legalistic brethren in the footnotes to his reasons in *Cattanach v Melchior*.

Some types of top down reasoning are illegitimate and their very method of introduction offends orthodox judicial method. Philosophies and concepts that flaunt established principle, or that are applied by individual judges in the teeth of existing authority or the plain text of statutes or constitutions must be rejected. But that is because they are poor theories, or conflict with binding precedent, or fail to gain judicial acceptance. It is not because they may originate in academic writings, or decisions from overseas legal systems, or the insight of an individual judge.

Theories may, in Posner's words, be invented or adopted. Some can be traced to their birthplace which may be a single judge or an academic writer. None, I suggest, can truly be described as 'deriv[ing] from judicial decisions upon particular instances, not the other way around', as if the two were mutually exclusive.

'My concern is with those who deny the universality and legitimacy of 'top-down' reasoning that is part of the common law tradition. I am not advocating a role for the judicial superman (or woman) who does nothing but bring extra-legal theories or concepts into legal discourse. I have yet to meet such a character. He or she is in the class of the unicorn, as non-existent as the legal purist who is said to bring nothing to the task but a high judicial technique that finds everything within the four corners of a revealed but closed canon of legal scripture.'

Lord Atkin had the parable of the Good Samaritan as much as the existing case law in mind when he enunciated the morality-based neighbour principle that turned much of the earlier law on its head.⁵⁶ Lord Wright imported an exotic plant into English jurisprudence when he introduced the principles of the American *Restatement of restitution*.⁵⁷ This was a grand top-down theory (of still debatable content) that would displace the implied contract theory of quasi-contract and may yet do further damage to inherited certainties.⁵⁸ Many ideas have entered the common law when a judge picked up a theory from an academic article, road-tested it and ran with it.

My difficulty with Gummow J's description of judicial method is that it offers a false dichotomy and presents only half the picture.

The last 30 years has been an era in which the High Court has generally welcomed the insights of comparative law,

international law, academic theory, social history, moral discourse. Read the judgment of Gleeson CJ in *Cattenach* for an instance where all of these factors are brought into focus in addressing a novel legal issue. But even for less exotic topics than the one considered in *Cattenach*, the connections and disconnections between existing precedents within our judicial system are often perceived 'top-down' through such lenses. It is obviously true to say that general principles derive from existing judicial decisions. But that is only part of the picture. Other factors are at work, from the top-down as it were. They may provide the tools for 'deriving' principles from existing case law. They may assist in 'prioritising' conflicting decisions or introducing or spurning legal ideas from abroad. Top-down theories (of the finest kind) are the usual spur for a major shift in legal reasoning.

Let me illustrate by two examples drawn from the recent law of negligence.

Thirty years ago the leading courts in Australia and England treated causation issues as questions of fact to be answered with no more than a hearty dose of robust common sense. How things have changed. In *March v E & MH Stramare Pty Ltd*,⁵⁹ Mason CJ said that the 'but for' test, applied as an exclusive criterion of causation, 'yields unacceptable results and ... the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations'. Today, even this profound acknowledgement is just the signpost to further pathways for approaching causation issues in a principled (i.e. theory-based) manner. In the last decade you can hardly read an appellate decision on the topic that fails to acknowledge the insights of Professor Jane Stapleton. Many of her views stem from pure philosophy mediated to lawyers through Hart & Honore's *Causation in the law*. Of course, Stapleton has worked with the caselaw, but in a highly critical manner. Theories have been tested against the decided cases. The decided cases have been tested against the theories. In turn, Stapleton's constructs have been tested and applied (to a degree) by the High Court and the intermediate appellate courts.

This judicial reception is top-down reasoning of the highest legitimacy.

My second example relates to concepts that have simply been introduced over the top of existing precedent because of what Holmes described as the 'felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, even the prejudices which judges share with their fellow men'.⁶⁰

A lawyer who gave advice today about the law of negligence by reference to principles derived from High Court decisions when Sir Gerard Brennan was chief justice would be an easy target in a professional negligence claim. There have been tremendous changes over the last decade. For example, the notion of general reliance has been rejected. Some justices of

the High Court now pay open regard to the availability and cost of insurance as a factor relevant to imposition of a duty of care.⁶¹ There is much emphasis upon taking responsibility for one's own actions, so much so that it is now built into the duty of care owed to footpath pedestrians.⁶² Categories of strict liability are disappearing. Non-delegable duties are harder to find. The seismic shifts have not all been in the one direction, as *Brodie* and *Tame* demonstrate.

I am not concerned to debate whether these trends show that the earlier law was wrong. That is an irrelevant question for anyone who is not a member of the High Court. For everyone operating in the law below the High Court, what that court said was right in 1984 was right in 1984 and what it says is right in 2004 is right in 2004.

My point is that these dramatic swings of the negligence pendulum didn't just emerge by deductive reasoning from the earlier case law. If this were the whole story, one would not expect to see the violent shifts that are now the norm in tort law. Policy issues crop up frequently - and I don't mean just the 'policy of the law' found in the reports of decided cases.⁶³ Several extra-legal policy factors have entered the recent law of tort from the top-down.⁶⁴

In my submission, these changes have been the product of entirely legitimate species of top-down reasoning adopted by the High Court. They were derived from much more than reading earlier precedents. In *Tame's Case*, the learning from psychiatry and the philosopher's call of coherence were too strong for old distinctions to hold. The enthusiastic judicial reception of the notion of taking care for one's own safety reflects a public mood of impatience against the culture of ambulance-chasing and blaming, as well as concern about the prohibitive cost of state-run and private insurance. It will be obvious that I imply no criticism of the judicial method that has influenced these fundamental shifts in tort law. I refrain from suggesting that they are instances of judicial 'activism' that is widely-applauded, but only because 'judicial activism' is an overworked cliché that lies mainly in the eye of the beholder.

Judges must listen to counsel and each other. And they must bow to superior judicial authorities and the ineluctable texts of statutes and constitutions. A judge who, in Posner's words, 'invents or adopts a theory about an area of law' will always have an uphill battle to achieve its acceptance. No single jurist, not even a Dixon urged on by a Byers, can work in isolation or free of the constraints of judicial method.

To revert to Holmes, 'we have too little theory in the law rather than too much'.⁶⁵ Theories are essential, including those introduced from outside local case-law. There is nothing wrong with theories, even grand theories. They must of course gain acceptance through the proper exercise of judicial power, ultimately by the High Court of Australia.

In the final analysis, the justices of the High Court will decide what theories bear upon the structures of the law from time to time. They are the keepers at the gate that leads to and from the vast world of ideas. It would be sadly misleading if they saw themselves as no more than guardians within an enclosed cave.⁶⁶

- 1 (1996) 186 CLR 140.
- 2 (1996) 187 CLR 1.
- 3 (1996) 189 CLR 51.
- 4 *Australian Capital Television Pty Ltd v The Commonwealth; New South Wales v The Commonwealth* (1992) 177 CLR 106.
- 5 See *Attorney-General (WA) v Marquet* [2003] HCA 67, 202 ALR 233 at [160]-[164]. He observed at [104] (ruefully?) that no attempt was made to reopen the holding on the constitutional implications decided in *McGinty*.
- 6 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- 7 (1947) 74 CLR 31.
- 8 (2003) 77 ALJR 491.
- 9 (1992) 177 CLR 106 at 135. Mason CJ cited Dixon J in *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81 in support of the first sentence.
- 10 (1992) 177 CLR 106 at 138-40 per Mason CJ, at 168 per Deane and Toohey JJ (who incorporated their reasons in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72-75), at 208-214 Gaudron J.
- 11 (1992) 177 CLR 106 at 135.
- 12 (1996) 186 CLR 140 at 168-9.
- 13 *ibid.*, p.231.
- 14 *ibid.*, pp.184-5.
- 15 (1997) 189 CLR 520.
- 16 *McGinty v Western Australia* (1996) 186 CLR 140 at 231-2, footnotes omitted.
- 17 *ibid.*, p.291.
- 18 *ibid.*, pp.169-71.
- 19 *ibid.*, pp.184-5.
- 20 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70.
- 21 (1992) 177 CLR 106 at 209). Gaudron J cited *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J, a passage discussed below.
- 22 (1992) 177 CLR 106 at 211-212.
- 23 *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 362-3.
- 24 177 CLR 106 at 123.
- 25 Richard A Posner, 'Legal reasoning from the top down and from the bottom up: The question of unenumerated constitutional rights' (1992) 59 *U Chi L Rev* 433. A revised version appears as a chapter in Posner's *Overcoming law*, 1995, Harvard University Press.
- 26 Cf McHugh J's footnote in *McGinty* at 232 (247).
- 27 Transcript, 8 April 1997.
- 28 (1997) 189 CLR 465.
- 29 Transcript, 11 March 1997.
- 30 (1949) 80 CLR 229 at 260. See *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585-7.
- 31 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81, cited by Dawson J in *McGinty* at 184. See also n9 above.
- 32 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.
- 33 (1993) 177 CLR 541 at 552.
- 34 Reproduced in *Jesting pilate*, 1965, Law Book Company, pp38-9, 42.
- 35 *ibid.*, p.38.
- 36 Re *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699, 195 ALR 502 at [72].
- 37 Letter 1 June 1937. Quoted by Bennett, *Keystone of the federal arch*, p67.
- 38 Constitution, sec 24.
- 39 *Lange* at 560 *per curiam*.
- 40 (1997) 189 CLR 520 at 567.
- 41 See *Port MacDonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340 at 374, *Pearce v The Queen* (1998) 194 CLR 610 at 630, *Lipohar v The Queen* (1999) 200 CLR 485 at 553-4.
- 42 189 CLR at 54-55, 61-62.
- 43 *ibid.*, p.102.
- 44 *ibid.*, p.98 per Toohey J.
- 45 (1992) 176 CLR 1 at 27. See also per Gaudron J at 55, per McHugh J at 68.
- 46 See e.g. *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [13]-[14] per Brennan CJ, 208 [73] per Gaudron J, 220-221 [112] per McHugh J, 232 [146] per Gummow J. See generally, Justice McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21 *Aust Bar Rev* 235 esp at 237-241, The Hon JJ Spigelman AC, 'The Truth can cost too much: The principle of a fair trial' (2004) 78 *ALJ* 29 esp at pp32-33.
- 47 Cf the passage cited at fn 11 above.
- 48 (2001) 208 CLR 516 at 544.
- 49 See Jane Stapleton, 'Comparative Economic Loss: Lessons from Case-law-focussed 'middle theory'' 50 *UCLA Law Review* 531 (2002).
- 50 Tony Weir, 'Book review of *An analysis of the economic torts*' (2002) 118 *LQR* 164 at 165, quoted by Stapleton, *op. cit.* p.580.
- 51 The phrase is that of Beldam LJ in *Barrett v Ministry of Defence* [1995] 3 *All ER* 87 at 95.
- 52 See *Sullivan v Moody* (2001) 207 CLR 562, *Cattanach v Melchior* (2003) 199 ALR 131 at [35] (Gleeson CJ).
- 53 (2001) 208 CLR 516 at 545 [74].
- 54 [1932] AC 562.
- 55 [1964] AC 465.
- 56 See Geoffrey Lewis, *Lord Atkin*, Butterworths 1983 pp57-8.
- 57 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61-64. The restatement was published in 1937.
- 58 See Justice Keith Mason, 'Where has Australian restitution law got to and where is it going?' (2003) 77 *ALJ* 358.
- 59 (1991) 171 CLR 506 at 516.
- 60 Holmes, *The common law*, 1881, Little Brown & Co, p.1.
- 61 See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 282-3 (McHugh J), *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 595-6 (Kirby J), *New South Wales v Lepore* (2003) 195 ALR 412 at 424-5 [36] (Gleeson CJ).
- 62 *Brodie* at 581 [163].
- 63 Cf *Cattanach* at [73]-[75] per McHugh and Gummow JJ.
- 64 See generally D A Ipp, 'Policy and the swing of the negligence pendulum' (2003) 77 *ALJ* 732.
- 65 Oliver Wendell Holmes, 'The path of the law', 10 *Harv L Rev* 457 at p.476 (1897).
- 66 I am indebted to Michael Coper, David Ipp and Leslie Katz for their suggestions about earlier drafts. I also acknowledge the research assistance of Michael Rehberg and Tim Breakspear.

A statistical analysis of gender at the NSW Bar

By Ingmar Taylor and Chris Winslow

Introduction

Statistical analysis of gender at the Bar can be problematic. Irrespective of which aspect is being studied, the imbalances in the aggregate figures and gender ratios are inescapable: there are only 288 local practising female barristers, representing just 14.7 per cent of the Bar. Further, because there are so few female barristers, changes affecting a handful of individuals may effect large proportionate changes. One example of this would be in respect of women who are senior counsel.

Nevertheless, data held by the Bar Association can reveal much about the history and the current position of women at the Bar. For a clearer perspective, this information can be compared with statistics from other professional bodies and educational institutions. This exercise reveals that the Bar is not dissimilar to the medical and engineering professions.

Bar News began this analysis by examining the proposition that the aggregate number of women at the Bar does not reflect the ever-increasing numbers of women who are studying law and entering the solicitors legal profession.

It then completes the picture by studying the numbers of women at each possible stage in their career at the Bar -

**TABLE 1: UNIVERSITY LAW GRADUATES:
NSW, PER CENT FEMALE 2003**

University	Per cent female
Macquarie University	60
Southern Cross University	77
University of Newcastle	41
University of New England	49
University of New South Wales	59
University of Sydney	61
University of Technology (Syd)	Not available
University of Western Sydney	50.2
University of Wollongong	62

including data relating to the Bar Practice Course, current areas of practice, female applicants for silk and appointments to the Bench. An important subsidiary issue is retention of women at the Bar, and whether women are more likely to leave the Bar having commenced practice.

Law students

Table 1 below reveals that in many of the state's law schools, there are more female graduates than male. This trend continues into the College of Law, where recent statistics show that in 2002, 58 per cent of those completing their practical legal training were women, rising to 61 per cent in 2003.

Legal practitioners

Statistics collected by the Legal Practitioners Admission Board show that women now comprise a clear majority of those being admitted as legal practitioners in New South Wales, and have done for a number of years.

Women also comprise a steadily increasing minority of solicitors in New South Wales. Table 2 below shows that by 2004, nearly 40 per cent of practising solicitors were female. If current trends continue, it is possible that within a decade they may represent fifty percent practitioners in this state. Clearly, this would not be possible unless the growth in the number of female solicitors greatly surpassed the rate of growth in the aggregate number of new solicitors. Accordingly, the Law Society's *Profile of solicitors* shows that, between 1988 and 2003, the number of female solicitors has increased by 258 per cent, whilst the total number of solicitors has increased by 93 per cent.

	Admission as legal practitioners - by year		
	2002	2003	2004
Male	756	736	235
Female	992	1107	336
Total	1748	1843	571
Per cent female	57	60	59

Source: Legal Practitioners Admission Board

TABLE 2: PRACTISING SOLICITORS 1988 – 2004

	1988	1990	1992	1994	1996	1998	2000	2002	2003	2004*
Male	7829	8393	8801	8992	9331	9414	10,060	10,987	11,170	11,412
Female	1979	2398	2837	3291	3868	4457	5322	6,477	7,079	7,469
Total	9808	10791	11,638	12,283	13,199	13,871	15,382	17,374	18,249	18,881
% female	20.2	22.2	24.4	26.8	29.3	32.1	34.6	37.3	38.8	39.6

Source: New South Wales Law Society web site *March 2004

Comparisons are often odious, and the equivalent statistics for barristers are not as positive. The statistics in table 4 (over) show that the total number local practising female barristers have increased from 179 in 1996 to 288 in 2004, an increase of 60.8 per cent. Over the same period the total number of local practising barristers has increased by only 23 per cent: see table 4.

However, in proportionate terms, women have grown from 11.3 per cent of barristers in 1996 to only 14.7 per cent today. During the same period, 1996-2004, the number of female solicitors has increased by 93 per cent, off a much higher base.

When compared with data from other professions, the results are similarly mixed. According to the Australian Institute of Health and Welfare, the proportion of female medical practitioners has risen from 27.6 per cent in 1996 to 30.7 in 2001.¹ That aggregate figure, however, masks some wide variations. For example: nearly 48 per cent of RMO / interns are women, whilst only seven per cent of surgeons are women.²

Conversely, the gender balance at the Bar is not significantly worse than for engineers although, once again, there are great disparities between *disciplines*. In 2002, women comprised 15 per cent of engineering graduates, yet only 7.6 per cent of professional engineers. However, in 2001, the proportion of women graduates in chemical and environmental engineering was 30 per cent and 42 per cent respectively, whilst only 10 per cent of software engineering and 14 per cent of civil engineering graduates were women.

Given these significant variations between disciplines or branches of other professions, it raises the question as to whether the custom of viewing the Bar as monolithic entity hides similar differences in gender ratios. For example, 23 per cent of public defenders and 26 per cent of crown prosecutors are women. Alternatively, could any apparent preference that women may have for the work in particular disciplines or sections of the Bar, such as crown prosecutors, be used to leverage up the aggregate numbers of female barristers?

Demographics

Bar News mined the Bar Association's database to analyse how many women commenced at the Bar in each year from 1963. Table 3 (opposite) is not limited to current local practising barristers. Rather, it records all those who *ever commenced* practice at the NSW Bar and the year in which they commenced, and as such, may include women who have been appointed to the Bench, retired, reverted to being a solicitor, or passed away.

It reveals that until the 1980s, women starting at the Bar were very much the exception. Until 1976 no more than two women commenced at the Bar in any one year, and it was not until 1981 that more than six commenced in any one year. Only since the late 1990s have we seen consistently 20 or 30 women starting each year.

TABLE 3: COMMENCEMENT OF PRACTICE, MALE AND FEMALE, BY YEAR OF PRACTICE, 1963-2004 PRACTICE

Date (Year)	Males	Females
1963	14	1
1964	11	1
1965	11	1
1966	9	1
1967	18	0
1968	18	1
1969	15	1
1970	18	1
1971	29	2
1972	24	1
1973	32	1
1974	41	0
1975	63	1
1976	48	6
1977	64	2
1978	65	2
1979	57	6
1980	56	3
1981	68	11
1982	64	11
1983	75	12
1984	96	12
1985	86	4
1986	68	6
1987	68	12
1988	86	9
1989	90	11
1990	80	17
1991	92	14
1992	52	9
1993	67	18
1994	56	15
1995	90	15
1996	91	21
1997	117	17
1998	100	34
1999	102	33
2000	93	26
2001	88	34
2002	78	25
2003	77	25
2004	56	13

Coming to the Bar

How many women have come to the Bar in recent years and are women more likely than men to leave the Bar in their early years?

The first means of analysing admission to the Bar is to study the statistics from the Bar Practice Course. Data from pre-1997 courses was excluded because it was not reliable.

It should be noted that data contained in table 5 below does not capture *everyone* who started at the Bar in the last seven years. For example there were interstate applicants who commenced practice without having to do the Bar practice course.

However, noting those limitations, table 5 reveals that:

- between 1997 and 2004, 641 barristers completed the last 15 Bar practice courses;
- women comprised 24.7 per cent;
- since 1997 158 women have enrolled in the Bar Practice Course, comprising, on average, 25.4 per cent of the class;

- this average conceals quite a high fluctuation in numbers: The standard deviation between courses is quite high: 7.88; and

- there is no discernable upward trend in the number of women doing the BPC.

To see whether women stayed at the Bar, once they have started practising, an analysis was conducted of every person who completed a Bar practice course in the last seven years. The results are displayed in table 5 below.

The rate of retention was determined by checking off the names of readers for each Bar Practice Course against those who still have a current barrister's practising certificate. There are many reasons why some have not got a current PC. These include, *inter alia*:

- returning to practice as a solicitor;
- departing for interstate or overseas; or
- acceptance of an appointment to a commission or tribunal.

TABLE 4: HOLDERS OF NSW BARRISTERS' PRACTISING CERTIFICATES 1996 – 2004									
	1996	1997	1998	1999	2000	2001	2002	2003	2004*
Male	1407	1312	1348	1615	1572	1601	1633	1622	1670
Female	179	201	197	224	230	242	265	270	288
Total	1586	1513	1545	1839	1802	1843	1898	1892	1958
% female	11.3	13.3	12.8	12.2	12.8	13.1	14.0	14.3	14.7

Note: Excludes interstate and overseas holders of NSW barrister' practising certificates. *As at April 2004

TABLE 5: BAR PRACTICE COURSES – COMPLETION & RETENTION RATES															
	1997		1998		1999		2000		2001		2002		2003		2004
	1/97	2/97	1/98	2/98	1/99	2/99	1/00	2/00	1/01	2/01	1/02	2/02	1/03	2/03	1/04
Total	45	35	40	53	52	43	53	37	39	32	41	27	42	34	68
Male	38	28	28	38	38	33	40	32	25	20	33	18	34	24	54
Female	7	7	12	15	14	10	13	5	14	12	8	9	8	10	14
% female	16	20	30	28	27	23	25	14	36	38	20	33	19	29	21
Current practising certificate – rates of retention															
Male	36	22	21	31	31	33	38	30	25	20	33	18	34	24	54
	(-2)	(-6)	(-7)	(-7)	(-7)		(-2)	(-2)							
Female	7	7	10	13	11	10	12	4	13		12	8	9	8	10
			(-2)	(-2)	(-3)		(-1)	(-1)	(-1)						

Of those 641 barristers, 33 men (6.8 per cent of men) and 10 women (6.3 per cent of women) have stopped practising

Holders of NSW barristers’ practising certificates: seniority

The data above would lead one to expect that women will be found to be more highly represented in the first 10 or so years of practice. Tables 6A and 6B below confirm that is the case. They also reveal that over the last two years there has been an increase in the percentage of women in the 0-4 yrs and 5-9 yrs categories, again consistent with the increase in numbers of women coming to the Bar in the last decade. Today nearly a third of barristers with 0-4 years seniority are women.

Areas of practice

All barristers are asked to nominate their areas of practice as part of their listing on the 'Find a barrister' database on the Bar Association's web site³. Some choose not to provide any information, whilst others simply say 'general'. Further, barristers are not asked to quantify, and so 'Find a barrister' does not display, the proportion of their work which a particular area of practice represents. The data in table 7 (over) is drawn from those nominated areas of practice.

It reveals that for many types of work the percentage of women nominating an area is similar to the percentage of men.

For example:

- equity: 30 per cent of women and 33 per cent of men; and
- administrative law: 21 per cent of women and 20 per cent of men.

There are, however, a number of areas where there is a distinct disparity between men and women.

One of the starkest differences is in relation to appellate work, which 22 per cent of men but only eight per cent of women nominate as an area of their practice.

Given the greater proportion of men in the higher seniority groups (set out above), one can expect that, as barristers retire, the overall proportion of barristers who are women will increase. Further, the recent sharp reduction in work in the male dominated areas of personal injury and workers compensation (which anecdotally is expected to cause some barristers to not renew their practising certificate this year) may serve to create a more immediate (though small) increase in the overall percentage of barristers who are women.

TABLE 6A: SENIORITY PROFILE OF THE NSW BAR 2001													
TABLE 5A	0-4	5-9	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-55	Total	
Male	415	283	359	324	244	150	43	20	13	8	4	1863	
Female	122	67	47	30	13	5	2	1	0	0	0	287	
Total no.	537	350	406	354	257	155	45	21	13	8	4	2150	
% of total	25	16.3	18.9	16.5	12	7.2	2.1	1	0.6	0.4	0.2		-
% Female	23	19	12	8	5	3	4	5	0	0	0	13.3	

As at November 2001, includes interstate and overseas practitioners

TABLE 6B: SENIORITY PROFILE OF THE BAR 2003													
TABLE 5B	0-4	5-9	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-55	Total	
Male	377	320	300	291	229	188	52	22	15	7	2	1803	
Female	177	77	43	28	15	4	2	2	0	0	0	348	
Total	554	397	343	319	244	192	54	24	15	7	2	2151	
% of total	25.8	18.5	16.0	15.0	11.3	9.0	2.5	1.1	0.7	0.3	0.1		
% Female	32	19	13	9	6	2	4	8	0	0	0	16	

As at August 2003, includes interstate and overseas practitioners

TABLE 7: AREAS OF PRACTICE AS AT APRIL 2004

	Number of women	Percent of women	Number of men	Percent of men
Equity	87	30%	632	33%
Criminal	84	29%	549	32%
Personal injury	71	25%	643	39%
Commercial	70	24%	495	30%
Administrative	60	21%	332	20%
Family law	60	21%	177	11%
Wills and probate	54	19%	316	19%
Professional negligence	52	18%	621	37%
Medical negligence	47	16%	443	27%
Trade practices and competition	46	16%	440	26%
Property	46	16%	341	20%
Industrial/employment	39	14%	281	17%
Insurance	36	13%	499	30%
Civil & human rights/discrimination	35	12%	93	6%
Alternative dispute resolution	31	11%	173	10%
Workers compensation	30	10%	301	18%
Bankruptcy/insolvency	26	9%	227	14%
Building and construction	25	9%	268	16%
Local government/environmental	25	9%	187	11%
Intellectual property	24	8%	162	10%
Appellate	23	8%	362	22%
Defamation	22	8%	90	5%
Contracts	20	7%	133	8%
Banking	19	7%	226	14%
Migration	19	7%	84	5%
Constitutional	17	6%	104	6%
Inquests, royal commissions & statutory tribunals	15	5%	101	6%
Local courts	10	3%	56	3%
Tax	9	3%	68	4%
Native title	9	3%	31	2%
Liquor licensing	8	3%	53	3%
International	7	2%	66	4%
Dust diseases	6	2%	31	2%
Transportation law (aviation/maritime)	6	2%	89	5%
Communications / media	6	2%	29	2%
Conflict of laws	4	1%	21	1%
Customs	3	1%	59	4%
Motor accidents	3	1%	22	1%
Total numbers practising	288	100	1670	100

Excludes interstate and overseas holders of NSW barristers' practising certificates.

Not all practising barristers advise the Bar Association of their areas of practice and the association does not take any responsibility for the accuracy of the information provided to it by members in relation to the areas in which they practice.

Men are more likely than women to nominate as their areas of practice:

personal injury
 professional negligence
 insurance
 trade practices
 workers compensation
 building and construction
 appellate

Women are more likely than men to nominate as their areas of practice:

family law
 civil and human rights

Taking silk

While the number of women at the Bar has increased in recent years, is that translating into a higher number of successful female silk applicants? It is unusual for a barrister to obtain silk with less than 14 years seniority and, as the above data reveals, it is only in the last 10 to 15 years that women have been commencing at the Bar in greater numbers.

Table 8 below documents the number of men and women who have applied for silk since 1994 and the number who have been successful.

The percentage of silk applicants who are women broadly reflects the percentage of barristers who have more than 14 years seniority (see table 6B).

Over the last 10 years 65 silk applications have been made by women and 1002 have been made by men. From those applications, 13 women were successful and 191 men were successful. Because barristers can reapply each year one cannot determine what percentage of the total male or female applicants in the 10 year period were successful. However, the

percentage of successful applicants can be determined for each year, and they are set out in table 8 below.

An analysis of those who hold silk over the last 10 years reveals the percentage of all female barristers who hold silk increased from 1.8 per cent to three per cent between 1994 and 1998 and then has remained steady at three per cent, which is significantly lower than the percentage of all barristers who hold silk (which has fluctuated in a range of 11 per cent to 15 per cent) see table 9 (over). It should be noted that in the last 10-15 years there has been a large increase in the numbers of women commencing at the Bar (most of whom would not yet be ready to take silk), which means the total pool against which the number of female silks are compared has grown. Nevertheless the disparity seems remarkable.

Appointments from the Bar to the Bench

The last area examined is appointments to the Bench from the NSW Bar. These figures are drawn from the Bar Association's annual reports. Over the last six years, of the 69 appointments drawn from the Bar, 12 were women (17 per cent) and 57 were men (83 per cent). On those figures, women were appointed at only a slightly higher ratio than the ratio of women at the Bar. See table 10 (over).

Conclusion

The overall percentage of barristers who are women will not be anywhere near 50 per cent in the foreseeable future. Currently 14.7 per cent of barristers are women and the percentage of women commencing each year is rarely greater than 25 per cent. However there has been a significant change in recent years in the gender make-up of the Bar at the junior levels. Now it is not unusual for 30 women to start at the Bar in a year, a far cry from 20 years ago when it was unusual to have more than two women commencing practice.

TABLE 8: APPLICATIONS FOR SENIOR COUNSEL, 1994-2003										
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Applicants										
Male	72	56	84	91	106	111	106	123	126	127
Female	6	4	5	8	3	5	7	7	12	13
Total	78	60	89	99	109	116	113	130	138	140
% female	8	7	6	8	3	4	6	5	9	9
Appointees										
Male	12	15	13	15	18	21	18	19	27	33
Female	2	1	0	2	1	2	0	1	1	3
Success (%)										
Male	17	27	15	17	17	19	17	15	21	26
Female	33	25	n/a	25	33	40	0	14	8	23

TABLE 9: BARRISTERS HOLDING SILK										
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Male	201	204	208	213	231	241	253	249	251	272
Female	3	4	3	5	6	7	6	7	8	9
Total	204	208	211	218	237	248	259	256	259	281
Senior counsel ratios:										
Silks to all barristers	13%	13%	13%	14%	15%	13%	14%	14%	11%	15%
Female silks to all female barristers	1.8%	2.3%	1.7%	2.5%	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%

Excludes interstate and overseas holders of NSW practising certificates.
 Statistics include the appointees for the given year.

TABLE 10: APPOINTMENTS TO THE BENCH FROM THE NSW BAR						
	FY 1998-99	FY 1999-2000	FY 2000-2001	FY 2001-2002	FY 2002-2003	FY 2003-2004
Male	12	8	7	14	11	5
Female juniors	1	0	5	1	1	0
Female silks	2	0	0	0	2	0
Total female	3	0	5	1	3	0

The overall number of women practising as barristers in NSW has increased by 60.8 per cent in the last nine years. Of those with 0-4 years seniority today, nearly one third of barristers are women. And an analysis of the Bar Practice Course students of the last seven years reveals that women do not give up their practice at any greater rate than men. If that remains the case then we can expect that in a decade about one third of silk applicants will be women. Perhaps then we may also see a significant increase in the percentage of all female barristers who hold silk. And if there is a significant number of female silk role models, perhaps that will in turn encourage more women to come to the Bar.

¹ Australian Institute of Health and Welfare, *National health labour force series: Number 28*, 'Medical labour force 2001', p.1

² *ibid.*, p.5

³ The list of practice areas contained on the Bar Association's database was reviewed by the Bar Council in March 2002. The rationalised list was developed for consistency and to ensure that the search facility remained a useful searching tool for the use of solicitors and the public looking for a barrister to brief for their particular circumstances, and in terms of deriving useful statistics.

Why are there so few women at the Bar?

By Justin Gleeson SC and Rena Sofroniou

Introduction

What is the explanation for the low number of females at the New South Wales Bar?

The above statistical analysis has shown that up until 1976, no more than two women commenced at the NSW Bar in any year. During the 1980s, on average, about 10 women commenced at the New South Wales Bar each year, at a time when the male intake was between 70 and 90 per year. During the 1990s the female intake in most years had risen to between 15 and 20, although the male intake remained about five - six times that number.

The late 1990s were a boom period for intakes generally with over 100 males coming to the New South Wales Bar each year and the female intake rising to an all time high of 34 in 1998. Since 2000 there has been a general decrease in the number of barristers commencing practice, affecting males and females alike.

The fact that women today comprise only 14.7 per cent of the NSW Bar is largely a function of historical forces at work prior to the 1990s. Similarly, the low number of women as silk is at least partly explained by these historical trends: for barristers 15 years or more at the Bar, there are approximately 800 males and only 50 females. If one looks at barristers 10 years or more at the Bar there are about 1100 males and only 90 females.

‘To inquire further about the causes of the low female intake at the Bar involves recognising that things are changing for the better at the entry point.’

Another perspective is to focus more closely on the intake to the Bar over the last seven or eight years. That reveals a somewhat different picture where, on average, women comprise about 25 per cent of the Bar Practice Course and 25 per cent of the admissions and where the attrition rate, to use that unpleasant term, is roughly the same between men and women (between six per cent and seven per cent). For these reasons, women comprise 32 per cent of all barristers between 0 - 4 years at the Bar, and a further 19 per cent of all barristers between five and nine years at the Bar. Assuming these trends continue, it might be expected that in a number of years women would come to comprise one-quarter to one-third of the entire Bar, perhaps more, and their representation as senior counsel would dramatically improve. These latter statistics do suggest, however, that to the extent that the Bar as an institution can take measures to nourish the careers of its members, it is very important to ensure that the 32 per cent of barristers in the 0-4 year range who are women receive equality of opportunity and treatment so as to ensure that they do come through to perform a leadership role in the profession in the years ahead.



Women at the Bar: More are needed.
Photo: Murray Harris

To inquire further about the causes of the low female intake at the Bar involves recognising that things are changing for the better at the entry point. It also means recognising that for those women who came to the Bar 10 or more years ago they did so when the imbalance was far greater, which may have impacted upon their career. Also relevant to consider is the fact that even a current entry rate of 25 per cent - 30 per cent of women, against a background of 60 per cent of law graduates being women, suggests that the Bar is less attractive to women than men. There must be reasons for this.

Nature of the investigation

Our attempts to investigate possible causes for the low female intake to the Bar have resulted in some thought-provoking findings. We commence with a couple of preliminary observations.

First, there does not appear to have been any formal study conducted into this precise question. We are unaware of any expenditure by the Bar, the universities or other bodies on research into the issue.¹

Accordingly, although necessarily impressionist in analysis, we have asked women who have chosen to come to the Bar, the more recently the better, to speculate as to why their female colleagues have not chosen to join them. Further, we have asked women of long standing at the Bar to give us their impressions of their life as women at the Bar and the extent to which they think there is room for improvement.

We acknowledge that we have not asked many men to comment on the issue and perhaps this is worth following up at some later stage.

As one of us (the authors) is female and the other is not, we have also swapped our own war stories and subjective experiences. Perhaps not surprisingly, we identified a number of

overlaps, common to male and female sensibilities, as well as some contrasting experiences.

This investigation is not meant to gainsay the hard work of some members of the Bar Council or EOC over the last 10 years. Virginia Lydiard's article in this issue outlines a number of Bar Association initiatives over that period. However, an entry rate of 25-30 per cent for women, as against a female law graduate rate of 60 per cent, suggests even today there are forces at work that need to be investigated.

'The question, for our purposes, is whether the 'male-ness' we have identified is necessarily supportive of women? Is it construed by women who might have otherwise come to the Bar to be so unwelcoming that she is deterred from doing so?'

Results of investigation

We offer the results of our investigations in the form of the following propositions:

- The issue of women's choices in coming to the Bar and their experiences once at the Bar, is in fact much more subtle and multi-faceted than usually portrayed. The generalised nature of 'women' and of the 'Bar', like most such broad subjects, invites a variety of responses. There are as many views on the subject as there are variations in the spectrum of opinions from ultra-conservative to ultra-radical.
- In fact, whereas a number of women were gracious and thoughtful enough to provide very moving and clear depictions of their experiences at the Bar as women, very few such speakers were willing for us to record their observations in this journal. We are very grateful to those who have participated. Time and again we were concerned to find that almost every woman we spoke to who, whilst enjoying her own experiences at the Bar, had anything other than an optimistic and uncritical view of the institution and could understand why women were discouraged from joining in, nevertheless expressed the reservation that her view was probably not in keeping with a general attitude, or was in some way not valid. Whilst not by any means reaching the extent of secrecy or persecution, there was an unmistakable sense received from such women that, in each case, she was effectively alone in discussing her concerns, or at least isolated from her colleagues (male and female). To make too many criticisms was to be a complainer or, perhaps, an accurate but unduly strident critic of a work environment that was, on the whole, enjoyed and its bad points tolerated.
- Following on from the previous point, there does not yet appear to be any established forum for the swapping of

women's experiences, views and stories, although some embryonic steps have been taken in this regard.

- Further, the issue of a woman's choice to come to the Bar is tied up with a consideration of a woman's viability once at the Bar, since it has been speculated that it is female law graduates' perceptions of what life at the Bar as a woman would be like that could reasonably be expected to play an important part in rejecting the Bar as a desirable work environment.
 - As one woman succinctly expressed it, 'it boils down to the two 'F factors': Fear and Family. Whereas, she suggested, men might be encouraged to follow through with their risky professional dreams and vocations (including the setting up of practice as a self-employed barrister), women were, whether innately or by social conditioning, more risk-averse.
 - As a correlation, the argument continues, whereas men are often pressured to display, in their judgements and actions, more self-confidence than they necessarily feel, women on the whole down-play their strengths, avoid what might be termed 'arrogant' behaviour (more unseemly in the female than the male) and are valued more when they displayed more temperate, commonsense, supportive and conciliatory qualities.
- It is perhaps then not surprising that historically men at the Bar, as well as solicitors briefing young barristers, have developed support networks that bolster the 'young bucks' who show promise and interest during their fledgling years at the Bar. We emphasise that such networks are not open to all men, nor to all types of men and that individual men might certainly be isolated or 'out of the Club', as a matter of subjective experience. However, at a more general level, the hierarchies, networks and supports are intrinsically male in their culture, their metaphors and their codes. This is not in itself a bad thing and 'male' is not a dirty word. Some women (the female author included) revel in such an environment, and this may have more to do with early parental and other role models and life experiences than it does with anything specific to the Bar. The question, for our purposes, is whether the 'male-ness' we have identified is necessarily supportive of women? Is it construed by women who might have otherwise come to the Bar to be so unwelcoming that she is deterred from doing so?
- We take the view that it might not be a sufficient response to this argument to point merely to the undoubted number of happy and successful women currently practising at the Bar. The occasional, prodigious, appropriately-pedigreed or otherwise well-placed woman may interact to some extent with these networks on particular floors, but her designation as a genuinely welcomed and supported 'mate' does not make the hierarchy she visits any less male in its

characteristics, and if that 'maleness' is perceived to be unwelcoming to other women, they will still be deterred from joining.

- What do we mean by 'maleness' in this context? We have used general language in this regard, but the actualities are obvious to those wishing to observe them. Rather than just consisting of a majority of male barristers, we mean that the Bar from time to time consists of, involves, or rubs shoulders with, male activities and traditions that exclude women, whether explicitly or implicitly. Lunches in the exclusively male Australia Club are an example, the rugby union connections (not merely as current fans but frequently as former team mates or adversaries), current tennis buddies (rarely featuring mixed doubles, as we understand it). Further we can point to the apparent floor 'dynasties' (designated by lines of 'readership' more frequently than by blood), which at least in practice often do not include women.
- We do not suggest that the existence of the more blatant of these networks are particularly comfortable for excluded individual males (there were after all only five men included in the purported 'A' list recently published in a glossy mag, but one might fairly speculate about the characteristics of any putative 'B' or 'C' list).
- The subject raises in a very direct way issues that potentially threaten one's sense of security as a barrister. In this regard the relatively small number of women at the Bar appears to perpetuate the problem. To what extent does each woman feel herself to be a single (perhaps happy, perhaps barely-tolerated) exception to the over-arching proposition that the archetypal image of a barrister remains that of a tall, not too young, preferably baritone man?
- As to the other 'F factor', family, it is trite to observe the extent to which we are reminded that working women nonetheless generally perform, in terms of hours spent, the majority of work in keeping house and raising children, particularly when those children are very young. We do not understand the question of women at the Bar to be synonymous with child-care and family-friendly Bar policies: men are, after all, often parents and women are not necessarily mothers. But it would be naïve to suppose that for women of child-bearing age the heavy demands of the job, and the need to run a small business, would not play a major role in the decision whether to enter such a career.
- We do not propose that the 'maleness' endemic to the Bar be obliterated or demonised. We suggest that a consciousness of its existence and a recognition of the dubious connection between such embedded structures and the ability to do effective work as a barrister will assist in relaxing such arbitrary barriers to women actually 'belonging', whether 'prodigies' or not, 'exceptional' or not.

What is to be done?

It is not the intent of the authors to be prescriptive. We would rather invite open discussion than seek to presume to comprehend fully the problem or the answers to it. Indeed, the above discussion has sought to suggest that at many points the question of women's experiences at the Bar intersects with more fundamental questions about survival at the Bar which are faced by all of its members.

A first question that should be faced is whether the Bar should support or even mandate steps designed deliberately to bring female barristers better to the attention of solicitors and clients. This notion was given prominence in March of this year, with Malleson Stephen Jaques being the first solicitors' firm to announce that it would allocate all work to barristers using the national equal opportunity briefing policy drawn up by Australian Women Lawyers. That policy requires the firm to take all reasonable steps to identify female counsel in relevant practice areas and to genuinely consider engaging them. The position of the New South Wales Bar Council is that on 23 October 2003 it adopted its own Equitable Briefing Policy (Bar Brief, November 2003). Since then the Law Council of Australia has drawn up its own policy which draws on the NSW Bar, Victorian Bar and Australian Women Lawyers policies. The Standing Committee of Attorneys General (SCAG) is considering the LCA policy. The New South Wales Bar Association has said (through its Executive Director, Philip Selth) that it is currently meeting with major institutions to persuade them to adopt the LCA policy, and that the New South Wales Bar Association considers it has been a real leader in the drive for an equitable briefing policy across Australia.

'The above discussion has sought to suggest that at many points the question of women's experiences at the Bar intersects with more fundamental questions about survival at the Bar which are faced by all of its members.'

As will be seen elsewhere in this issue, some female barristers regard this as an important step forward; others regard it as offensive. The tentative view of the authors is that it should be trialled fully. To the extent that discrimination occurs in subtle ways, a feminist critique might hold that the former Bar rule prohibiting any form of self-promotion was gender biased. If most barristers are male, and they already have established networks and modes of obtaining briefs from solicitors, then it would be in their interest not to have solicitors and clients fundamentally rethinking how they go about briefing barristers.

We also think that if the briefing policy is adopted widely, it can be exploited by young female barristers (and young male barristers for that matter) in ways that are not only good for the individuals but also highly competitive overall. For example,

floors of barristers could take this opportunity to present a marketing profile to major firms, indicating something about their various members, including female members, and their various specialties, talents and skills.

Secondly, and at a minimum, it is a fundamental challenge for the Bar to ensure that the one-quarter to one-third of each intake who are female progress through to the leadership roles in the profession. This is not only the proper reward for these persons but also because more, and more varied, successful female role models itself will be a highly transforming force. We suspect that part of the inertia which may cause solicitors firms not to fully embrace the briefing of female barristers, particularly in cases in the commercial area, is a perception influenced by what we have referred to earlier as the 'archetypal' or classic male role model barrister. No one these days may be able to emulate the Hon TEF Hughes QC in his cross-examination skills, but some strive to, and many solicitors and clients still appear to expect only this from a cross-examination. Powerful male role models reinforce notions that a cross-examination is there to 'destroy' a witness's credibility or to leave 'blood on the floor'. Even apart from cross-examination, there are many aspects of the presentation of any case where young barristers coming through model themselves upon those whom they perceive to be the successful leaders of the profession. When most of those leaders are by historical necessity male, stereotypes are perpetuated and are in turn fed through to solicitor and client perceptions.

Thus, whatever view one may care to take about the principle of affirmative action, we think that steps by the Bar Association to nurture and encourage female barristers, especially between five and ten years at the Bar, to ensure that they do become successful leaders and successful role models, are very important for the health and flourishing of the institution as a whole.

Thirdly, it is worth noting that courts have played a role in accepting and encouraging a wider diversity of advocacy styles and manner than hitherto. In April 2000, Chief Justice Black AC of the Federal Court said as follows:

high levels of overt aggression and theatricality are not persuasive. Judges do not like them. They regard them as a diversion and a nuisance. They do not impress and they do not persuade. One wonders why it is thought that juries - representative of the community as a whole - would be any more impressed by such conduct than judges. This is not to say that our court is a dull place, or that an advocate's flourish is discouraged. Far from it. But the qualities by which judges are assisted in the conduct and decision of a case include, predominantly, intelligence, perception, knowledge and scholarship, as well as excellence in the skills of communication and independence of thought and spirit. Remember too, that the adversarial system, while still adversarial in essence, is changing.²

'We suspect that part of the inertia which may cause solicitors firms not to fully embrace the briefing of female barristers, particularly in cases in the commercial area, is a perception influenced by what we have referred to earlier as the 'archetypal' or classic male role model barrister. '

Women - and male - barristers should be encouraged to know that this is what is expected of them by all courts.

Fourthly, where the Bar Association, or floors of barristers, are considering reform that may improve the quality of life or practice for their members, those reforms should be considered on their merits and not classified merely as women's issues. We have already mentioned that we believe child-care to be such an issue. On 22 April 2004, the Bar Council approved a permanent in-house child care scheme for members of the Bar. It stated that: 'It did so to spread some new and practical ideas to members which would give support to all barristers with family responsibilities. It is hoped too that this programme will encourage more women lawyers to consider a career at the Bar.' The scheme will work in the same way as did the pilot programme, featured in the 2003 Winter edition of this journal. The essence of the scheme is that the barrister calls the service provider, McArthur Management Services, to obtain backup childcare in emergencies or when regular childcare arrangements breakdown.

We would conclude this article with another plea for members, and prospective members, to communicate their views on the issue. Ultimately, the issues at stake are not only the career aspirations and experiences of the 2000 plus barristers at the New South Wales Bar, but the health of our institution as a whole.

¹ We should acknowledge the pioneering study by Virginia Lydiard and Geri Ettinger, 'Law lawyers and society' (1981) and their update paper 'Women in law in NSW' (2003) which addressed issues in this area.

² Keynote address by the Hon MEJ Black AC at a seminar on 'Equality of Opportunity for women at the Victoria Bar', 5 April 2000.

Women, the Bar and democracy

By Dominique Hogan-Doran

The following paper was delivered on 16 March 2004 as one of a series of lunchtime lectures entitled: 'Liberty's defence? Women and the law', held at St James Church, King Street, Sydney.

Introduction

I was fascinated to read the other day that apparently the first 'computers' were in fact women. The term derives not from the machines that now control our lives but from women who worked in observatories, particularly Harvard University. These women spent their lives studying photographic plates of the stars, in the early part of the last century, making computations - hence the name.

As Bill Bryson describes in his book *A short history of nearly everything* the lives of these computers were 'little more than drudgery by another name'.

The system was unfair, but it did have, as Bryson describes, certain unexpected benefits: it meant that half the finest minds available were directed to work that otherwise would have attracted little reflective attention. When the work did receive reflective attention it led to some of the great discoveries of space by the likes of Edwin Hubble.

It also ensured that women ended up with an appreciation of the fine structure of the cosmos that perhaps eluded their male counterparts. I suspect also it led many women to eventually progress in area of science otherwise dominated by men.

We can see a similar pattern in the law. For many years women have outnumbered men in law schools. Having ground away as 'computers' in the 'observatories of the law' in the telescope gazing at the legal galaxy, we are now more visible in partnerships, the Bar and the judiciary.

Promoting liberty and equity

Notwithstanding the surge of women from the law schools, you may be surprised to learn that over the last ten years there has been no substantial increase in the number of women coming to the Bar - we are never more than a quarter of each twice-yearly intake. And because women tend to leave the Bar quicker and in greater numbers than do men, there has been no demonstrable rise in our overall number - we constitute less than 14 percent of the almost 2000 barristers.¹

Women at the Bar face difficulties on many fronts, some of which I propose briefly to explore. Most insidious perhaps is that their advocacy on their own behalf and on behalf of clients speaks not only for themselves, but for their colleagues as well. For, as Bar President Ian Harrison remarked at the ceremonial sitting to mark the retirement of the Hon Justice Meagher from the Court of Appeal, 'when a male barrister makes a mistake he makes it for himself. When a female barrister makes a mistake she makes it for all women'.

But a (fairly) quiet revolution is happening in the promotion of women at the Bar. Indeed, last December the Law Council of Australia enthusiastically declared that gender equity is its 'first priority'.²

So, much is being done by the Bar itself to welcome women.

This includes:

- visits by groups of university women to sow the seed of a career in advocacy,
- discrimination policies to make life at the Bar less forbidding;
- an emergency child care scheme to provide a back up when all else fails; and
- creating mentoring schemes to foster and keep women at the Bar.

Some steps are being taken to promote part-time work. The take up rate for women undertaking part time work in the law is poor. Women in the legal profession are three times less likely to work part time than women in the general workforce. To help promote family life we ought to recognise and accept there can be part-time practice, even if only for a time. It requires a long term view and openness to innovation.

Yet fostering the demand for women barristers is our greatest challenge. If there is no work to do, there is no point in coming or staying.

The Victorian and NSW Bars agree that it is in the interests of clients that the best and the brightest are briefed to appear. So it is no surprise then that our new Bar President has said that advocacy is at 'its purest form an intellectual exercise where hormones and chromosomes have no relevance'.³

One can accept that, but it nonetheless carries a critical assumption. The problem is that women barristers cannot practice 'advocacy at its purest' unless and until they have a seat at the Bar table.

Choosing barristers requires a well-informed market. Women are small in number, we lack visibility, so we may not be immediately called to mind. And sometimes, arbitrary and prejudicial factors operate to exclude women from consideration at all. That these perceptions are antithetical to good briefing practice is borne out by testimonials to the profession from its most senior law officers, including Chief Justice Black of the Federal Court of Australia, and Justice Michael Kirby of the High Court, as to how competent and able women are as counsel.⁴

It is here that equality of opportunity briefing policies can be designed to address these fundamental issues. At its heart, such policy simply calls for practitioners and clients to identify women barristers and give genuine consideration to briefing them.

Just last week Mallesons, the second largest law firm in the country, committed itself to using the National Equal Opportunity Briefing Policy drawn up by Australian Women Lawyers.⁵ Clayton Utz too looks set to adopt the policy.⁶ The action of these firms follows the earnest implementation of the policy by the Victorian government, and I expect the federal

government and other state governments will follow with the meeting of the Standing Committee of Attorneys-General this week.⁷

There is of course a difference between adopting a policy and implementing it but commitment is always the first step. It is one thing for government to make a commitment, but when the large private firms take the same step, it seems to me practical implementation of the policy is inevitable. Nonetheless, the visible and vocal commitment by the leadership of our professional associations and our senior judicial officers will be critical to giving clients the necessary comfort in their actions.

And I am confident that once firms take an active look at *all* counsel on offer, women barristers will seize that opportunity to shine.⁸

‘In my view, the Bar will and should be a source of political talent, of both genders. It is important that it is so in the same way that the diversity of our judiciary goes to legitimacy of those institutions.’

The argument from liberty to democracy

However, I also wanted to take this opportunity to reflect on why, in my view, it is important to our society that this revolution takes place at the Bar. It is more than a mere 'gender equity' issue. It is vital for the continuing development of a mature liberal democracy such as ours.

The new - and first female - Chief Justice of Victoria, Marilyn Warren, has spoken of what her Honour perceives are the valuable differences that women bring to the law.⁹ There is some delicacy in advancing this proposition, both at a factual and strategic level. On the first count, there is more substantial commonality between male and female lawyers than there is not. On the second count, the promotion of difference could serve to enforce the perception that the points of difference mark out women as something 'other' to the acceptable standard.

Even so, as we all know traditionally, the judiciary draws from the ranks of the Bar. In the past this process has been criticised as cloistered and a narrow approach not providing a broad range of people representative of our community. Whether this is right or wrong, the slowly increasing strength of women at the Bar should allow for change in this perception.

The diversity and representativeness of our judiciary goes to the heart of the credibility of those institutions. There are women lawyers of merit, women who in any fair assessment of their integrity, their wisdom, their intellect and their judgment, are appropriate for appointment. In that knowledge, we ought feel a keen sense of disappointment for our society that no

other woman has been appointed to the High Court since Justice Mary Gaudron was in 1987.¹⁰ It would be comforting to be confident that the next appointment will correct that trend.

As long as it remains true that the Bar is the best breeding ground for the Bench - and on balance, in my view, it is usually so - we have no hope of making any substantial inroad into achieving that democratic objective unless we ensure that women have a seat at the Bar table.

There is another reason why women at the Bar are important to democracy. Traditionally the Bar has been an incubator for political talent. One only has to look at the honour roll of past presidents in the Bar Association to see that - Sir Garfield Barwick and Tom Hughes QC to name just two. Neville Wran QC and the late Lionel Murphy QC were prominent silks who entered politics. Our present Supreme Court has two former silks that have served as attorneys general in this state and the Minister for Communications Technology and the Arts, the Hon Daryl Williams AM QC MP, was federal attorney-general until taking up his current portfolio.

In my view, the Bar will and should be a source of political talent, of both genders. It is important that it is so in the same way that the diversity of our judiciary goes to legitimacy of those institutions.

Yet whilst this too comes with a responsibility there is also, in my view, a unique opportunity. There has been much recent criticism and political capital made about the judicial and parliamentary superannuation schemes. It stems from a perception that politicians and to a lesser extent judges gain financial advantage from occupying a public office. The



January 21, 2004: Deputy Lord Mayor, Councillor Dixie Coulton walks along harbour foreshore at Rushcutters Bay in Sydney.
Photo: Rohan Kelly, News Image Library.

opportunity for women (and men) who seek to serve in the judiciary or politics is to demonstrate that the prime reason one serves in a public office out of a sense of civic duty.

I have heard Tom Hughes QC, a former federal attorney-general himself, lament that fewer people from the Bar seem to be putting their hand up to serve in politics. It is heartening thus to observe that a female member of our own Bar, Dixie Coulton, has done just that in her campaign for Lord Mayor of the City of Sydney. The present NSW Justice Minister, John Hatzistergos, is of course a long time member of the Bar.

Like the computers of Harvard, we have done our grinding work and now take on responsibility - and opportunity - of service to the law in its many guises. We come to it with an appreciation of the legal and social cosmos - that may perhaps elude some of our male counterparts.

Epilogue

I remember well the interview for my first paid job out of law school. It was with the then chief justice of New South Wales, the Hon Murray Gleeson, for a position as his research director. We managed to discuss three heretical topics: sex, politics and religion. It seemed as if we disagreed on all three counts. I left the interview confident I would be utterly rejected, but liberated that I had said my piece nonetheless.

Reflecting on what I have raised today, it rather seems there are some uncanny parallels - although I have left religion to venue alone. I can only hope that this time my first reaction will be confounded again, and that my second reaction engenders the same in you.

- 1 The New South Wales Bar Association regularly issues statistical analyses that are available at www.nswbar.asn.au
- 2 'A level playing field for Australian Lawyers' Media Release 7 December 2003 available at www.lawcouncil.asn.au/read/2003/2388554493.
- 3 President's message, *Bar News*, Summer 2003/2004. The text was selectively reported by Michael Pelly in 'Don't mention the hormones, female lawyers told', *Sydney Morning Herald*, 9 December 2003.
- 4 The Hon M E J Black AC, Chief Justice of the Federal Court of Australia, keynote address, seminar on equality of opportunity for women at the Victorian Bar, 5 April 2000; see also, The Hon Justice Michael Kirby AC CMG, 'Women in the law: What next?', *Victorian Women Lawyers*, 20 August 2001.
- 5 Chris Merritt, 'More equal before the law', *Australian Financial Review*, 5 March 2004, p.51.
- 6 Katherine Towers, 'Utz set to stress skill over mateship', *Australian Financial Review*, 5 March 2004, p.51.
- 7 At its 14 November 2003 meeting, the Standing Committee of Attorneys-General endorsed 'the principle of government entities engaging legal services with regard to equality of opportunity'. SCAG will meet again in on 18 and 19 March 2004 to consider, and hopefully adopt, a National Equitable Briefing Policy developed by Australian Women Lawyers and the Law Council of Australia.
- 8 Katherine Towers, 'All we want is an opportunity to shine', *Australian Financial Review*, 5 March 2004, p.53.
- 9 Address by the Hon Justice Marilyn Warren, Supreme Court of Victoria to the Victorian Women Lawyer Achievement Awards Presentation Dinner, Parliament House, Victoria, 15 May 2003, published at http://www.womenlawyers.org.au/promoting_difference.htm. An edited version was published in *The Age* as 'The feminine effect on law', 27 November 2003, p.15.
- 10 See http://www.womenlawyers.org.au/high_court_vacancy.htm; *ABC Law Report*, 'Changing of the guard at the High Court' 4 February 2003, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s774889.htm>.

Equity is equality

An edited version of the address given by Madame Senior, Christine Adamson SC, at the 2004 Bench & Bar Dinner.

It was the end of January. It had been weeks since I had produced a drop of adrenalin.

Ian Harrison phoned.

'Will you do me a favour?' An ominous question. 'I want you to speak at the Bench & Bar Dinner.'

At first I said, 'I don't go to those dinners.' Then, as part of his duty of full and frank disclosure, he told me that Justice Meagher would also be speaking.

If ever there were a situation that called for a right of reply this was it.

Of course I said yes. What greater honour could there be? Philip Selth told me that I would not have to pay for the dinner

in cash - only in sweat and tears. He added, 'I hope blood won't be necessary.'

Anyway, I thought to myself, it can't be more difficult than:

- (a) trying to get an adjournment in the District Court from Judge Garling;
- (b) trying to work out what the High Court meant in *Perre v Apand*; or
- (c) trying to get chambers to replace the carpet.

But at least in court, judges needn't find what you say amusing. In fact, it's probably better if they don't. Indeed, sometimes the sweetest words to hear in court are, 'Ms Adamson, we do not need to hear from you', but if you said that to me tonight, I confess, I would be offended.

I understand that there is a convention that the silk at this dinner speaks about the Guest of Honour. But in the finest traditions of the Bar I have delegated this difficult and delicate task to Mr Junior and I'm sure you will not be disappointed by his work.

In the four months since I was invited to give this speech (of course I was free; I don't plan that far ahead) I have devised many speeches. I have thought of my fifteen years at the Bar and how quickly they have passed. I remember my trepidation at the outset and my concern that I would not get any work. Having arrived in Sydney the previous year, I knew few solicitors.

Over time, my practice grew, thanks to the support of other barristers who were prepared to sign my work as their own, and introduce me to their solicitors. I celebrated the end of my first year at the Bar by buying a set of *Commonwealth Law Reports*.

The other day I was sitting in my chambers staring at those reports, which are now in their 212th volume. In the more than one hundred years of that publication, there appear the judgments of only one woman.

I remember when I graduated from university in Adelaide women comprised half the law graduates. I went from university to the Commonwealth Attorney- General's Department, where about half the professional staff was female. After two years as a solicitor there, I came to the Bar. Yet, the Bar web site reveals that women comprise only about 13 per cent of the Bar.

I ask myself: where have all the women I studied with, and worked with, gone, and why don't they come to the Bar?

When a profession or work place is dominated by one sex or the other, there is an obvious inference that there are arbitrary forces at work, which have nothing to do with merit. Why has my experience been so good, and yet so few of my sex have come with me?

Perhaps unwittingly barristers overstate the risks of coming to the Bar, and discourage people, particularly women, becoming barristers. Fortunately I knew so few barristers when I came to the Bar that I had not been told that it was foolhardy to come to the Bar without money or contacts, or for that matter much experience. And I found that it was not foolhardy, because barristers helped me. Also I found that it is easier to get excited about a Local Court arbitration at Blacktown at the age of 26 than at the age of 36.

But why, you may ask, does the Bar need more women?

For the Bar to be an effective, useful and respected institution, I believe it should reflect at least the pool of people who are legally qualified, if not society as a whole. If it fails to do so it will be weakened, and seen by parliament, the executive, and the public as ultimately irrelevant, and rightly so.

One possible consequence is that the executive will find it easier to sideline the views of the Bar. In these times, as in all times, we need a strong independent bar to remind the executive of the importance of the civil liberties which the common law has developed. I have in mind the right to silence, the right to know that by which we are charged, the right not to be detained indefinitely, the right to a trial by jury.

'I ask myself: where have all the women I studied with, and worked with, gone, and why don't they come to the Bar?'

If we ourselves advocate and exemplify equality we will have greater strength to withstand the forces that oppose these liberties.

Many years ago, when I had been at the Bar for about a year, I attended a christening. The host introduced me to a silk who is now a District Court judge. As soon as he heard I was a barrister he said, 'Good, my daughter wants to go to the Bar. Come and tell her the Bar's no place for a woman.'

I told him that I could not do so, because my experience was to the contrary. I regard the Bar as a good place to practise law, whether one is male or female, if one has a certain temperament and intellect, and doesn't mind anxiety attacks, insomnia, working on Sundays and irregular cashflow.

So when your daughters or your wives or your sisters or your friends come home from school or university or work and express an interest in coming to the Bar, please do not do what that silk did to his daughter. If you do not feel qualified to recommend the Bar to a woman, by all means give her my phone number, and I will. All it takes is a little encouragement. For me, all it took was for a Melbourne barrister to take me aside after the Jessup Moot competition when I was a student and tell me that I should go to the Bar. A chance remark like that can change someone's life.

And many such remarks can change the Bar.

Most of the women who come to the Bar stay at the Bar. But so few are coming. We must do something more to attract them, for all our sakes.

The Bar resembles a boys' club only because 87 per cent of the Bar is male. But, in my experience the Bar is not exclusive. Unlike some institutions, such as the Australian Club, the Bar does not exclude women from membership. Parliament, the Bench and the Bar used to be male-only clubs as well, and they have changed, due to the enlightenment of many men and women. After all, equity is equality. We should try to be advocates for equality.

The fact that I am entitled to wear silk to court and not just to this dinner is testimony to the support I have received from the Bench and the Bar. For that I thank you all.

An interview with Margaret Cunneen

An interview by Chris O'Donnell

Chris O'Donnell: Margaret thank you for coming along today to be interviewed by *Bar News*. Could you start by telling us a bit about your background, schooling and how it was that you began to study the law?

Margaret Cunneen: I was educated in primary school by the Saint Joseph's nuns, in fairly straitened circumstances, in Belmore and Beverly Hills. We had classes of seventy children in a room, but we learnt in spite of, and perhaps because of, this the dedication of these wonderful women to teaching. Then I went to Santa Sabina at Strathfield, where conditions were a little rosier and I became interested in debating and the humanities. My father often said to me that I should go into law because he found me adept at argument, though I always lost.



Newspix

Chris O'Donnell: Was your father a lawyer?

Margaret Cunneen: No he wasn't. He was a civil engineer - the chief commissioner of the Water Resources Commission.

Chris O'Donnell: I was taught by nuns myself in primary school and I found a lot of them quite challenging in a disciplinary way - some very admirable, feisty and independent women. Did you find any role models there yourself?

Margaret Cunneen: Yes, I did really, because at our school at Santa Sabina we had very little involvement by the male gender, so there was nothing that we couldn't do. There wasn't really any talk of men, so that we had to do everything for ourselves and the Dominican nuns always use to say things like: 'when you enter your professions...'

Chris O'Donnell: So it was taken as a given thing?

Margaret Cunneen: That's right, none of this housewife business.

Chris O'Donnell: When did you first decide that you would do law? Was it when you were still at school?

Margaret Cunneen: Yes, I certainly applied to all of the law schools. Fortunately I also applied to a new part-time course, because whilst I did achieve entry into Sydney University and the University of New South Wales, my personal circumstances changed and I had to work full-time.

Chris O'Donnell: Were you where living away from home?

Margaret Cunneen: Yes, that's right. So I applied and took up the offer of the position at the new New South Wales Institute of Technology Law School and on the same day started work as a legal clerk in the ministerial office of the NSW Attorney General's Department.

Chris O'Donnell: Which would have been a very rapid and early start to a legal career.

Margaret Cunneen: Yes, It was somewhat advantageous because I still finished law in five years by carrying extra subjects, but at the same time I worked my way fairly rapidly up the ranks of the administrative and clerical division of the public service.

Chris O'Donnell: And was it a difficult challenge to study at that relatively young age and support yourself through full-time employment?

Margaret Cunneen: Looking back it was, but I had always been a rather hard worker. I had at least two, and sometimes three, part-time jobs all the way through high school as well as going to school, so that I was accustomed to making pretty good use of my time. It was certainly easier working and studying then, than had I waited until I became a mother.

Chris O'Donnell: Yes, indeed. Did you get financial support outside your work, or was it simply a case of studying part-time?

Margaret Cunneen: Yes, we weren't allowed to have any other jobs because we were public servants 24 hours a day.

Chris O'Donnell: What sort of legal experience did you gain in your first position?

Margaret Cunneen: I gained a thorough understanding of all of the courts and worked a lot on the ministerial correspondence concerning legal issues. I had to write submissions to the attorney general giving advice in various areas, so of course I had learn about them first.

Chris O'Donnell: Indeed, so where did your interest in criminal law develop? Was it at that time or at a later stage?

Margaret Cunneen: Not really at that time although I found criminal law very interesting at university, but I went from the Attorney General's Department to the Public Service Board of New South Wales as an industrial officer just before I was admitted as a barrister in 1982. The position involved advocacy in the Industrial Commission and the Government and Related Employees Appeal Tribunal and that was in a sense prosecution work because it involved prosecuting cases of

people charged under the Public Service Act and appearing for the employer in their appeals for reinstatement

Chris O'Donnell: Were these work-related misdemeanors or contraventions of obligations as employees?

Margaret Cunneen: Yes, our greatest customers were psychiatric doctors, nurses and corrective services officers. They seemed to have the scope for getting into the most trouble, particularly senior officers such as psychiatrists in the Health Department. Many people seeking re-instatement had a lot riding on the case, so that they engaged senior counsel to represent them. Thus, very early in my advocacy career, I had the opportunity to be pitted against experienced counsel and I learnt a lot from those years.

Chris O'Donnell: That must have been great experience.

Margaret Cunneen: It was superb experience and it was augmented by the fact that on the Government and Related Employees Appeal Tribunal was a man, it was usually the same person representing the employers' side, who became a great mentor of mine and his name was George Roots, now deceased. George had the habit of coming back after having sat on these appeals and calling me into his office and telling me in no uncertain terms all of the things I did incorrectly.

Chris O'Donnell: In a way to encourage you?

Margaret Cunneen: There was a degree of encouragement because as I started to improve under his tutelage he would remark upon it that I had remembered one of his lessons, but one lesson which he did impress upon me is always to know more about your brief than any one else in the court room.

Chris O'Donnell: As a prosecutor in particular?

Margaret Cunneen: Yes, and so it has always been a case of just diving into that brief and finding out everything that you can about it because you never know when a piece of information, no matter how apparently tangential, will become of assistance in the hearing.

Chris O'Donnell: You must have developed the necessary skills to remember all that information when necessary.

Margaret Cunneen: I haven't had such a problem remembering factual matters because the human element interests me greatly. I rather wish that I had the same facility with remembering case law.

Chris O'Donnell: You can always look that up. Did you find that in that context you got experience in cross-examining as opposed to, for example, addressing?

Margaret Cunneen: I had the opportunity to gain a great deal of experience cross-examining because the chairmen of the tribunals had the view that if a person who was fighting for his or her job did not have the interest or the commitment to get into the witness box and subject him or herself to cross examination, then there was very little chance that they

were re-instated. So I always had the opportunity for cross-examination in those early days, in the 1980s, and that was something that not every one in the criminal law on the prosecution side had at that stage.

Chris O'Donnell: And what was the next major step in your career after that?

Margaret Cunneen: In the mid 1980s, what was called then the Clerk of the Peace Office started to take over the prosecution at committal level of child sexual assault cases. This innovation occurred as a response to a number of developments in the area of child sexual assault prosecutions and it was thought that if a specialist unit was developed within the Clerk of the Peace Office then people from that unit would be more effective in conducting prosecutions from the start with child complainants. Because in those days before changes to the way committal proceedings are conducted it was the rule rather than the exception that complainants gave evidence at committal proceedings.

Chris O'Donnell: So there was no option, that was a requirement?

Margaret Cunneen: Yes, at the defendant's request, and in keeping with the idea that the children would benefit from having a continuity in terms of the lawyer with whom they had developed some kind of rapport. We started doing those committal proceedings at that stage, with a view ideally to having the solicitor who had conducted the committal proceeding then instructing in the trial, if there was one.

Chris O'Donnell: So there was a focus on, if you like, making it easier for the victim to go through the experience once having to give evidence in a trial?

Margaret Cunneen: Yes.

Chris O'Donnell: In the committal as well?

Margaret Cunneen: Yes, it proved often to be a useful practice because it distilled the issues at an early stage, although of course, it's difficult for the victims to give evidence once let alone twice.

Chris O'Donnell: How did you find that work at the time, did you originally find it confronting and difficult?

Margaret Cunneen: Some people take the view that sexual assault prosecutions are very easy or very simple. I often have this repeated to me and there is a particular term which I dislike - 'kiddy sex cases' and that seems to me to be a pejorative term, but I found the work rewarding because as a group of people, victims of crime, assuming they are genuine victims, are in the criminal justice system through no fault of their own. So whilst it's of course essential and very laudable for people accused of crime to have representation and support, I also see a great need for people whose involvement in the system does come through no fault of their own to have support and assistance and to be treated courteously and with a considerable degree of compassion.

Chris O'Donnell: Do you take that to be an important aspect of the crown prosecutor's role, who is conducting the particular trial involving that person?

Margaret Cunneen: I see it as a very important role. It may be largely as a result of a legacy of my having been a career public servant now over 27 years, but I do take public service seriously. I am always mindful that I am paid by the taxpayer and that I represent the community. I have always tried to deal courteously with everyone I meet. I see no reason to drop one's standards for any individual or section of the community. So that is what it comes down to: courtesy and consideration.

Chris O'Donnell: Now in the context of that position you had experience in running trials, I presume?

Margaret Cunneen: As a solicitor, yes. I did follow through to instruct in some of the trials. I also had a significant managerial role in those years in the late 1980s as senior principal solicitor, Advocacy Unit, in what became during those years the Office of the Director of Public Prosecutions and by then I had also completed a Master of Laws Degree, which concentrated largely on criminal law.

Chris O'Donnell: Now after your position there did you move on to the crown prosecutor's position?

Margaret Cunneen: Yes, in 1990.

Chris O'Donnell: What inspired that move?

Margaret Cunneen: I applied for the position and, of course, from time to time, senior solicitors within the ODPP are successful in attaining appointment to the ranks of the crown prosecutors. I was fortunate for that to occur.

Chris O'Donnell: Was it your long-term aspiration to become a crown prosecutor?

Margaret Cunneen: When I arrived at the DPP I started to entertain the aspiration, yes.

Chris O'Donnell: What sort of work did you do to begin with?

Margaret Cunneen: I did the full range of District Court trials. I just received the same work as every one else, although I had a fairly early entrée into the Supreme Court because when I became a crown prosecutor certain types of child sexual assault cases were still being heard in the Supreme Court: cases with a certain gravity involving children under 10. So I started my Supreme Court career very early and it was an easy transition to homicide cases, particularly having done so many committals of persons charged with murder in my previous role. Contrary to some perceptions, I have done all manner of trials, extortions, conspiracies to pervert the course of justice, large drug matters, armed robberies. Of the almost 400 trials that I have done since I've been a crown prosecutor, only about one-third have had anything to do with sexual assault.

Chris O'Donnell: My understanding of the role of a New South Wales crown prosecutor is that it can be a extremely

demanding, because of the number of trials that you get, sometimes at short notice, and sometimes having to pick up a list of trials in a particular court, either in the outlying areas of Sydney or in the country. Did you find yourself literally jumping off the deep end at times there?

Margaret Cunneen: Yes, it was somewhat daunting at times. I spent some time in Campbelltown during the first year that I was a crown prosecutor. The trials were short but you did a lot of them and I also have done some circuits in the country and one has to develop a degree of flexibility and the ability to keep separate in one's mind the various factual situations and be ready to run any of them at very short notice.

Chris O'Donnell: And you have done a significant amount of appeal work as I understand it as well?

Margaret Cunneen: Yes, I've done a few six-month stints in the Court of Criminal Appeal.



Chris O'Donnell: Do you miss Justice Meagher?

Margaret Cunneen: I have only ever appeared before him when he had been sitting as one judge on the Court of Criminal Appeal, so I haven't had a great deal of experience appearing before him. However, I didn't find him any more unusual than the general run of judges.

Chris O'Donnell: In your experience as a crown prosecutor, is it sometimes difficult to balance the rights of the accused against the rights of the victim, particularly in cases where there is a traumatised victim?

Margaret Cunneen: Obviously there is always a tension, but so long as one keeps in mind that one's role is to present the evidence objectively and fairly but firmly then one can still accommodate the rights of the victims.

Chris O'Donnell: I have read a paper that was delivered on 12 February 2003 by Nichols Cowdery QC the New South Wales Director of Public Prosecutions. The paper he gave was about

the conduct of sexual assault trials within a human rights framework. In that paper he refers to a number of possible measures that have been advocated which could, in effect, make it easier for the victims of sexual assault to go through the experience of giving evidence in those trials. One proposal that apparently exists in Sweden is that the victim actually be a party to the proceedings. Do you think that might create more problems here, with our jury system, than it would aid the victim?

Margaret Cunneen: Yes, I don't see any need to introduce a third party into the proceedings. I always explain to complainants that I don't represent them, I represent the community.

Chris O'Donnell: Do complainants generally understand that or do they find it difficult to see the special role that the crown prosecutor has?

Margaret Cunneen: I am sure that they do find it difficult to appreciate that, but I explain to them that they are a witness, no doubt the most important witness, in the trial. That seems to convey to them their position within the framework.

Chris O'Donnell: Some other measures that Mr Cowdery discussed included having hearings in-camera, the use of closed circuit television next to remote court rooms through which evidence can be given, screens in court to separate the complainant from the accused when the complainant is giving evidence and a broader use of non-publication orders. Do you think there is any scope for extending any of those measures when conducting these trials in New South Wales?

Margaret Cunneen: All of those measures are in place to some degree already and have been for a long time, subject, of course, to satisfying the presiding judge that they are available and it is in the interests of justice to use them. I also favour the non-publication of the accused's name or anything which could identify him while he remains of that status. All of those measures or a combination of some of them can be used depending on the circumstances. There are some complainants who don't need any of those measures.

Chris O'Donnell: Because of their personalities or their confidence?

Margaret Cunneen: Yes, their confidence and their ability to convey their meanings and, of course, a well-prepared witness is a more confident witness. We now have in the Office the Director of Public Prosecutions witness assistance service officers who have taken a large burden away from prosecutors of acquainting victims with courtroom set ups, the personnel within court, and of the availability to complainants of a support person.

Chris O'Donnell: Do they play a personal support role as opposed to a supporting role where they might take their witness through the proof of the evidence and that sort of thing?

Margaret Cunneen: They don't touch the evidence because they are not bound by prosecutors' ethics, but they are bound by their own ethics. The way they make sure that the correct procedures are maintained is that they do not traverse the area of the evidence at all, leaving that to the prosecutor to explore in an appropriate way.

Chris O'Donnell: And has that been a well-received development?

Margaret Cunneen: Initially there was a degree of scepticism from some lawyers who represent defence interests, thinking that the witness assistance service people may not behave with propriety. But now I am sure that defence lawyers would much prefer to work alongside the psychologists and social workers from the Office of the Director of Public Prosecutions than those who aren't well acquainted with the ethical constraints.

Chris O'Donnell: Mr Cowdery also referred to the possible introduction of vulnerable witness legislation that might address these and other measures, we've been discussing, to address the imbalances that he thought remained with victims of sexual assault. Do you think there is a need for legislation here or do you think it could be dealt with at a more practical level?

Margaret Cunneen: The accommodations which you listed earlier are already governed by legislation and I can't think of any other means which could be the subject of new legislation. But every case is different. The ideal situation as far as I'm concerned is a complainant who is confident to go into a court room and, without barriers, give evidence to the court and in that way be on an equal footing with other witnesses and with the accused if he or she gives evidence.

Chris O'Donnell: This might sound like a Dorothy Dixier, but what has been your general experience of life at the Bar?

Margaret Cunneen: It's a curious situation for crown prosecutors because we serve several masters and the way that I came to the Bar was by adding my membership of the Bar Association and my obligations as a prosecutor to the other obligations that I already had as a crown employee. We have our Head of Chambers of course - Mr Mark Tedeschi QC - who allocates to each of us the briefs we will prosecute. We have the Director of Public Prosecutions who, in effect, instructs us all. But having been for all of my life used to observing the directions of the department head, he, of course, is someone whose wishes must be observed and so one's obligations as a prosecutor are yet another area to observe and fulfil.

Chris O'Donnell: You have mentioned that as a crown prosecutor you really are a servant of all and of one master. Do you find, for example, that there may be differing expectations between different judges as to how a prosecutor should behave - for example with the degree of firmness in which submissions are made or a cross-examination is conducted?

Margaret Cunneen: Yes, it seems to me that prosecutors are treated almost with contempt by some small sections of the legal profession. This is rather difficult to cope with in a job which has confrontation as part of its very nature.

Chris O'Donnell: The serial conduct of criminal trials?

'I would hope that measures designed to advantage women would have a twilight clause in them'

Margaret Cunneen: Yes, there is that aspect. But then if one is also fighting a battle against people who don't like you because they think that you are some kind of jumped-up policeman, then that makes things altogether more difficult. Certainly a degree of restraint is required of prosecutors which is not required of other advocates and, generally speaking, that is fairly easy to maintain because it becomes a habit to choose one's words carefully.

Chris O'Donnell: Do you feel occasionally that you are stepping across a minefield of conflicting expectations and duties?

Margaret Cunneen: Yes, that does not mean a prosecutor must be bland or timorous, which could itself be failing in one's ethical responsibility.

Chris O'Donnell: To prosecute effectively?

Margaret Cunneen: To prosecute effectively.

Chris O'Donnell: Particularly in context of a jury trial?

Margaret Cunneen: Yes. Of course jury advocacy requires some firmness, particularly when one is trying to meet enthusiastic advocacy on the other side. But so long as the tone is measured and the content is objective then that is something which can easily be done.

Chris O'Donnell: Now, have you found gender to be an issue at the Bar? For example are there disadvantages do you think faced by women barristers in general with say solicitors, other barristers, judges, juries and the clients?

Margaret Cunneen: Like every other area of life, things have improved for women over the course of the time that I have been at work. That is for certain, because when I first started work in the law in the mid 1970s, many people were surprised that I was bothering to study law at all, because it was thought that women just dropped out and had children and that was the end of it. So things have improved an enormous amount, so much so, that I really don't notice any difficulties being a woman at the Bar or perhaps I just got used to life with that particular qualification.

Chris O'Donnell: There was a recent comment by the President of the Bar Association Mr Ian Harrison SC. It got a

little publicity and you're no doubt familiar with it but I will remind you of it:

Advocacy is at its purest, an intellectual exercise where hormones and chromosomes have no relevance. I continue to be troubled by the notion that the fight to equalize opportunities for women at the Bar so often starts with propositions that they are a separate group. I consider that equalizing levels of representation should be a goal which drives the debate.

Do you agree with any aspect of that comment ?

Margaret Cunneen: Yes, I respectfully do agree with Mr Harrison's statement. In fact when I heard it I thought it was refreshing. It's idealistic, of course, and I have often wished to abide in work places where hormones and chromosomes have no relevance. I have a profound belief that women can do anything in this life and if we just get on and do it then every one else will be singularly convinced. I would hope that measures designed to advantage women would have a twilight clause in them, because it is to be hoped that we are working towards, and very rapidly towards, the time when women have precisely the same opportunities and are given the same level of acceptance and respect by other men and by other women in every area. I am quite sure that at the Bar women are better off than in work places where people don't have the benefit of such high levels of education. So I don't see it as a particularly difficult handicap in my profession.

Chris O'Donnell: And you, of course, are lucky to have three teenage boys. Did you find it difficult, particularly when your children were young, to balance professional life with family life?

Margaret Cunneen: It was a cataclysmic experience having a very intensive period of motherhood. I had three children in just over three years spanning the time when I became a crown prosecutor, and I was concerned that some people probably thought I was completely stupid. But it was at that time I realised the benefit of maternity leave. There is a short time when motherhood, sleepless nights and breast feeding make you a little less than you are used to being. You may lose confidence and feel that one's brain power may never be back to the level it was before having children. So it's a marvelous thing to have a job to go back to, in which you have already proved yourself, without having to apply for it again. One also learns from one's children and from the things that they learn. The motto of my sons' house at school is *Audere egregia* and that has currency for me.

Chris O'Donnell: As a father I wonder whether one gets the brain power back if one had it in the first place, but it's good to hear that parenthood and life at the Bar are not mutually inconsistent or incompatible. In terms of your recent practice, you've run a series of very high profile cases that have attracted a lot of media attention. Have you found that difficult to deal with professionally or personally?

Margaret Cunneen: I didn't feel that it was difficult at the time but I am currently doing a series of anonymous cases that don't seem to carry the same degree of stress because, of course, whatever way the cards fall, publicity does give people the chance to criticise you for something and that does add an extra degree of stress to any case. Some of the sexual assault matters which I have prosecuted have been attended by extensive publicity and I have been surprised to hear that I have been thought by some people who don't know me to have somehow encouraged it. The press turns up when the press wants to turn up. The press has not been interested in 90 per cent of the murder trials I have done. The press was however very interested in my prosecution in Queensland of a magistrate for a rather more minor matter. There is nothing that a prosecutor can do either to encourage or dissuade the press. Some advocates may be more daunted by the pressure of publicity at the time for fear of losing in public as it were. But fortunately at the crown we never win or lose. Justice is simply done so that we never have to have that fear. Disinterest is a comfortable state.

Chris O'Donnell: Do you find that to be a satisfactory place to be in the framework of the legal system?

Margaret Cunneen: Being a crown prosecutor is a very satisfying position because it does bring with it a real sense of service, which is extremely rewarding.

Chris O'Donnell: And what lies ahead for you Margaret?

Margaret Cunneen: I am very happy with the position that I now hold: 'Deputy Senior Crown Prosecutor'. I'm very content

'The press turns up when the press wants to turn up. The press has not been interested in 90 per cent of the murder trials I have done.'

with the work that I have and the wonderful friends in the chambers in which I work. Messrs Cowdery and Tedeschi are enormously talented in their respective roles and they have been extremely supportive of me. So I feel that I can serve the public in this role better than in any other role and am perfectly happy for it to continue. I am in the old, old superannuation scheme so that will hold me in good stead for retirement.

Chris O'Donnell: Is that as good as the one that the present federal parliamentarians used to enjoy?

Margaret Cunneen: I am sure it's not but it's as good as a public servant can get.

Chris O'Donnell: And ever hope to get.

Margaret Cunneen: That's right, so they will have me on the books until the statutory retirement age of 60 in 14 and a bit years time.

Chris O'Donnell: Alright thank you very much Margaret.

Margaret Cunneen: Thank you very much Chris.

The breadwinner

By Michelle Painter

I came to the Bar in February 1998, having practised as a solicitor for seven years. Coming to the Bar meant a move from Canberra to Sydney and a change in job for my partner. We arrived in Sydney a week before the Bar Practice Course started and moved into our rented house. My work with the Attorney-General's Department in Canberra had been in trade practices - my only client was the ACCC - and as a consequence the only jurisdiction with which I was familiar was the Federal Court. You can imagine my dismay when I first encountered a Friday morning motions list at the District Court!

I read with Paddy Bergin and with Tim Castle, and initially occupied 9 Selborne's reader's room in the National Dispute Centre. I then licensed on 7 Wentworth, where I was privileged

to occupy Bob Stitt's magnificent chambers for a time. In about my third year I purchased chambers on 8 Wentworth and was there for a couple of very happy and productive years before moving over the road to 6th & 7th Floor, St James' Hall Chambers.

One of the things which I have tried very hard to achieve is a semblance of balance of work, family and leisure. Too often this balance is viewed as important only to families with children, but I am firmly of the view that having a happy and rewarding life outside of work is important to all of us, whether parents or not. It also calls into question the nature of family. I don't accept that a family must consist of the traditional unit of mother, father and children.

'We joke that we have now evolved to a 'traditional' relationship, but reversed. I am the primary breadwinner, while his responsibilities are home based.'

My partner and I have been together for 15 years and have a strong relationship founded on equality and trust. We took for granted that we would have equal responsibilities and commitments. However, a year or so ago, my partner negotiated a redundancy package from his employer. This has meant that he has been able to move out of the work treadmill. We joke that we have now evolved to a 'traditional' relationship, but reversed. I am the primary breadwinner, while

his responsibilities are home based. This has meant some adjustments for us, and also for our friends and extended families. Many people have difficulty understanding how our new arrangement isn't threatening or somehow offensive to the 'natural order' of things. Eyebrows are raised at the thought of a male partner staying home while the female partner goes out to work.

The important thing is that it works for us. The bonus for me is that I am free to concentrate on work during the week, and don't have to worry about juggling any of the other demands on my time and attention which other working women are often burdened with. It also means that I don't spend weekends frantically attending to the backlog of domestic duties in order to prepare for the coming week. I can relax and enjoy the weekend.



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Perceptions are the underlying problem

By Jane Needham

It has been fourteen years at the Bar for me this year! I have worked continuously since August 1990, although I worked part-time in 1998 and in 2002-present, taking maternity leave, and working part-time since the birth of my daughter. I currently work four days per week, with flexibility when needed. I've also taught at UTS and am currently a judicial member of the ADT, as well as having been on Bar Council and on various Bar Association committees.

It is difficult to isolate one 'most significant' professional challenge in being a barrister. What I like about the Bar is that every day is a challenge. I can point to particular cases I have argued, of course, but that's an individual approach to the question. Probably the greatest challenge to life at the Bar is maintaining the number of roles required of me: advocate, counsellor, researcher, and writer. Then personally, the greatest challenge in being a barrister is adding wife, mother and friend to all the above.

'I think that the direction in which the Bar Council is going with the child-care aspect of life at the Bar is very important.'

I find the job most challenging when I am sick or am going through a time of personal upheaval. The duty to the client and the court comes first, of course, and it's hard going at times.

The most rewarding aspect of the job? Professionally, I love the work I do. I took a decision a while ago to specialise in areas of work I enjoy, rather than work that simply pays the bills (within the bounds of the cabrank rule, of course!) and mostly I sympathise with my clients. I have had some very interesting cases, in particular Legal Aid housing matters and charitable trust cases for the Crown. Personally, the most rewarding aspect is that I have the freedom to dictate when I work, within reason, and that has allowed me to continue my practice while spending time with my daughter.

My standard answer when I am asked about being in a workplace minority is that my sister was a rouseabout in shearing sheds in western NSW, and she is the one who knows about hostile working environments!

I have very few problems with judges or opponents that I can pin down to my being female. I've had some notable exceptions to this: arbitrators who call the male barristers 'mate' and me 'Miss Needham', leaders who ask me 'who's looking after your child?' and who are horrified when I reply 'my husband' or 'my nanny', and opponents who are patronising or inappropriately touchy. But generally speaking, I find that that is now the exception, not the rule. Things have improved enormously since I came to the Bar, and I hope they'll continue to improve. I've had to get used to being the only woman in a professional role in most courtrooms, and now

it's becoming rarer that that is so. The main problems arise more from my family responsibilities rather than my gender. There is a divergence of opinion on whether you can practice part-time, as I have been doing now for over two years; I have had to shed some of my solicitors who don't like it, but I have found others who appreciate and support it. Judges, I can't do anything about, but some are aware and helpful, and others definitely are not.

Having been on the Bar Council for six years, I have no problems with the corporate attitude of the Bar and the direction in which it is going. Almost my first Bar Council meeting involved the issue of The Painting and its removal, and the next big step was the introduction of rules relating to sexual harassment. I think that leadership isn't the issue. It's more the perception, both inside and outside the Bar, that it's not really a place for women.

As to why the percentages of women at the Bar have not significantly increased over time, having spoken to young women, students and solicitors, I find that they're scared off by their preconceptions that:

- it's very blokey and your tutor needs to double in some way as protector;
- if you don't have 'protection', you end up isolated;
- it's all a bit of a grind, and not much fun; and
- you can't combine a career at the Bar with family responsibilities.

I regard all of these perceptions as wrong, and try to take some time to point out why.

I do find the Bar quite blokey, but not in a football-locker-room way, and I don't find it actively difficult to deal with (coming from a family with three brothers, perhaps I'm attuned to that kind of thing). It's easy to deal with the conception that it's not much fun, because it is, if that's what you like. The tutor-as-protector thing is interesting, and I have never considered my tutor in that light, nor seen it part of my role as tutor, but it's been said to me in a worried way by a couple of prospective readers. My floor has quite a number of women on it (seven at the moment) and it's less blokey than others, so I can show them that I work in a supportive environment by way of reassurance.

I think that the direction in which the Bar Council is going with the child-care aspect of life at the Bar is very important. Not only does it give recognition to the importance of parenting roles, it also shows that there is some movement towards making life at the Bar more family-friendly. Similarly, the attempts to show female law students what real life at the Bar is like can only improve the number of women coming to the Bar.

Life in Crown Prosecutors' Chambers

Concerning Sally Dowling

Sally Dowling is a crown prosecutor with the NSW Office of the Director of Public Prosecutions. She is currently the only part-time trial crown prosecutor in NSW. Sally works 'one week on, one week off' from Crown Prosecutors' Chambers in Castlereagh St, Sydney. In her week 'on' Sally looks after her one year old son and three-year old daughter. On other weeks, she prosecutes a five-day trial.

Sally started her legal life as a commercial /equity practitioner. She graduated from the University of Sydney in 1994 and worked as associate to Justice Hill in the Federal Court during 1995. Then followed a short stint as a solicitor at Deacons Graham & James, where she practised in intellectual property and trade practices.

Sally went to the Bar in 1997 and read with Rowan Darke and Ron Webb. She had chambers on 8th Floor Wentworth (1997 – 2000) and later Blackstone (2000 – 2002). Sally's private practice was predominantly commercial/equity and intellectual property.

'The Office of the Director of Public Prosecutions has been an exemplary employer of a barrister with young children.'

Asked for her fondest memories of the commercial Bar, Sally responded: 'I was very lucky to to work with personalities like Tom Hughes QC and Dyson Heydon QC. That and the money.'

Sally started at the Office of the Director of Public Prosecutions in July 2001. 'In preparation for my first District Court trial I read the *District Court Procedures* loose-leaf from cover to cover. That trial was better prepared than a Justin Gleeson special leave application. Since then it has been a steep and exciting learning curve. In the last two years I have

prosecuted drug cases, armed robbery, sexual assaults, fraud cases and attempted murders. Regardless of how well prepared the Crown may be, each trial throws up unexpected and difficult issues. Trial by ambush is alive and well in the criminal law. At the close of the Crown case, I usually do not know whether I am about to cross-examine the accused or close to the jury.'

Her three main hopes for the prosecution service were fulfilled: she finds criminal prosecutions interesting and rewarding to run, the flow of work is easier to regulate than in private practice and she doesn't have the worries of running her own business.

'I really enjoy my new incarnation as a crown prosecutor. The Office of the Director of Public Prosecutions has been an exemplary employer of a barrister with young children. I generally get a brief three to four weeks before it is listed for trial. So I can do most of my preparation in chambers during my working weeks. Usually I see witnesses one afternoon of my week off. To date only a few trials have exceeded their estimates. In those cases, I work through until the verdict is reached.'

The response of Sally's colleagues in commercial practice to her change of direction has been interesting. 'I found that more experienced practitioners supported the idea of developing expertise in such an important area of the law and the honing of trial skills that criminal practice can afford. They apparently remember the days when barristers practised in all areas of law.' Others ask her when she will return to the Bar. 'I am at the Bar, employed by the state. The level of independence of crown prosecutors, the nature of preparation for trial and the forensic decisions required during trials is the same as that of barristers in private practice. Life in Crown Prosecutors' Chambers is very similar to private chambers, although now I work with more women barristers and without the views.'

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It's time to move on

By an anonymous female barrister, whose name has been withheld by request.

I have been at the Bar for more than a decade and have practised continuously for that period.

When I first came to the Bar, I did not find that the tutorship system provided me with much support, work or introduction to solicitors. I think things are very different now, and I hope that new barristers receive a lot more support from within the Bar and the Bar Association. Certainly I have tried to make new barristers with whom I come in contact feel welcome and I try to make myself approachable. I don't know if that works or not.

I consider that I was very lucky in that I came as a reader to a very welcoming floor. If I had not met this group of kind, generous men (yes, men) I would not have stayed at the Bar but they gave me work, cheered me up and made me feel that I could succeed. I think our floor at that time had only one other female barrister and she was soon appointed to judicial office.

I am still on that floor. It has not a bad proportion of female to male barristers, however I am disappointed to say that there are only two of us who work full time. Without going into detail, my area of practice is male dominated but I have never been conscious - funnily enough except recently- of any issue connected with that. At its highest I would say that I have felt sidelined - sidelined from the bigger cases and sidelined from the 'big end of town' type of work. However, whether that is a result of being in outer chambers and on a floor which does not do much of my type of work, or whether it is a chick thing, I don't know.

'I accept that some special groups of people should be given positive encouragement and support to practice at the Bar, but frankly I do not think the slavish commitment to 'women's issues' continues to be appropriate.'

Funnily enough as far as clients go, I think the chick thing can be an advantage. They recognise that there are not many women barristers (particularly in a male dominated area of law) and they seem to take the view that I must be better and 'really smart' (to quote one) to be where I am.

I suppose the most challenging work that I have undertaken at the Bar is appellate work. I do not receive much appellate work and tend only to be briefed to appear in the Court of Appeal in matters in which I appeared at first instance. However, I like the intellectual exercise much more than trial work and frankly feel that I do it better. For the same reason, I have found this work to be the most rewarding.

Having said that, it is immensely rewarding to conduct a difficult although meritorious matter and win it. Then, it feels as though justice prevails.

I dislike the way the gender issue is continuously raised by and at the Bar: the fact is that working as a barrister is, to quote Ian Barker, 'grindingly hard work'. The proper practice of law is difficult. One is required to make significant sacrifices in order to achieve a successful practice and frankly I don't see how child care and conducting a full time practice can ever be reconciled - one or the other and probably both will suffer. I expect that specialist medicos and even politicians would say the same thing. Just as a matter of interest, I wonder how many female brain or heart surgeons are in practice?

In addition I am irritated that when gender issues are raised it is almost always in the context of having children and juggling child care arrangements. That is not an issue for a lot of women and I, for one, resent being included in that group as if it were axiomatic.

I accept that some special groups of people should be given positive encouragement and support to practice at the Bar, but frankly I do not think the slavish commitment to 'women's issues' continues to be appropriate. I accept that this is a personal view but I believe that most firms and institutions briefing counsel will brief the best person for the job, irrespective of any gender, race or religious issue. Doubtless there is the occasional misogynist but they will always be with us. Moreover, I would rather be briefed on my reputation and merits rather than as the beneficiary of a policy which the briefing party was bludgeoned, by the spectre of political correctness, into adopting.

I find the model briefing policy quite offensive. The effect is that my brief is now tainted by the odour of obligation. Moreover, my experience of government work is that the brief fee offered is significantly lower than the market rate. By briefing women as a policy, it runs the risk of creating a second class type of brief.

I understand that in percentage terms, at least in the last seven years, the 'drop off' rate for men and women at the Bar is roughly the same. I suppose we will never know the individual reasons without an exit poll but I suspect that we all know the reasons. They are probably an exacerbation of feelings we have all had at one time or another.

In short, in my view, we should move on. My preference would be for the Bar to concentrate on supporting people who come from backgrounds where even the thought of studying law seems remote and unattainable.

I would like to see more energy devoted to raising the profile of certain lawyers or groups of lawyers as positive encouragement to others. It seems to me many other problems would then solve themselves.

Women needed help and now they are getting it

By Virginia Lydiard, Chair of the Equal Opportunity Committee



In 1982 I was studying law at the University of New South Wales and, in conjunction with a fellow student, I wrote a paper on 'Women in law in New South Wales'.

Our introduction stated that:

Of all the professions it seems that the legal profession has been the hardest for women to enter. Of the women who have become lawyers, few have attained the upper reaches of the profession.

I was in my final year of studying graduate law, having attained an Arts degree some years earlier. I was a single mother, with three teenage children, so whatever I was to do with my law degree, it had to fit in with my primary role as a mother. In other words, I had to find an income-earning situation that gave me flexibility with time.

Joining a law firm would not have given me that flexibility, whereas going to the Bar would. However, before making a final decision, and having familiarised myself with the difficulties for women entering the legal profession through writing the abovementioned paper, I sought advice. The women lawyers I spoke to said, 'You must be a solicitor first- you just can't go straight to the Bar. It is so difficult for women!' The men said, 'If you want to go to the Bar, go straight to it - don't waste time.' And time was important, not just in the sense of being available for my children, but important because time was running out: I was nearly 40.

To the Bar I went, becoming the first female member of 16th Floor Wardell Chambers. I remained there for more than sixteen years before joining the crown prosecutors in 2000.

Gender inequality in briefing practices

When I came to the Bar I was totally inexperienced and had few contacts in the legal profession. I was extremely fortunate in joining a floor that gave me all the support and assistance I required. I read with two tutors over two years, and they not only gave me advices to draft and mentions in which to appear, but they also introduced me to their solicitors. In due course, some of those solicitors began to brief me in my own right.

However, the greatest source of work was the floor clerk, who would be asked by solicitors to recommend a suitable barrister for a particular matter. The clerk was required to put forward a number of names. Of course, mine was the only female name, being the only female member of the floor at that time. Invariably, the solicitor would choose a male barrister. To counter this, the clerk would provide only surnames. However, if mine was selected, the problem of gender would still often raise its ugly head, when the solicitor would say, 'Oh, I think my client would prefer a male.'

Having had first-hand experience of the difficulties female barristers face, and as Chair of the Equal Opportunity

Committee, I am delighted that our Bar Council and the Law Council of Australia have adopted equitable briefing policies. The object of such policies is to change the attitudes of solicitors and do away with the gender inequality in briefing practices. Without being given an opportunity in the early years to hone one's advocacy skills at the Bar table, it is impossible to reach the level of excellence that makes a barrister desirable for briefing in more complicated matters later on. Hopefully, this will encourage more women to become barristers or advocates, and will encourage them to stay on in the profession, having joined it.

'The solicitor would say, 'Oh, I think my client would prefer a male.'

Over the years I have been greatly supported by female solicitors who, like me, were all too familiar with the perception that female lawyers were an oddity, or indeed as Sir Leslie Herron said, 'an aberration of nature.' But I have also found that other female lawyers, and in particular some female barristers, are very protective of their own position and practice, and are very critical of other women. That attitude also needs to be addressed.

Bar Association initiatives

The Bar Association began addressing the problems faced by female barristers in 1995 when it established a Gender Issues Committee. On 2 June 1995 the Bar Council adopted a Sexual Harassment Policy, which has been amended from time to time. The Gender Issues Committee was later renamed the Equal Opportunity Committee (EOC).

The EOC, under the chairmanship of Michael Slattery QC, put in place a number of programmes to help women establish successful practices at the Bar.

In 2001 it adopted a programme of visits by final-year female law students. These are conducted three times a year and all law schools, from the various metropolitan universities, including Wollongong, are invited to participate. The purpose of the programme is to familiarise female law students with the workings of the Bar and to encourage them to consider coming to the Bar.

Since 2001 there has been a voluntary mentoring scheme in place for female barristers, to assist them in the development of their practices, particularly in their second and third years at the Bar.

A model Sexual Harassment Policy, for adoption by individual chambers, was endorsed by Bar Council in 2004 and is in the course of being implemented.

An emergency child care scheme, reported in the Winter 2003 edition of *Bar News*, was piloted in 2003 with very positive

results. The EOC is hoping to extend this into a permanent scheme in 2004. On 22 April 2004 Bar Council approved a permanent child care scheme.

The current EOC is committed to ensuring the continuation of the abovementioned schemes as well as developing other programmes to assist women at the Bar. The committee currently has in train the organisation of a number of programmes to be held in 2004. These include talks on 'how to set up a small business', 'how to finance your entry to the Bar and the early years in practice', and 'how to network'. The details of speakers and dates will be announced in the near future.

There is no doubt that women have made progress since I came to the Bar in 1983, and much has been written about the progress of female lawyers over those years. The fact remains, however, that the progress has been slow and in 2004, women barristers represent less than 14 per cent of approximately 2000 barristers. However the EOC hopes that the progress of women at the Bar will be accelerated through the introduction of the abovementioned policies and programmes so that, in the not too distant future, the make up of the Bar and the judiciary has gender balance more closely reflecting the 50 per cent or more of law graduates who are women.



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The Child Care Initiative - Sydney Bar Model

By *Rashda Rana*

Exactly a year ago this month, the Equal Opportunity Committee commenced the pilot of the Child Care Initiative - Sydney Bar Model (so-called because it is a novel initiative). The pilot concluded at the end of the Bar year 2003. The initiative was assessed by Jane Smyth of Smyth & Associates at the beginning of this year. Her investigations concluded that the initiative was a resounding success and other than minor tweaking of the process, she recommended that the initiative be made available to the wider community of the Bar of NSW.

The recommendation, adopted by the EOC, was finally approved by Bar Council in late April 2004. That initiative is now open to all barristers and in the manner of economies of scale the initiative will become more efficient by greater use. I have personally responded to 10 inquiries since the announcement!

The following is a brief exposition of how the initiative is intended to operate. It is an initiative that had its foundation with the Bar Association but is not being operated by the Bar. Other than resolving a pressing problem for many barristers the Bar has no further involvement in the initiative. It is being operated by a service provider, McArthur Management. McArthur specialises in providing recruitment and human resources services in a number of specialist divisions including health and childcare services. The 'contract' for child care services will be between the barrister and McArthur. Hence, all communications and enquiries should be directed to McArthur Management (details below).

The initiative enables a barrister in an emergency (or when normal childcare arrangements fail) to make one telephone call to McArthur for help and McArthur can then make all the necessary arrangements for the carer to arrive at the barrister's home or collect the child as is required. The centralised telephone system operated by McArthur is a 24-hour service. McArthur will eventually have a comprehensive database supporting the facility containing the names, address, chambers address of the barrister parent, clerk, children's likes/dislikes, children's routine, etc, which assist in administering the scheme and which would also be available to the carer.

If, for example, a family member or usual carer calls in sick at 7am and the barrister is due in court at 10am, it is a requirement of McArthur's service under the scheme that the carer will be there to relieve the situation within an hour of the call. Similarly, the barrister may be caught unexpectedly at a hearing until 5.00 pm and is unable to meet prior arrangements to collect a child from daycare or to meet some other commitment in relation to the child that the barrister expected to be able to meet. In those circumstances, the barrister (or the barrister's clerk) can telephone McArthur to have the carer collect the child and do whatever is necessary to care for the child until the barrister becomes free from immediate professional obligations to meet domestic commitments.



Kate Guilfoyle and Jane Needham with their daughters Imogen and Stella
Photo: Wade Laube / Sydney Morning Herald

A key feature of the scheme is that the carer who is called in under this service will be someone who already knows the children of the barrister because of a regular periodic investment of some childcare time by the barrister's family with that carer. A regular engagement is necessary for the smooth running of the scheme. This is achieved by the barrister engaging the carer in a minimum of four hours per fortnight in some caring role with the children. This may be babysitting or some other child centered activity. The continuity of contact will ensure that the transition from the parent leaving for work and the carer arriving at the home goes smoothly and without causing any stress or anxiety for the parent, child or carer.

Families will be given a choice of carers matched to suit the needs of the family and the location of the home.

This is how the pilot was conducted and tested. It worked as was envisaged by all those who were involved in the organisation of the initiative and those who gracefully and voluntarily became guinea pigs for the pilot.

So far as the EOC is aware this is the first initiative of its kind in Australia. In recognition of this fact, the EOC is organizing a more formal launch on 10 June 2004 at 5.15pm at the Bar Common Room to which all interested members are invited. It will be an opportunity to meet members of McArthur, Jane Smyth and some of the participants in the pilot. Further details will be provided in due course.

Although the Bar Association has no ongoing involvement with the service, the web page will soon contain the relevant contact details for the scheme's administrators. In the meantime, should you want further information, please contact McArthur's direct on ph: 9252 0799 or fax 9252 1399 and ask for Corina Byers, Lisa Friggieri, Carli Norton, or Bernadette Dunn.

A letter from Honiara

By John Cauchi, 'barrister-at-large', in the Solomon Islands.

When I told people I worked in Tonga, in the past, they usually recounted the famous story of Queen Salote Tupou III attending the coronation of Queen Elizabeth II on a stormy London day. Queen Salote is remembered for her friendly smile, her ability to engage the crowds and her refusal to cover the carriage she was in. I recall a Malaysian diplomat was also soaked through because of it. Of course the terrible joke from Noel Coward is also mentioned.

When I worked in Vanuatu comment was always made about the wonderful restaurants and the French influence.

Now I am working in the Solomons people tell me it is very necessary, adopting very serious tones asking: 'What's it like there?'

Honiara used to be known as the 'Pearl of the Pacific'. Everyone of a certain age in Australia has heard of this place because of the battles fought here in the Second World War. HMAS *Canberra* is in Iron Bottom Sound with US and Japanese ships. PT 109, JFK's patrol boat, was here. Oh those days!

More recently the news about the Solomons has been more notorious. The Istabu Freedom Movement, the Guadalcanal Liberation Front, the Malaita Eagle Force, various so-called 'freedom fighters' and wait for it - the Central Neutral Force - are the names on the tongues of the people here. Our foreign policy called this place a 'failed state' and commenced an exercise which has been termed a 'permissive intervention'.¹ Here it is called the Regional Assistance Mission to the Solomon Islands (RAMSI) and *Operation Helpem Fren*.

The initial emphasis in August of 2003, when it commenced, was to re-establish law and order in the country. This was done by deploying troops and police from the region, led by Australia. The largest numbers were from Australia. The first task of RAMSI was to secure to custody various members of the different factions. Even brief investigations revealed offences for which these offenders were able to be arrested.



Part of Operation Helpem Fren: Australian Federal Police officer Tim Dahlstrom with Royal Solomon Islands Police officers. Photographer John Feder. News Image Library.

AusAID, our overseas development department increased its spending from around \$37m to \$90m.

Part of the AusAID programme was an existing project managed by GRM International to assist the police and prison service. It is called the Solomon Island Law and Justice Institutional Strengthening Project or SILAJISP. This project was given additional responsibilities to find staff for the Attorney-General's Chambers, the Magistrates Court, the Public Solicitor's Office and the Office of the DPP. AusAID, in this way, funds the positions of two magistrates, the solicitor-general, a deputy legislative drafter, the public solicitor, seven solicitors in the Public Solicitor's Office and four prosecutors in the DPP's office. I am one of those in the DPP's office - the other three are from Melbourne.

'One of the larger matters is called the *Marasa* brief. The offences alleged are numerous and include multiple murders, abductions, arson and general terrorising of a number of villages on the weather coast.'

What do you say about a place when the repeatable gossip around town is whether the parts for the generator have arrived from Brisbane? They have, you will be pleased to know. However, there are still periods of each day with no power. It was a problem for us before we moved into our air conditioned and newly renovated offices (complete with standby generator). Our old premises were not air conditioned but it was comfortable to have a ceiling fan going at least to complement the louvre windows.

There have been about 95 new prosecution files opened since the efforts began and these deal with the recent period of unrest, also called the time of 'ethnic tension' or just 'the tensions.' 'Ethnic' tensions you might ask? The local people here identify very strongly with their home island. Rather more seriously than we regard our home states in Australia. So it is common for locals to tell you they are Malaitan or from Guadalcanal or the Western Province.

There are many theories that abound about the source of the tensions' in this country. One is the land and access to it: a perennial South Pacific problem with more people and less land available each year. Foresters have also been a problem and businesses which take resources away from the Solomons at low cost to sell in markets for high profit. None of which finds its way back here. On Guadalcanal there was a problem as the local people said that inadequate compensation was paid for the capital being here. Added to this was the greater number of Malaitan people in government and administration meant their use of Guadalcanal land became a catalyst at least for coups and unrest.

The Solomon Islands are much more beautiful away from Honiara. There are resorts close by [1-3 hrs by boat] for weekend relief if you need it, or short flights to other resorts. The fishing is good and, I am told, so is the diving.

One supposes for a journal such as *Bar News* I should say something more about the work here. One of the larger matters is called the *Marasa* brief. The offences alleged are numerous and include multiple murders, abductions, arson and general terrorising of a number of villages on the weather coast. The weather coast is the area on Guadalcanal generally along the south west of the island. It is turning out to be a bit like the 'killing fields' of Guadalcanal. This was the area of operation of the GLF in an effort by them to take over the island and to create a sort of a Republic of Guadalcanal. As part of the familiarisation with the area I attended a view, together with another prosecutor and the AFP investigators. This involved a helicopter ride across the island. Unfortunately our purpose was to see burial sites and the like.

On the lighter side of life I was here for the annual Rotary fundraising event - a 'black tie' ball to rival the Bench and Bar Dinner and raise funds to attempt to reduce the incidence of infant mortality in the Solomons.

One wonders in a place like this whether you make a difference. Then suddenly you see a truck load of people who wave at you with big smiles (the biggest in the world) and say '*halo yu gud?*' You feel welcome and walk safely down the street not worried about being shot at. Which was how, I am told, people felt.

After the Easter break I get to go on one of the High Court circuits to Ghizo Island in the Western Province, a common



Left to right: John Cauchi, Victoria Aitken (Attorney-General's Chambers) and Brian Liddy (Public Solicitor's Office).

feature of court work in the islands. At least Ghizo has power, a decent place to stay and some of the best swimming and snorkelling around. So with copies of *Blackstone*, *Archbold* and the laws of the Solomons all on the hard disk of the lap top, off you go to some fantastic place. You just need to be assured the DeHavilland Twin Otter is leaving. One tends to understate the infrastructure problems of a place like this; you just have to get on with it. As you do, I am sure, when you sit in a traffic jam or your train doesn't arrive.

Today you might think you could stay in the Solomons for many years but tomorrow you will be looking to catch the next flight home- it's that sort of place.

Lukim yu

¹ Michael O'Connor, 'Rebuilding the Solomons: A case study in developing principles for permissive intervention', *Australian Army Journal*, 1(2), December 2003 p.121ff.

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The Newcastle Bar

By Terry Ower and Andrew Bell

There are 40 barristers based in Newcastle, including seven crown prosecutors and two full-time public defenders. Simon Harben SC is the only current silk. His appointment last year marked the first time that a local practising barrister was so elevated.

The preponderance of practitioners can be found in Church Street, directly opposite the court complex. A few others, including the most senior junior, Warren Chipchase, are located around the corner in Bolton Street. Most occupy fashionable terrace houses which have been lovingly restored. Newcastle Chambers, established in 1988, has ten members and is the only grouping to operate as a traditional chambers with a full-time clerk, library and integrated computer network. Although the balance of practitioners operate as individuals or smaller groups below the 'critical mass' necessary for traditional chambers, the overheads are still a fraction of those experienced by those in the Sydney CBD.

A brief history

Charles Hibble was the first barrister recorded as practising in Newcastle, doing so between 1904 and 1916. By 1959 there were nine barristers practising in the local area. John Williams had returned to Sydney practice by this time and was later to take silk and be appointed as a judge of the Workers Compensation Commission. Judge Williams was a regular visitor to the area on circuit and, like most visiting judges, chose to stay at the salubrious Newcastle Club. One of the many anecdotes regarding this sometimes eccentric figure involved him leaving the club at an ungodly hour to research a point of law. Unfortunately, his books were in Sydney. His progress was impeded by a disbelieving stationmaster at Newcastle station

who was somewhat skeptical when confronted with a man in pyjamas brandishing a gold pass!

Other prominent names associated with Newcastle and the Newcastle Bar are, of course, Justice McHugh of the High Court and Justice Lindgren of the Federal Court.

'A disbelieving stationmaster at Newcastle station...was somewhat skeptical when confronted with a man in pyjamas brandishing a gold pass!'

Justice McHugh practised out of chambers in Newcastle between March 1962 and June 1964, having read in Sydney in 1961 with John Williams and John Kearney. He returned to Sydney in July 1964. During his time in Newcastle, McHugh kept chambers on the first floor of 22 Church Street, a terrace house opposite the building in which the Supreme Court and the District Court were housed and which he shared with a medical specialist on the ground floor and a tenant on the third floor. He had no clerk and paid the doctor's secretary £1 a week to take telephone messages. At that time, there were seven barristers in practice in Newcastle including Joe Braun, the senior practitioner, Eric George, Harold Bond, Joe Fergus, John Tuckfield, Jim Reeves and Malcolm Britts. Two judges were generally allotted to the District Court sittings in Newcastle and there were Courts of Petty Sessions in Church Street and at Belmont and Wallsend.

Reflecting on his time at the Newcastle Bar, Justice McHugh recalled that it was a period where he acquired, and was forced



Newcastle Harbour with the Newcastle-to-Stockton ferry.
Photo: Robert McKell. News Image Library.

to acquire, an all-round knowledge of all areas of law. He was enticed back to Sydney by J W Smyth QC who was leading him in a criminal trial in the Quarter Sessions at Newcastle in May 1964 and, from July that year, moved to University Chambers. He maintains his link with the Newcastle Bar through his position as patron of the Newcastle Bar Association whose dinners he attends as often as he can and through the eponymous McHugh Chambers in Church Street.

Upon leaving secondary school, Justice Lindgren became an articled law clerk, and, following his admission as a solicitor, a partner, in the Newcastle firm of solicitors now called Harris Wheeler. As a solicitor, he briefed members of the Newcastle Bar, and, in Supreme Court personal injury cases, regularly briefed the duo of Athol Moffitt and Colin Allen. He left private practice in 1969 to take up an academic position at the University of Newcastle.

From the start of his university career, he developed in parallel an advisory practice on briefs from solicitors, transferring from the roll of solicitors to the roll of barristers on 1 August 1975 (when the annual practising certificate fee for solicitors reached \$175.00 and there was none for barristers). In about 1979, he established chambers on the first floor of 12 Church Street, Newcastle, another of the terrace buildings on the opposite side of Church Street to the court buildings. Richard Taperell maintained chambers on the ground floor in the same building. In the same year, he became a member of the New South Wales Bar Association (on the nomination of Rogers QC and McHugh QC). The annual membership subscription of the Bar Association was then \$50.00 for 'country members'. Until about 1980, his work consisted of an advisory practice, chiefly for Newcastle firms, and was characterised by conferences in his chambers in Church Street with solicitors in the early morning or evening, and written opinions; a *modus operandi* which did not intrude on his work on campus. Because his practice was predominantly in equity and commercial cases, that work inevitably led to appearance work in Sydney rather than Newcastle, and after undertaking a small number of cases in the Supreme Court in Sydney in the early 1980s, he commenced practice full-time there in 1984.

The Bar in Newcastle did not substantially increase until the mid-1980s when it grew to 20 and then to 30 by the mid- 1990s.

In the early 1980s the Newcastle Bar Association was officially formed with Harold Bond as the first president. It is currently more active than it once was due largely to the increase in members since that time. The association organises annual dinners, conferences and regular meetings. It is the main point of liaison with the Bar Council.

In recent times Ralph Coolahan was appointed to the District Court (1999), John Connors was appointed to the Bench of the High Court in Fiji (2003) and Giles Coakes was appointed as a federal magistrate in 2004.



Customs House building, Newcastle.
Photo: Rob McKell. News Image Library.

The courts

In Newcastle, the Family Court, District Court (Crime) and Local Court sit full-time. The other jurisdictions have sittings on circuit during the year. The court complex in Church Street has a full-time registry for the Supreme, District and Local courts. On occasion, the AAT, IRC and DDT also sit in Newcastle. The local Bar is well placed to service circuit courts in the greater Hunter region, central and north coast.

The change of jurisdictional limits in the District Court has led to the virtual demise of the once busy Supreme Court civil lists. Fifteen years ago the Supreme Court civil jury sittings were listed three to four times per year for three weeks a time. In each sitting approximately 90 matters were listed. The non-jury lists were even more frequent. Last year only one matter was heard in the Common Law Division of the Supreme Court in Newcastle.

Paradoxically, the local Bar has grown over the same period. It would be safe to conclude that the downturn of Newcastle Supreme Court work, though a sore loss to the local community, had more an effect upon the Sydney Bar than the Newcastle Bar.

Recent legislative changes to personal injury litigation may have a more dramatic effect. For a number of years the Compensation Court in Newcastle was effectively sitting full-time with at least two judges (and sometimes a commissioner) presiding in rotation every week. The court listed up to ten matters per day per judge. With the abolition of the court, this busy jurisdiction came to an abrupt end. It is still too early to gauge the effect this change will have upon the local Bar.

Changing times at the District Court

By Keith Chapple

Before 2000, on any given Monday, the Sydney District Court Criminal Jurisdiction could provide no certainty that a trial would proceed.

A certain number that were listed would actually be heard. Those trials that could not be accommodated were marked 'not reached'. They were re-listed months later, sometimes being 'not reached' yet again.

These false starts could result in an accused remaining on remand for a long period and for those on bail the prospects were even grimmer. Obviously there was a loss of time, money and public confidence in the justice system.

But times have changed and the District Court's own figures tell the story. In 1998 the 'not reached' figure for trials in Sydney stood at 77. In 1999 it was 40. But for the four years since then the figure for 'not reached' trials in Sydney has been nil.

If there is any doubt about the turnaround the latest annual report of the Australian Productivity Commission has removed it. The commission keeps figures on what it describes as the first national standard in courts, that is, no more than 10 per cent of criminal lodgments pending completion being more than 12 months old. In the District Court, Australia-wide, New South Wales was the only jurisdiction that met this national standard.

The improvement has even made the mainstream press. When the New South Wales Government statistics were released for 2003 showing a 42.8 per cent reduction in delays over the last few years in the District Court criminal listings, the *Australian Financial Review* wrote that the Chief Judge, Justice Reg Blanch AM 'should have been crowing'.

'... for the four years since then the figure for 'not reached' trials in Sydney has been nil.'

The mission: Timely delivery of justice

When *Bar News* caught up with the Chief Judge to find out the reasons behind the changes, it would be fairer to describe him as reflective and proud of the court's achievements.

His Honour pointed out that he was well aware of these endemic problems with the listing system long before he went to the Bench.

Before his appointment he had experienced the delays first hand as a public defender and then for many years as the director of public prosecutions.

His Honour recalled a sense of 'embarrassment' when the inefficiency was raised at conferences within Australia and internationally, especially when it did not exist to the same extent in similar systems in England, Canada and the United States. His Honour's overwhelming conclusion by about the



John Maddison Tower.
Photo: Milan Scepanovic. News Image Library.

mid-1990s was that there was no real reason why the New South Wales systems could not be improved to an acceptable level. The main difficulty was that he was still not in a position to act.

All of this changed with his appointment to the Supreme Court and then subsequently taking the post of chief judge of the District Court. Reduction in delays was a high priority.

'It was one of the main reasons I took this job', his Honour told *Bar News* and then carefully outlined the reasons behind the transformation.

Changing the approaches

The modifications were many but in the main came about after a meeting between the Chief Judge, the former chief

magistrate, the new DPP and the Legal Aid Commission. This resulted in a centralised committal system with some major improvements coming about almost immediately, others following a year or so later. The most important changes were:

- The DPP was given carriage of serious matters from the Local Court onwards, rather than when they reached the District Court for the first time.
- Legal aid was granted in committals in serious matters because it allowed the DPP lawyers and those from the Legal Aid Commission to be in close contact with each other to sort out charges and conduct any plea bargaining that might be involved. An early plea in one matter meant that legal aid funds could be husbanded for more expensive and complicated trials that actually proceeded. It also meant that there would only need to be one application for legal aid for committal and trial.
- Another dramatic reform that was agreed upon was to have the DPP present an indictment within a month of committal to allow the defence to consider their approach to the final disposal of a case. The indictment could only be changed by agreement or by leave of the court.
- Pre-trial disclosure was also formalised around the same time.

'All the practitioners *Bar News* spoke to were impressed with the new regime, especially those who have laboured in the jurisdiction for a decade or more.'

The combined effect of these initiatives was that the system speeded up dramatically. Following committals in the Local Court, matters were first listed in the District Court as early as one week later.

Reaching the not reached

Coupled with the changes before trial were the new procedures introduced on hearing days.

Most criminal practitioners will recall that it was about 1999 when the Chief Judge began sitting himself in LG.2 in the Downing Centre to supervise the criminal trial lists. At that stage the 'not reached' trial figures were still running at about 15 per cent of the court's business. As a result, if an accused was inclined to delay he or she only had to make themselves part of that 15 per cent and the object had been achieved. The reduction in the 15 per cent was critical to success.

A multi-pronged attack was made on this problem:

- The number of judges available to hear criminal trials was effectively increased from 15 to 17.
- Retired judges were brought in as acting judges on the

Tuesday of a trial week if necessary.

- The District Court regarded the whole metropolitan area as a combined area for trial allocation which led to trials being sent, for example, from the Downing Centre to Parramatta or Campbelltown.
- Extra courts were available in the John Maddison Tower and Darlinghurst if needed.

In a relatively short time the improvements in the system and concentration of resources brought about a position where the focus moved from reducing the 'not reached' numbers to how to deal with and properly dispose of those trials that had been listed. Date certainty meant that the matter proceeded to finality one way or another unless there were proper reasons for an adjournment.

The new system at work

It was not as if attempts had not been made earlier to try and reduce delays in the District Court. One of these was the Sentence Indication Hearing regime that was running during the mid 1990s.

The Chief Judge remembered this system when he was the DPP. His final verdict on it is that it did not address the fundamental problems in the system. He was of the view that to some extent it brought the system into disrepute because of the lenient sentences that were often imposed. Ironically, it could often lead to delays because of further plea bargaining and preparation of evidence that could be called by the defence to try and bring about an even more reduced sentence than that first indicated.

Clearly the system by the mid-1990s was in need of fundamental changes at the two levels at which serious criminal matters were being processed. Changes in committal proceedings and early arraignment eliminated some delays. But it was the relentless focusing of resources on trial listing days that finally lowered the 'not reached' levels.

Throughout the interview the Chief Judge stressed that the changes were the result of a lot of work by a lot of people over the last five to ten years. His rather modest appraisal of his own role: 'I take pride in it'.

All the practitioners *Bar News* spoke to were impressed with the new regime, especially those who have laboured in the jurisdiction for a decade or more.

Their unanimous verdict on the Chief Judge's initiatives was simple - mission accomplished.

The Hon Justice R P Meagher

On 15 March 2004 it was standing room only in the Banco Court at a ceremony marking the retirement of the Hon Justice R P Meagher. The Hon Justice J J Spigelman AC began proceedings with the following speech.

We gather here today to mark the departure from full-time involvement in the administration of justice of one of the intellectual giants of our legal history. The Honourable Roderick Pitt Meagher, known universally as Roddy, is the most widely loved judge of his time. There are some exceptions to that proposition but they need not detain us.

The source of the esteem in which your Honour is held is your combination of immense personal charm with an extraordinary intellect, reinforced by the wickedness of your tongue, the sparkle of your wit and the relentlessness of your intellectual honesty, not least with yourself. Throughout your career in the law, as lecturer, author, barrister and judge, you have followed the law where it led, whatever the consequences may be. On no occasion did anyone suspect that you fudged either the law or the facts to achieve a convenient, let alone a popular decision.

Often the confidence you exude, together with your extraordinary command both of the law and of the language to explain it, leaves the rest of us surprised, even anxious. That, however, is not your problem but ours.

As everyone in this courtroom knows your major contribution is found in that magnificent text *Equity: Doctrines and remedies*, a joint work which is the product of a massive scholarly endeavour.

'The Honourable Roderick Pitt Meagher, known universally as Roddy, is the most widely loved judge of his time. There are some exceptions to that proposition but they need not detain us.'

Justice Heydon said of this publication: 'It has extremely strong claims to be placed on, indeed at the top of, a short list of the greatest legal works written in the English language in the 20th century.'¹

It is a different kind of text to any that had come before. It spoke without the diffidence characteristic of legal texts; it exuded, and sometimes luxuriated in, its own confidence and mastery of the subject; its style was irreverent, witty and disrespectful, including strongly expressed opinions about the inadequacies of judgments by judges of high repute. It heralded a new and distinctive voice in Australian legal discourse, a voice which would enrich the intellectual endeavour of a generation of lawyers in numerous further publications, speeches, judgments and, for those of us privileged to have experienced them, in conversations with you. I am confident you will, one day, find your Boswell.



Photo: Murray Harris Photograph.

In the Court of Appeal and in the Court of Criminal Appeal, your Honour dealt with matters across the full range of this court's jurisdiction, travelling well beyond equity jurisprudence. Chief Justice Gleeson, who is overseas and has asked me to apologise for his absence today, informs me that he was careful to ensure that you sat with him on your first appearance as a judge in the Court of Criminal Appeal. Immediately after the Bench sat you turned to the Chief Justice and said: 'You only have to look at him to know that he is guilty.'

Chief Justice Gleeson felt obliged to point out: 'The appellant hasn't been brought up from the cells yet. You're looking at the court officer.'

Throughout your years on the bench of this court you have conducted yourself with unfailing courtesy to counsel and litigants. In hearings you have manifested an ability to direct attention to the real issues upon which the outcome of the case would depend, distilling the facts into their simplest form, before applying the precise principles of law required to determine the case. Your judgments are written concisely, accurately and with humour, encapsulating within a few pages what others take dozens to express. This is not the style fashionable amongst your judicial contemporaries, including myself. There are many of us who yearned for more. We are, however, most grateful for what we received.

All of us cherish the memory of your many witticisms, your mischievous inventions, your flaunting of unfashionable

opinions - some of which you probably hold - and your eloquent turns of phrase. Even those who have been the object of your most pointed barbs, many of which must have been hurtful, seem to accept that they were devoid of malice. I am sure they were. For no-one was exempt from a rapier like thrust at the heart of their reputation.

Sir Frederick Jordan was one for whom you have the highest intellectual respect. Nevertheless, with respect to a particular footnote in his *Chapters in Equity in New South Wales* you once observed, in a judgment:

Great as is the homage we all owe to Sir Frederick Jordan, one must state that the footnote is nonsense. It has, of course, been approved by the High Court on about four occasions ... but that does not convert it into sense.²

This was 1998, when your Honour had served on the court for about a decade. In 1983, when your Honour wrote the foreword to the republication of Sir Frederick Jordan's papers³, the High Court judgments, to which you would later refer with such scorn, were mentioned in that foreword. Far from being critical of those judgments, your Honour referred to them as an indication of the 'current utility' of Sir Frederick's great work. Perhaps you were teasing. Your Honour was of course then counsel. This may have been an uncharacteristic display of tact, or at least discretion. You would rise above tact on the bench.

As you move into the entirely tact free zone of post judicial life, we look forward to continuing enrichment from your wit and your intellect. The fact that it will no longer be available to me on a virtually daily basis is a loss which I will feel deeply. So will many other members of this court. I and we will miss you.

¹ Heydon 'The role of the equity Bar in a judicature era' in G Lindsay (ed) *No mere mouthpiece: Servants of all, yet of none*, Sydney (2002).

² See Chief Commissioner of Stamp Duties v *ISVT Pty Limited* (1998) 45 NSWLR 639 at [64]; 'Sir Frederick Jordan's footnote' (1999) 15 *Journal of Contract Law* 1.

³ Sir Frederick Jordan, *Select legal papers*, Sydney 1983, Foreword, p2.

Ian Harrison SC, speaking on behalf of the Bar, delivered the following speech.

There was a time when the Bench and Bar were populated by more than their fair share of eccentric women and men. The ranks, however, are thinning. Many of the eccentrics are still around. Indeed, some are still here today. I shan't name them. They know who they are.

Which brings me to your Honour. I remember your Honour well from my days at law school. Perhaps you remember me as well. Perhaps not. I had the privilege of being taught by Meagher, Gummow and Lehane even before they became Meagher, Gummow and Lehane. It is a great sadness for all of us that the late Justice John Lehane is not here to see you off. Justice Lehane was one of nature's gentlemen with a delightful

'Proponents of this technique would loll foppishly across the lectern for hours on end in a sort of Darling Point swoon.'

disposition. The only time he ever confided in me about things that troubled him was when he confessed that writing a book with your Honour had sent his hair prematurely white. That wasn't as much a concern to him, however, as the fact that your Honour's hair stayed youthfully brown. Justice Beazley told me that she thinks the colour of your hair could now best be described as Dorian Grey!

I also remember your Honour at the Bar. You were a mellifluous advocate with an inspiring economy of words. You pioneered the style of advocacy known as the 'lectern draping', sometimes known as 'lectern hugging'. This soon became very popular. Proponents of this technique would loll foppishly across the lectern for hours on end in a sort of Darling Point swoon. The idea was to give their submissions a casual flavour of persuasive indifference. Dyson Heydon used it at the Law School when teaching. One QC I know uses it for speeches at all of his weddings. Although your Honour perfected the technique, none of your disciples has done as well. Towards the end of your career at the Bar you became famous for performing your spectacular 'double lectern drape', but only occasionally and only in the High Court. Those hoping to emulate this feat should understand that it is quite dangerous and should only be attempted under strictly controlled conditions. Jack Kenny QC, who was quite short, could never understand why you would not teach him this technique, despite sharing chambers with you on the eighth floor. It is thought that this is why Kenny developed a strand of advocacy in opposition to the lectern drapers. This strand didn't use lecterns at all. Instead, barristers shouted at the court from underneath the Bar table. Tom Hughes QC joined neither group, preferring to keep all lecterns at arm's length, much as he treated Protestants and monarchists.

And then in what seemed like the flash of an eye, your Honour was appointed to the Court of Appeal. You brought colour to the Court of Appeal but not, if I may say with the greatest of respect, much movement. There was reason for this. This was made clear by your Honour in *Trevalli Pty Limited (Trading as Campbelltown Roller Rink) v Haddad* (1989) Aust Torts Reports 80-286 at 60.036. In that case you said this:

Whilst all reasonable people know that any form of physical activity is both unpleasant and dangerous, and probably unhealthy as well; and whilst sport, which is communal physical activity, suffers the added feature of exposing its participants to the perils of tribal barbarism; nonetheless the law has never regarded the playing of sport as contrary to public policy or even unreasonable

Justice Hodgson has never read *Trevali Pty Limited (Trading as Campbelltown Roller Rink) v Haddad*. Justice McColl would have dissented. Justice Sheller, by contrast, hands out copies of the judgment on street corners.

Conformably with this passage, your Honour's demeanour has been slow and measured. You walk at a sensible pace. You never hurry. You prefer to take your time and you waste lots of it. You have been known to warn Justice Young on ceremonial occasions such as today that he'll end up knocking over all the justices in front of him like a row of red dominos if he doesn't slow down. There is considerable wisdom in your caution.

But what of your Honour's colour? It has many aspects. Most significantly there is your passionate and abiding interest in art. You introduced art to the Court of Appeal with the same flourish that Justice Powell abolished full stops in the Probate Division and with the same enthusiasm that Justice Wood taught police how to sit in the front seat of patrol cars. You educated your fellow judges in the Court of Appeal about art. Art appreciation on Level Eleven reached fever pitch. Justice Mason tells me that now even Justice Handley can recognise a genuine work of art. This is because it will have a fraction written in pencil in the bottom right-hand corner. Also, with your Honour's help, Justice Ipp has been able to master the technique of looking like a Rembrandt portrait. He can sit in court for hours staring straight ahead but, as with all good paintings, the eyes follow you around the room.

I have had the pleasure of appearing before your Honour many times. I have always appreciated the fact that you made it clear, at the earliest possible opportunity, just how counsel could best assist you. On most occasions I liked this. However, on one occasion I remember your Honour saying to me: 'Mr Harrison,

'Mr Harrison, I am going to sleep now and I don't want you to be here when I wake up.'

I am going to sleep now and I don't want you to be here when I wake up.'

Your Honour also had the remarkable ability to be very pointed in the politest of ways. I recall once when you were delivering an extempore judgment you said of counsel, 'Mr Hall has said all that could possibly be said on behalf of the appellants, and more'.

For better or worse your Honour seems never to have been very far from controversy. Indeed, you have been very energetic and productive in this field. Commendably, your Honour has never been one to jump into someone else's controversy, preferring without exception to create your own. You seem with some ease to be able to polarise opinion and create enemies in a way quite out of step with what one would expect of a reasonable man taking proper care for his own safety. Your

incautious comments about women at the Bar have provoked the fiercest attacks. You must have expected these responses. For women at the Bar are confronted with unwanted and unnecessary difficulties that men of equivalent juniority or seniority don't face. A female barrister explained it to me recently with frightening clarity. She told me that when a male barrister makes a mistake, he makes it for himself. When a female barrister does so, she makes it for all women.

But I can't help thinking that your Honour's motives are not as base as some would paint them. Your Honour is, after all, famous for the immaculate line alluded to earlier, 'Oh, surely your Honour is only teasing me'. When I returned to the speech made by your Honour on the occasion of your swearing-in, in this room on 31 January 1989, I was reminded that your Honour said this, recently quoted:

Finally, I must thank my wife and daughter for performing handsomely the task for which they as women were designed, namely, to provide me with domestic comfort; and also for their fortitude in embracing the new challenge which confronts them - to supply me with financial assistance.

Many in this room today know better than I that you were a devoted husband and remain a doting father. It seems to me that some of the comments that you have made, which have caused so much fuss, should well have provoked the response: 'Oh, surely your Honour is only teasing me'.

I haven't troubled to repeat the high points of your Honour's stunning career or contributions to legal scholarship. These are all well documented, and in any event have already been referred to. I should note, in passing, however, that you served as a president of the New South Wales Bar Association with distinction for two years. The Bar is forever in your debt for that service. Nor did you forget those with whom you served on the Bar Council when finally you became a judge of this court. In *State of New South Wales v Coffey* you offered the following description:

[They]... were a motley crew. Many of them had psychiatric disorders. Some of them had been patients at institutions. Some were addicted to drugs or alcohol, or both. Most of them were foreigners, and many of them were female.

That sounds like a description of almost every Bar Council in living memory.

As I look around the room I see that there are many more people here today than were present at your swearing-in. There are possibly three reasons for this. First, you are now more popular than when you were appointed. Secondly, there are just more lawyers than there used to be.

On behalf of the Bar of New South Wales I wish you well in your retirement. Stay close, and please don't get lost in the wilds of Darling Point, wherever that is.

Senior Counsel 2003



Top Row left to right: John Stratton, Philip Taylor, Jeffrey Phillips, Philip Doherty, Anthony Franklin, Daniel Feller, Robert Newlinds, David Conti.
Second row left to right: Christopher Hodgekiss, Adam Bell, David Williams, Phillip Boulten, Simon Harben, Hayden Kelly, Michael Willmott.
Third row left to right: John Wilson, Thomas Blackburn, Luigi Lamprati, Peter Gray, Todd Alexis, Robert Kaye, David Robinson, John Wheelhouse, Hugh Marshall. **Front row left to right:** Elizabeth Olsson, Christine Adamson, John Fern on, Randall Powell, Harold Shore, Peter Arden, Gregory Laughton, James Stevenson.

Bar Practice Course 01/04



Top row left to right: Michelle Collyer, Mark Seymour, Richard Wilson, Brent Martin, Philip Carr, Tristan Bors, Mathew Lynch, Brian Murray, Nicholas Bilinsky. **Second row left to right:** Craig Bolger, Andre Zahra, Jason Lazarus, Nicholas Owens, David McBride, David Rayment, John Travassoros, James Mcleod, James Sheller, Adrian Maroya. **Third row left to right:** Neil Murray, Brett Saunders, Simon Shepherd, David Jay, George Fraser, Paul Castley, Andrew Rich, Stuart Moffet, Paul Kerr. **Fourth row left to right:** Martin Rush, Michael Easton, Ben Beukes, Sean Flood, Christos Mantziaris, Phillip Davies, Sean Hughes, Andrew harding, Declan Jarrett, Stephen Gardiner. **Fifth row left to right:** Todd Marskell, Mathew Wong, Michael Small, Ken Saurajen, Wayne Sharwood, Justin Hewitt, Robert Peattie, Hakan Sonmez, Scott Nixon, James Watson. **Sixth row left to right:** Kieran Ginges, Frank Kalyk, Justin Patey, Nicole Carroll, Louise Henderson, Steven Hausfeld, Marion Carpenter, kate Morgan, AmandaTibbey, Craig Wilson. **Front row left to right:** Turvey To, Madeline Avenell, Craig Evans, Elizabeth Yam, Suzanne Christie, Jehane Ghabrial. Jane Healy, Janine Webster, Debra Harris, Sophie Mason.

Proof of anti-trust markets

By Caron Beaton-Wells
The Federation Press, 2003

Economic essays on Australian and New Zealand competition Law

By Maureen Brunt
Kluwer Law International, 2003

The *Trade Practices Act 1974* (Cth) is coming up to its 30th anniversary. In recent years, the Australian Competition and Consumer Commission (principally under the stewardship of Professor Allan Fels) has done a lot to increase the awareness of the Act both amongst business persons, and the public generally. This has been due largely to a number of prosecutions of high profile companies for various market rigging activities.

In recent years, there have also been a number of significant cases heard by the High Court, dealing with the scope of the central anti-competitive provisions contained in the Act: see *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1; *Boral Besser Masonry Ltd v ACCC* (2003) 77 ALJR 623; *News Limited v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515; *Visy Paper Ltd v ACCC* (2003) 77 ALJR 1893; and *Rural Press Ltd v ACCC* (2003) 78 ALJR 274. The public awareness of the Act was also no doubt heightened by one of the decisions referred to above, being the *Souths* decision, involving the highly publicised decision to exclude South Sydney from the Rugby League Football competition.

Litigation under the Trade Practices Act has now become one of the principal sources of work for the Federal Court of Australia and the Federal Magistrates Court. As such, some knowledge of the provisions of the Act is almost essential for most practising commercial lawyers.

In keeping with this increased profile, two books have recently been published dealing with particular aspects of trade practices law. The first, entitled *Proof of anti-trust markets in Australia* by a Melbourne academic Caron Beaton-Wells deals with a relatively narrow aspect of the Act - namely market definition. The second book is by Australia's pre-eminent anti-trust economist, Professor Maureen Brunt, entitled *Economic essays on Australian and New Zealand competition law*, being a collection of essays previously individually published by Professor Brunt over a period of approximately 30 years, covering a number of aspects of the Act.

The first book by Beaton-Wells deals with the relatively narrow area of proof of market definition. For a number of the key provisions contained in Part IV of the Act - being the provisions dealing with anti-competitive conduct - market definition is the initial issue to be determined in considering whether there has been a breach of the Act. For a number of the prohibitions, it is only where the conduct has, or would be likely to have, the effect of substantially lessening competition in a market, that it is a breach of the Act. For sec 46 of the Act, the issue is whether the alleged contravener of the Act has a substantial

degree of power in the market. The issue of market definition is thus one of central importance in determining a breach of the Act. A narrow market definition tends to heighten the anti-competitive effect of particular conduct and the market power of the major participant. Those attempting to prove a contravention of the Act thus generally prefer narrow market definitions. The converse is generally true for those defending the actions.

The book proceeds on the traditional analysis of a purposive approach to market definition, which recognises that definition of a market is not an end in itself, but rather a means by which to facilitate resolution of the substantive issues with which the Act is concerned - namely the exercise of market power, and the effects on competition of specified conduct. The book is not simply a restatement of principles, but rather the focus is on the way in which the courts have, to date, handled the evidence relevant to the issue of market definition. The idea is to assist those involved in actually running a case which involves the issue of market definition, with working out how it has been approached in the past, so as to assist in the future.

The book is divided into four chapters, each of which tackles a different category of evidence involved in the definition of markets under Part IV of the Act. The four categories are as follows:

1. industry evidence - evidence that is derived from the industry to the case at hand and concerns, in broad terms, competitive dynamics in that industry;
2. consumer evidence - evidence that is derived from or concerns, broadly speaking the consumers to whom the products or services offered by the industry are supplied;
3. quantitative evidence - evidence that is derived from quantitative analyses of market data and intended to show, in broad terms, relationships between prices and the demand for or supply of products or services in the industry; and
4. expert opinion evidence.

Whilst there a number of general texts available in Australia which discuss, in broad terms, the relevant principles that have been laid down by the courts with respect to market definition, this book is the first comprehensive text dealing with market definition. For those practitioners involved in trade practices litigation, and in particular, involved in the consideration of market definition, the book is likely to be a very useful tool, providing a ready to hand source in answer to most of the problems that arise.

The final chapter, dealing with expert evidence, is particularly useful. In recent times, there has been a considerable focus in litigation generally on the way in which experts are used, and give their evidence. Most courts now have Practice Notes or Directions dealing with the form and substance of experts reports and the retainer of experts, and most now have particular rules dealing with the manner in which experts are to give evidence and providing for the experts retained by each side to meet prior to giving evidence in an attempt to narrow the issues between them. A number of these new principles derive from the use to which experts have been put in trade practices litigation, and in particular before the Trade Practices Tribunal (now the Australian Competition Tribunal). For a number of years, a practice has been observed in some trade practices cases whereby both experts give evidence at the same time, rather than being cross examined in the usual adversarial

fashion. This chapter provides a useful discussion of the development of expert evidence in trade practices litigation, and the current rules. It should be noted, however, that the Federal Court has recently, and since the publication of this book, revised and reissued its Practice Notes dealing with experts - see *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, dated 9 March 2004.

The second book is a compilation of essays by Professor Maureen Brunt, who, for a great number of years, has been Australia's pre-eminent anti-trust economist. Professor Brunt served, for a number of years, as a lay member of the Trade Practices Tribunal, and was also a lay member of the High Court in New Zealand, sitting on competition cases. In these capacities she has been involved in a number of significant cases under the *Trade Practices Act 1974* and the *Commerce Act 1986* (NZ).

There are seven such essays that have been reproduced, and Professor Brunt has written an introduction, effectively updating all of the chapters. The seven essays (and when they

were first published) are as follows:

1. 'Legislation in search of an objective' (1965);
2. 'Lawyers and competition policy' (1976);
3. 'The use of economic evidence in anti-trust litigation: Australia' (1986);
4. 'Market definition issues in Australian and New Zealand trade practices litigation' (1991);
5. 'Australian and New Zealand competition law and policy' (1992);
6. 'The Australian anti-trust law after twenty years: A stock take' (1994); and
7. 'Anti-trust in the courts: The role of economics and of economists' (1999).

Both books are recommended to any trade practices practitioner.

Reviewed by Ian Pike

Trusts law in Australia (2nd ed)

By Denis SK Ong

The Federation Press, 2004

As the author, an associate professor of Law at Bond University, notes in the introduction to his work, the most important institution in equity was, and is, the trust. And it is the trust and trust law in Australia which is the focus of this book.

The opening chapter provides a useful summary of the nature of the trust and compares it to other concepts, such as debt. The author recognises what he refers to as a dichotomy between trust and debt in certain circumstances, the most notable of which being the *Quistclose* trust. There can co-exist in the one transaction both legal and equitable rights and remedies, that is, remedies at law arising from the relationship of debtor/creditor but also remedies in equity arising from the mutual intention of the parties as to how the moneys the subject of a loan are to be utilised. The author provides a useful and easy to digest analysis of the judgment of Lord Wilberforce in *Quistclose*. The nature of a *Quistclose* trust is considered in the context of cases which have applied it both in Australia and England. The prevailing view in the authorities that a *Quistclose* trust is in the nature of an express trust was challenged by the House of Lords in *Twinsectra* in 2002 where Lord Millett held that such a trust was an entirely orthodox example of a default or resulting trust. The author incisively considers the conceptual incongruities which emerge from Lord Millett's view of the nature of the *Quistclose* trust which is at odds with the prevailing view.

In considering trusts in the context of other concepts, the author also examines the use of the *Romalpa* clause which, if effective, affords to an aggrieved supplier a right to trace either the property the subject of the clause or to trace the proceeds of sale. The book considers the development of the law in relation to retention of title and the position of *Romalpa* clauses after the High Court's consideration of them in *Associated Alloys* and, in particular, the danger that a retention

of title clause could be construed as either a trust or, of greater concern for suppliers, that it could be construed as a charge and fail for want of registration.

So whilst the focus of the book is on trusts, the comparison with other concepts such as the *Quistclose* trust and *Romalpa* clauses provides the reader with a multi-faceted manner of examining particular factual circumstances which could arise either as part of one's study of the law or its practice.

After the interesting and informative opening chapter, the author then deals in a comprehensive fashion with the 'compulsory' considerations in any work on trusts, namely, the 'Three certainties required for the creation of express trust', the 'Writing requirements for certain types of transactions', the 'Complete constitution of voluntary trust', the duties, liabilities, powers, rights, appointment, retirement and removal of trustees, an examination of charitable, resulting and constructive trusts, tracing and the rules against perpetuities and accumulations.

The chapter on tracing provides a useful summary of the general principles of tracing at common law and in equity including an examination of the topical issue as to whether the rule in *Clayton's Case* is of any application in determining the manner in which a mixed fund is to be distributed. In considering this issue, the author has considered the development of the law both in England and Australia since *Re Diplock* to come to the conclusion that there is no scope for the operation of *Clayton's Case* except in limited banking contexts. To the authorities considered in the book on this topic may be added in *Re: Global Finance Group Pty Ltd* (2002) 26 WAR 385 and in *Re French Caledonia Travel* [2003] NSWSC 1008 which expressed views consistent with those of the author.

The book is an informative and easy to read update on the law of trusts in Australia. Its content and style render it useful to both students of law and practitioners alike. It is a welcome addition to the corpus of works on trust law.

Reviewed by Anthony Lo Surdo

The Hon Justice John David Hislop



John David Hislop was born on 4 October 1945. He was called to the Bar on 9 February 1973. He practised from Seven Wentworth. He took silk on 2 November 1991. He was sworn in as Justice Hislop of the Supreme Court of New South Wales on 23 March 2004.

Barely anything more is known about his Honour. At least publicly.

However, these facts can also be established. About 10 years ago, after a long career as a leading trial lawyer, his Honour began to specialise in appeal work. Because of the demands this placed on him, he soon eschewed trial work and confined his practice to appeals, primarily in common law. It was a solid practice. J D Hislop QC appeared in roughly half of all common law appeals in the New South Wales Court of Appeal in the last eight years. His Honour's domination of this area was such that he would spend three days a week, sometimes more, appearing before variously constituted appeal courts. And it was not just the NSW Court of Appeal, but also the High Court, Federal Court and the appeal courts of the other states and the territories. David Jackson QC (who would probably know) describes his Honour's domination of appeals in this area as unprecedented.

'He is - and this is a possibly unique attribute at the New South Wales Bar - entirely modest of his considerable achievements and abilities'

If his appearance rate was unprecedented, his success rate was phenomenal. His Honour was a favourite of the appeal judges. Little wonder: his written submissions were concise; his oral

submissions were concise; his submissions on fact were accurate and reliable; his knowledge of law was wide and deep; and he did not argue bad points. As appellate counsel his Honour provided a genuine contribution to all aspects of the common law, appearing in many notable cases on causation, foreseeability, the existence and standard of a duty of care, breach, contributory negligence and all aspects of damages.

But what was his Honour like as a person? What was the barrister like as a man?

Those who worked with his Honour unanimously describe a quiet man, a reserved man, careful, patient and respectful of other's opinions. He has never been known to lose his temper. Or even raise his voice. He was not scared of hard work, and he actually did read the briefs, and mastered the detail. He does not smoke. He drinks in moderation. His gambling is limited to Melbourne Cup sweeps. He is not greedy. There is nothing showy about him. He does not womanise and is happily married to his only wife. He is a persistent, although untalented golfer. He is - and this is a possibly unique attribute at the New South Wales Bar - entirely modest of his considerable achievements and abilities.

When I ran these features past a prominent criminal lawyer, he suggested they pointed inescapably to the fact that his Honour was hiding something.

His Honour's appointment has been greeted by universal acclaim. Genuine acclaim. Not just the usual sycophantic acclaim. It appears that hard work, application, persistence mixed with natural talent and appropriate modesty can be rewarded. We can take comfort from the appointment of Justice Hislop that our system can identify the best candidates for appointment to the Bench.



The Hon Justice Hislop and the Hon Justice Spigelman AC listen to speeches at the swearing-in ceremony.

The Honourable Robert Calder McDougall

Bob McDougall QC was sworn in as a judge of the Supreme Court on 21 August 2003. Bret Walker SC welcomed His Honour to the court on behalf of the Bar. He recounted that his Honour attended the Scots College, at which place his Honour apparently earned the nickname 'Prof', according to Mr Benjamin, welcoming his Honour for the state's solicitors. His Honour was admitted as a solicitor in 1972 and commenced practice at the Bar in December 1974. His Honour has now joined his pupil master, the Hon Justice Tobias on the Supreme Court Bench. It was noted that another pupil of Justice Tobias is Justice Beazley. His Honour started his career at the Bar as a member of Frederick Jordan Chambers, before moving to two floors of Selborne chambers, where he remained as a long-time member of the Twelfth Floor Selborne Chambers.

His Honour was appointed Queen's Counsel in November 1990. Walker SC indicated that, at that stage, his Honour's ordinary case preparation was extraordinarily careful; his preparation of 'extraordinary cases', prodigious. He described his Honour's presentation in court 'as always dignified, always calm, and had, of course, therefore, the cumulative effect, together with the preparation, of considerable gloom felt by your opponent, but, most significantly, considerable relief felt by the Bench'.

His Honour had a widely varied commercial practice at the Bar. He was described as a 'guru' of the Consumer Credit Code and some of the major cases in which his Honour appeared included the *Estate Mortgage* case, the NRMA CASE and the HIH Royal Commission, amongst many others.

Further, his Honour was 'remembered with great gratitude and respect' by the members of the Bar Association for 'year in year out hard work in relation to ethics and professional discipline'. Walker SC added as a personal note of particular gratitude that over the years his Honour had been of great assistance to Walker in a number of difficult and sensitive matters he had to deal with in relation to discipline and ethics.

Walker SC concluded: 'Finally, of course, it has to be said that your Honour has, in a particularly important, but less professional role, joined a very lonely band of pioneers in the much overdue move from law books, as a form of decoration in chambers, to ceramics. It is greatly regretted that the Bar is a very lonely band of pioneers in that regard and is, I think, halved by your Honour's appointment. I don't think, in that regard, the Bench has greatly increased.'

His Hon Judge Mark Curtis Marien SC

On 3 February 2004 his Honour Judge Mark Marien SC was sworn in as a judge of the New South Wales District Court.

The Attorney General of New South Wales spoke on behalf of the Bar and described his Honour's distinguished career in the law and public life. This included practising at the private Bar and as a senior crown prosecutor and working on numerous law reform and legal education bodies.

The Attorney referred to an early interest his Honour had in both acting and the law in the following way:

A career guidance counsellor set out what appears, from subsequent events, to have been a life time of mental conflict by recommending that your personality was suited to either the Bar or the stage. It is our good fortune that your Honour ultimately chose the former, and in recognition of your professionalism and dedication you are today ascending to judicial office rather than working out which tuxedo to wear to the Academy Awards.

Mark Curtis Marien was educated at St Patrick's Christian Brother's College, Sutherland and Sydney University where he studied Arts/Law. His university studies were interrupted by a brief foray to England where his Honour tried his luck as an actor.

After working as a solicitor in Sydney, in 1982 his Honour spent three years as the business manager and assistant to the general manager of the Australian Opera.

On his return to the law his Honour again spent some years as a solicitor with the Commonwealth Deputy Crown Solicitor's Office in Sydney and later joined the Commonwealth DPP. There he gained extensive experience in litigation instructing counsel in long and complicated trials and also earned a reputation for affability and hard work.

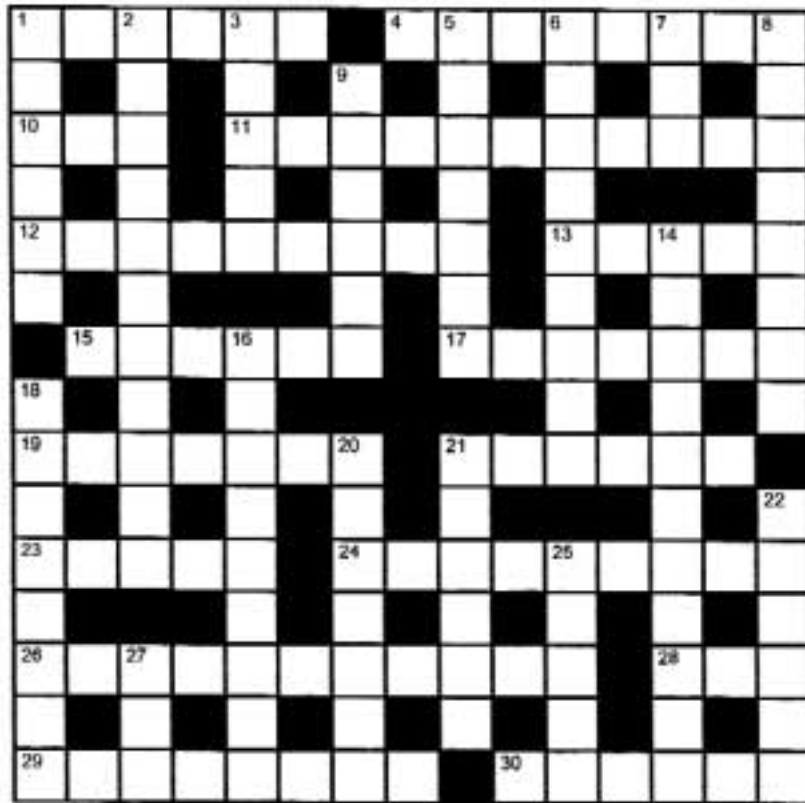
His Honour was admitted to the Bar in 1986 and read with John Whittle (as he then was) in Wardell Chambers.

In 1992 Judge Marien was appointed a New South Wales crown prosecutor and appeared in all criminal jurisdictions, rising to the position of deputy senior crown prosecutor. He was appointed senior counsel in October 2003.

His Honour served on many legal bodies while at the Bar and during his time as a crown prosecutor. In particular, in September 2001 he was seconded as director of the Criminal Law Review Division of the Attorney General's Department and was actively involved in programmes conducted by the New South Wales Bar Association.

In his remarks in reply at his swearing in, his Honour thanked his family and others for their support over the years, in particular the late Reg Marr QC, a former solicitor general for New South Wales, who provided encouragement for what his Honour described as 'that great leap into the unknown of going to the Bar'.

Bar News warmly welcomes his Honour's appointment to the Bench.



Across

- 1 Watson's mate who opined the life of the law had not been logic; rather it had been experience (6)
- 4 Send around a rugged rock for a shoddy neck of mutton (5-3)
- 10 Toward a less roadless tug. (3)
- 11 A sound heir and Roundhead replacing a soliloquy's sun, throwing out one's own voice entirely. (11)
- 12 A lively piece could start twice over after Italy's gourmet isle ends in a good old Latin whoopee. (9)
- 13 Baffled belly-button contained in the veins. (5)
- 15 Abe's maker occurs afresh. (6)
- 17 Instrument for orchestra leader in a car crash? (7)
- 19 Outback lost nothing but could start instead the loss. (7)
- 21 Furnish library among selfish elves. (6)
- 23 Florentine family loses sound eye doctor. (5)
- 24 Financial bod becomes rates ruer. (9)
- 26 It'll vitiate corrupted effect of a funny bone strike. (11)
- 28 Basic English hangs libs out in frozen water. (3)
- 29 Why, Doris, not exactly Dayish behaviour. (8)
- 30 28 across, the novel nerd! (6)

Down

- 1 Shere's honour for dotcoms' province. (2,4)
- 2 This sort of person otherwise pities world. (3-8)
- 3 French sending forth a conclusion? (5)
- 5 Vehicle to perform middle-sized Ohio judge from New York. (7)
- 6 Alive? Late? (Ambiguously make lighter.) (9)
- 7 In short, a gentleman. (3)
- 8 Clyde ran quite different "water-free" treatment. (3-5)
- 9 Bridgee opposites power keen beginner (with safety first), with only morsels in the result. (6)
- 14 His anvil ran amok, to a hammered head finish? (4-7)
- 16 Cheryl can mix up a room of poohbahs? (9)
- 18 I'm racist, twisting a Turk's sword. (8)
- 20 Big task crumbles where the pads and bats call home. (3-4)
- 21 Kind pieces go to pieces. (6)
- 22 The author of Wednesbury unreasonableness (or the human factor). (6)
- 25 Scandanavian Saxon married English leader. (5)
- 27 Thanks for the cow's tail, a marble lash? (3)

Solution on page 72

Christopher Grenville Gee QC

(1941 – 2003)

By Robert Stitt QC

On Tuesday, 16th December, 2003 in Perth, Justice Neville Owen in the Supreme Court of Western Australia said:

Just before we start this morning there are a couple of things. Can I place on public record that I was greatly saddened yesterday to learn of the death of Mr Chris Gee QC. There is an old adage that beauty is in the eye of the beholder and I suppose one's perception of advocacy follows that route.

I must say that Australia is blessed with many fine lawyers but I believe that Mr Gee was one of the finest advocates who I have had the privilege of hearing. He was incisive and thorough and yet extremely urbane and pleasant. He will be a great loss to the Australian legal profession and the Australian community.

The genesis of this spontaneous commendation was the appearance by Chris, on behalf of a reinsurer, before Justice Owen in the royal commission inquiring into the failure of HIH Insurance Limited.

At the time of his death, on 15 December, 2003, after a short illness, Chris had gained a well-earned reputation in Australia as a leader of the Bar.

Christopher Grenville Gee was born on 24 August 1941 in Sydney, the eldest of three children of his barrister father Kenneth Gee (who became a District Court judge) and Nance Isobel née Russell. His siblings are Stephen Grenville, former deputy governor, Reserve Bank of Australia and Kate Grenville, the celebrated Australian novelist and writer.

Chris attended North Sydney Boys High School from which he matriculated in 1958 to the University of Sydney where he read Arts and Law. He graduated in 1964.

'They were a merry band which spent much of their time playing bridge, drinking, eating in restaurants and arguing the great issues of the day such as Vietnam.'

In 1962 he was an articled clerk at Clayton Utz articled to George Hardwick. It was there that he spent his formative years in the law. His wide circle of friends was eclectic; it included Michael Hornibrook, James Halliday, Spencer Ferrier and Kevin McCann. They were a merry band which spent much of their time playing bridge, drinking, eating in restaurants and arguing the great issues of the day such as Vietnam. He played teams bridge for the solicitors in their annual competition against the barristers, whose team was led by R P Meagher. It was the era of Haight-Ashbury and flower power. James Halliday gave their gluttony respectability by becoming a wine and food critic. A young solicitor in Clayton Utz, John Winston Howard, sometimes joined this bridge playing set but he spent much of his time organising his matters and affairs political.



"His love of flying was intense."

Chris's interest in aviation, sailing and motor cars dated from this time. He and Spencer Ferrier repaired and revived several moribund vehicles. Chris drove an early model Triumph Herald which had its bonnet bent upwards at a sharp angle. This gave it a raffish, square-rigged look. When the wind was in the right quarter it added a couple of kilometres per hour to its speed. So he kept it. His love of flying was intense and he and Spencer each gained a light aircraft pilot's licence. He acquired a life-long interest in sailing and spent many happy hours 'mucking about' in his ancient VJ sailing boat.

He was called to the New South Wales Bar in 1966. He first entered chambers on Eighth Floor Wentworth. The head of chambers was Gordon Samuels QC (as he then was) and the clerk was the larrikin Harry Peel. Other members of those chambers included Michael Kirby, Bruce Murphy, Peter Grogan and Garry Downes. Harry Peel had been a member of the 2nd AIF Sixth Division where he acquired his tact, diplomacy and people-skills by fighting both Rommel's *Afrika Corps* in the western desert and Tobruk and the Japanese in the Pacific islands. Harry was pungent in his criticisms of those who displeased him whether they were clients, instructing solicitors, members of the Bar or the judiciary. On one occasion he threatened a young junior, for whom he clerked, with defenestration.

Notwithstanding the efforts of his clerk, Chris's practice grew rapidly from beginnings in the local courts where he developed expertise in the *Landlord and Tenant Act 1899* and its various amendments. By the late 1960s the technical interstices of this convoluted legislation resembled a medieval saraband. Chris thrived on it and he took full advantage of all available points of law, evidence and procedure which lay thickly along the way. His instructing solicitors loved him.

In the early 1970s he moved to Seventh Floor Wentworth where he remained until his death. There, the clerk was Fred de Saxe - sometimes described as 'the prince of clerks'. Under his guiding hand Chris's practice blossomed and matured. He developed areas of speciality in aviation law, building and construction, insurance law, professional negligence and product liability. He proved to be an outstanding advocate with great skills of persuasion both at first instance, often appearing before juries, and at appellate levels. He was a penetrating cross-examiner. His forensic armoury was complete. In 1984 he took silk. He served as an acting District Court judge in 1988, 1989 and 1990. In 1999 he took chambers in Melbourne on level five of Joan Rosanove Chambers.

Apart from a large advising practice Chris appeared in many significant cases in different jurisdictions: *Stevedoring Industry Finance Committee v Crimmins* (1999) 1 VR 782 (duty of care owed by a statutory authority), *Commercial Union Assurance Co. v Beard* (1999) 47 NSWLR 735 (non-disclosure under a policy of insurance), *Phillip Morris (Australia) Limited v Nixon* (2000) 170 ALR 487 (composition of class actions in the Federal Court), *James Hardie & Co. Pty Ltd v Seltsam Pty Limited* (contribution between tortfeasors) and *South Tweed Heads RLFC v Cole* (2002) 55 NSWLR 113 (duty of care to an intoxicated patron). He also appeared in many arbitrations and inquiries such as the long running dispute concerning the extensions to Sydney's International Airport, the collapse of the Hunter Valley Coal Reclaimer, the coronial inquiry into the Thredbo Village disaster, the disputes concerning No. 1 O'Connell Street and many aviation inquiries.

Despite his growing stature in the legal profession he was never pompous. He did not feel the need to take himself seriously. This is a need which, unfortunately, often afflicts some members of the Bar. Always present, just beneath the surface,



Christopher Gee QC, Harriet Gee, Elizabeth Gee, Sophie Gee.

was his sense of fun, humour and mordant wit. He was a stimulating conversationalist and raconteur. His speech and stories were punctuated by Wildean aphorisms and one line witticisms.

In paying tribute to him at his memorial service at St James Church in February, D F Jackson QC, Head of Chambers of Seventh Floor Wentworth, said of him:

He was also very good at affecting an amusing, world-weary air when discussing the difficulties into which his clients has placed themselves and from which he was required to extract them.

He loved both the English and French languages (in the latter he was fluent) with all their nuances and subtleties. He was a Latin scholar. He read widely and deeply. His love of literature embraced a wide spectrum of authors including Jane Austen, Nabokov, Proust, Dickens and Somerset Maugham.

His much discussed 'Gee's laws of litigation' is a source of amusement and fun for many members of the New South Wales Bar but beneath the humour, and disguised by it, lay more than a grain of wise forensic judgment. His Voltaire-like description of an opponent's ability as 'the great advantage of mediocrity is that it is so easy to reach your peak' lives in the memory. He was never unintentionally rude about anyone. He had many loyal friends both within and outside the legal profession, all of whom were deeply saddened by his death. They will all greatly miss him.

In 1969 he married Elizabeth Ann Bruce. They have two daughters, Sophie and Harriet. He was devoted to his family and his love was reciprocated. They engaged in many activities together. As an adjunct to his interest in wine and food, Chris developed a skill in making marmalade and preservatives, some of which were awarded prizes at the Sydney Royal Easter Show. His activities as a *sous chef* caused hilarity and mirth amongst his daughters and Sophie's amusing story about his prize-winning marmalade won her the Sydney Morning Herald Young Writer's Award.

He derived deep satisfaction from the successes which each of his daughters achieved. Sophie gained her PhD from Harvard University and is now lecturing at Princeton University and Harriet is in final year medicine at the University of Melbourne.

It was Harriet's talent as a cellist which sparked the last love of his life - music, particularly opera. He and his family enjoyed travelling together, often to hear favourite singers perform in operas in overseas theatres. Their last trip together, not long before he became ill, was to Europe with a wonderful fortnight in Capri, where the tourists and the local inhabitants provided a rich vein for his sardonic humour.

He is survived by his father, siblings, wife and daughters.

Gee's Laws of Litigation

By Geoffrey Watson SC

Throughout his professional life Christopher Gee QC discovered, refined and propounded a small number of rules which he claimed comprised an original theoretical and practical basis for the presentation of cases, obedience to which would necessarily dictate success and professional advancement. With typical self-effacing modesty Chris called these rules 'Gee's Laws of Litigation'.

During the running of cases Chris would often refer and resort to the Laws, but he resisted all calls to commit Gee's Laws of Litigation to writing. He preferred to regard the Laws as part of an oral tradition. Despite this, when Chris died some of us who were schooled in the Laws decided they must be compiled. Naturally, there was no agreement whatsoever as to the content or wording of the Laws. That which follows is, I believe, the closest we can get to the true list.

These are Gee's Laws of Litigation:

1. The correct answer is always, 'No'
2. The correct answer is always, 'No'
3. The correct answer is always, 'No'
4. No case is not improved by a good verbal
5. Never smile in a jury trial
6. If you need to call the bank manager, settle
7. Under no circumstances pass the water bottle
8. Never re-examine

Each Law deserves elaboration.

The correct answer is always 'No'

This Law related to the way Chris wanted the witnesses he called to approach their cross-examination. Chris's regard for the importance of this Law is made obvious by its place in the list and its repetition. If you have not observed its importance in your own practice you cannot have been paying attention. How many times have cases slipped from my grip while my witness obliged in cross-examination with a 'Yes', when a 'No' would have done quite nicely?

Chris's fear of a breach of this Law unconsciously reflects his skill as a cross-examiner (it was not often that Chris was unconscious of his skill). Chris was a superb cross-examiner, especially of experts. His target was to get the witness to agree with him. His demeanor was sincere, with just sufficient affability to gain trust. He would commence by establishing assent to general and, in reality, unarguable propositions, building quietly on this until he had the witness agreeing to all manner of crazy things. Many witnesses did not recognise the havoc which their agreement was causing.

No case is not improved by a good verbal

The 'verbals' of which Chris was speaking here are not those kind of verbals examined in detail in the Wood Royal

'Chris was always amazed when other counsel would offer him information about their case. Amazed, but receptive.'

Commission. Rather, Chris was referring to the dynamic effect that oral evidence tended to implicate another party through that other party's own words, can have on a trial. Much of the hard-line commercial and contract cases are entirely dependent on cold examination of de-humanising documents. Chris believed a verbal could bring dry old documents to life. And it always left your opponent compelled to undertake one of those demeaning and inevitably fruitless 'No he didn't / Yes he did' cross-examinations.

Never smile in a jury trial

In his early days Chris did a lot of common law jury work and continued to do some, until that animal became nearly extinct in New South Wales. Nearly all that work was for insurers representing defendants.

Chris always regarded his role as a task to be undertaken with some solemnity. After all, commonly it was the case presented by the other side which attracted any sympathy.

If you need to call the bank manager, settle

I was never told the basis for this rule. I guess it derived from some very bad experience. I have never had to call the bank manager. Some have told me the rule is sound and, without knowing why, I suspect it is.

Under no circumstances pass the water bottle

This was Chris's metaphor for his interpretation of a barrister's role in the adversarial process: Under no circumstances should you provide assistance to your opponent. Chris was always amazed when other counsel would offer him information about their case. Amazed, but receptive. Then, without actively misleading anyone, Chris would offer nothing (or, at least, nothing of value) in return.

Chris regarded himself as an old-school, un-reconstructable, common lawyer. I remember him saying: 'Most modern reforms to the rules of court are designed to eliminate trial by ambush; it is the corresponding duty of a skillful barrister, working within those rules, to attempt to reinstate ambush to its rightful place in the litigation process'.

Never re-examine

Chris always felt that, for some reason unable to be explained, witnesses who were generally- speaking helpful could be struck by an unbecoming desire to appear 'fair' following cross-examination, making re-examination a dangerous process.

There were other rules or sayings that Chris had which were not elevated to Laws, but might have progressed had he lived longer. For example, in describing his low key presentation designed to attract minimum attention to his client in multi-party litigation, he would say 'Never get out of the trench unless ordered to do so'. When advising his clients on aspects of the inescapably chancy nature of the litigation in which they were embroiled, he commonly added the advice 'No-one ever lost a settlement'. Not long before he took ill he told me that he had just finished an opinion on a difficult point. When I asked him how he resolved it, he said: 'As I normally do - I came down firmly on both sides of the fence'.

Chris had a magnificent gift with words. In a long trial about two years before he died, Chris made a mistake. The trial judge picked it up and Chris conceded the error. The judge expressed surprise - not having seen Chris make a mistake before - to which Chris replied without hesitating 'Your Honour, it is only the mediocre who are at their best at all times'. Mediocre was one thing which that truly gifted barrister, Christopher Gee QC, was not.

Sir William Thomas Prentice KtCR MBE

(1919 – 2004)

By John McCarthy QC

Bill Prentice was a fine man, an outstanding Australian and a learned and courageous judge. Few Australians have loved Papua New Guinea as deeply as Bill Prentice, His death will be mourned both in Australia and PNG.

Requiem Mass for Bill Prentice was celebrated on Saturday, 7 February 2004 at St Leonard's Catholic Church, Naremburn.

Bill had a long and distinguished legal and military career in Australia and Papua New Guinea. His legal career began when he won an exhibition from St Joseph's College to study arts and law at the Sydney University, to which he matriculated in 1936. He was active in the Campion Society at Sydney University and had joined the Sydney University regiment.

After outbreak of war in 1939, he volunteered for the AIF. He was commissioned and served in the 7th Division both in the Middle East and New Guinea; first in the 2/33 Battalion and later as a staff captain with 7th Division HQ. He was mentioned in dispatches and was awarded an MBE for his service on the Kokoda Track. Later, he was with the 7th Division at Lae and Bougainville.

Bill returned to Australia in 1946 and resumed his legal studies. He graduated from Sydney University in 1947 and was admitted to the Bar in the same year. He had an active and extensive practice from 6th Floor Wentworth Chambers.

After service there during war, Bill continued his interest in Papua New Guinea and its people when he became a member of the Council of Papua New Guinea Affairs, which was responsible for the promotion of legal education for Papua New Guineans and he was influential in the establishment of

the Faculty of Law at the University of Papua New Guinea. He was responsible for encouraging the education of many Papua New Guineans.

In 1970 Bill was appointed a justice of the Supreme Court of Papua New Guinea and served on that court for 10 years. He was appointed successively senior puisne judge in 1975 and chief justice in 1978. He was knighted in 1977. His period on the bench therefore transected the momentous years of change through self-government independence and post-independence. His Honour was responsible for many leading judgments, particularly in the area of constitutional interpretation, which have had a profound effect upon the development of the law in Papua New Guinea.

In March 1980, Sir William Prentice resigned as chief justice in controversial and unfortunate circumstances and returned to Australia where he served for some years as a senior member of the Administrative Appeals Tribunal. He retired from active practice in 1987.

Throughout his life, Bill Prentice was a devout and erudite Catholic. He was a member of the St Thomas More Society for 55 years and served as councillor and honorary secretary in 1952-54. He was delighted to have been appointed as an honorary life member and was a joyous participant in the Silver Jubilee celebrations of the society in 1994-95.

In 1946 Bill married his wife Mary. They were blessed with four children - Damien, Toby, Felix and Jacinta. Bill died exactly six months to the day after the passing of his beloved wife.

Captain William Frank Cook LVO RAN (Rtd)

26 October 1916 - 21 November 2003

Captain Bill Cook died on Friday 21 November 2003. A memorial service was held on Tuesday 25 November 2003 at the Garden Island Naval Chapel.

Bill Cook had a distinguished career in the Royal Australian Navy from 1930 to 1960. He commanded *Voyager*, *Vendetta* and *Nizam*, and served in HMA ships *Australia*, *Yarra*, *Perth*, *Murchison*, *Melbourne*, *Wyatt Earp* and *HMS Devonshire*.

Captain Cook was the Assistant Register of the New South Wales Bar Association from 1964 to 1970, and Registrar from 1971 to 1985. He was much loved and fondly remembered by many members of the Bar. Below are some members recollections of Bill.

When I came to the Bar in 1982 he was a most welcoming and supportive influence. He was the essence of decency and civility with an amazing ability to put people at their ease and make them feel comfortable. He made it his business to know your name and have a chat whenever possible. He was genuinely interested in every barrister and keen to see them uphold the great traditions of the Bar. Those traditions matched his own principles - courage, courtesy and the pursuit of justice for all. The Capt'n was a friend of every barrister of his time.

Philip Greenwood SC

The twinkle in his eye, the perpetual smile at the corners of his mouth and the hearty chuckle which characterised his laugh will be my abiding recollections of Bill Cook - to me, they were constant features of the man, about whom I never heard a bad word said. I was fortunate to be at the Bar for the last 10 years or so of Bill's stewardship; I was never conscious of him treating me, or any other junior, no matter how raw, any differently than he did the doyens of the Bar such as Kerrigan QC, Deane QC, Byers QC and the like.

He was an impeccable, natty dresser which was something of a contradiction to the vision of Bill, frequently seen, hopping onto his motor scooter and beetling off home doing a very good impression of a motorised version of the 'Roadrunner'.

For those who did not have the good fortune to know him, he is immortalised in a portrait (I think the best in the Bar's collection) held at the Bar Association. From time to time, but never unkindly, it was asserted that the painting of the ostrich was in fact an accurate representation of our Bill.

John Maconachie QC

In appearance Bill Cook was a dapper, chirpy sparrow of a man, always darting about intent on getting things done, moving between slower moving objects. Comfortable with authority - his own and that of others - he moved freely in any company. He was a man of genuine charm whose service record released him from any need to prove his strength. His natural empathy for others endeared him to the broad range of personalities - young and old - with whom he had to deal.

Bill used to advantage the name 'Captain Cook', disarming a generation accustomed to think only of James Cook. His self-deprecating, but dignified, use of the title 'Captain' allowed him to break down barriers, as his anecdote in *No Mere Mouthpiece* (2002) at page 56 illustrates. It is classic Bill Cook:

A very interesting case was that of Miss C who complained of a barrister's behaviour in the execution of his duty on a suburban council. Although it had been pointed out to her that it was not within the jurisdiction of the Bar to deal with her problem, she had persisted in her complaint almost to the point of being declared a vexatious litigant. Eventually she demanded to see the Registrar [of the NSW Bar Association] and I had her company for about half an hour during which time I offered her the usual hospitality. Some time later, the barrister [rumoured to be Barry O'Keefe] told me the sequel to her visit. At an examination as to her mental fitness, she was proud of the fact that she had had a cup of tea with Captain Cook. Alas, this was her undoing and she was committed to a mental institution. On hearing of her plight, the barrister immediately assured the medical board that she had, in fact, had tea with Captain Cook - the Registrar - and Miss C was released. I believe the barrister 'dines out' on this story, as indeed I do too.

Only a man certain of his own identity would habitually ride to and from the offices of the Bar Association (as he did) on the little red motor scooter that was his trademark. He had no need of a Harley Davidson. Again, we see his personality emerge in his reminiscence of Sir Maurice Byers QC in *No Mere Mouthpiece* (at page 60):

[Sir Maurice] was a scholar...exceeding wise, fair spoken and persuading'. In addition to being acknowledged a great constitutional lawyer, he had a fine sense of humour. I met Byers and [Leycester] Meares one evening as I was leaving Phillip Street on my little red motorbike. Meares suggested that I should give Byers a lift. I was able to reply 'Sorry, Sir Maurice, I wouldn't take a knight out on a bike like this!'

Bill had a fine sense of humour. If he possessed guile, he never made a display of it. As Registrar of the Bar Association, Bill Cook was accessible. The Bar and the Association were much smaller in the 1960s, 1970s and 1980s than today.

As a junior junior in the last six years of his tenure as Registrar (before he retired in July 1985), my consistent impression was that, if he did not know the name of a member of the Bar, it was not for lack of trying, and he was generally friendly enough for formalities not to matter that much anyway. He was approachable and sympathetic. The Bar owes him much, and rightly respects his memory.

Geoff Lindsay SC

A full obituary on Captain Cook's life has been prepared by The Hon Justice Beaumont for the Australian Law Journal.

2003 Great Bar Boat Race



At the dock - the full crew - Denis Williams, solicitor, owner of the boat, *Paper Moon*, with the (pirate) crew from HB Higgins Chambers: Linda Tucker, Louise Tucker, Louise McManus, Ingmar Taylor, Shane Prince and Andrew Metcalfe.



On board, as above, without Denis Williams, with H B Higgins fluttering in the background.

Bench & Bar v Solicitors golf

By D M Flaherty

A near perfect summer's day greeted the field for the annual Bench & Bar v Solicitors golf day held at Manly Golf Club on Thursday 29 January last. A field of more than 64 players teed up to contest for right to possess the mace of the late Justice Herron for another year.

The result was the closest in recent memory. In fact it was so close it was, like the Presidents Cup, a tie. Eight of the Bench & Bar teams were successful. But eight were not. However, unlike the Americans in the Presidents Cup, the solicitors team refused to 'share' the mace until next year, claiming that as they had won it in 2003 and the Bench & Bar had failed to win it back in 2004 they were entitled to keep it until 2005.

A riot did not occur when Roger Williams (the captain of the solicitors' team) made this claim at the presentation ceremony, primarily because members of the Bench are always courteous and gracious (in every situation) and because barristers are reluctant to bite the hand that feeds them.

Despite the controversy, a large field then adjourned to the dining room of the Manly Golf Club for the traditional post-match dinner where planning (and plotting) for the 2005 event began.

The results were as follows below.

4BBB Overall winners	John Harris & Chris Millard (B&B)	49 points
Best solicitors' team	D Stuart & B Bruce	45 points
Best front nine	A Crompton & G Kinsey	26 points
Best back nine	Toner SC & Marshall SC	24 points
Individuals	E Fritchley	38 points
	Judge A Hughes	34 points
	Hislop QC	
	G Kinsey	
	J Bowe	
	R Williams QC	
Nearest to the pin	R Williams QC	
Longest drive	John Harris	

Juniors defeat silks by 36 runs

By the Hon Justice Richard White SC*

*'In the summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch.'*¹

*'The story of law, legal education and cricket depends for its content and meaning on our decisions about what to remember, underline, exclude or elevate in our reading of the particular text and all other social texts of which it is a part.'*²

On 8 February 2004 12 old men put Lord Denning's aphorism to the test on the grounds of Cranbrook School against the skilled athleticism of the junior Bar. They were not bent on exercise for its own sake, but as a stimulus to the intellect³. For this experiment in CPD they braved the perils of tribal barbarism⁴. Poulos QC muttered about the ancient Greeks. Sullivan QC, as his wont, broke into Latin: *Quis exemplum meum sequetur? Mens sana in corpore sano*. Andrew Stone could not restrain his laughter.

Proceedings started under the amused glare of Justice Gyles. It was not hard to read his Honour's thoughts. The standards of the Bar are not what they once were.

King SC (seven overs: 1/19) immediately had the opening batsmen watchful with his immaculate line and length. From the other end Douglas QC (2/15), a geriatric Keith Miller, did his best to intimidate his own wicketkeeper with wides and high full tosses.

Inexorably, the careful, and at times brutal, batting of Richard Steele (46 retired) and Ian Neil (36) threatened to take the game out of the silks' reach. But accurate spells from Hastings QC (0/21) and Greenwood SC (3/19) held them in check. After drinks it was time for wickets and runs. Laughton SC (2/12), Greenwood and Ireland QC (three stumpings and a catch) provided the former⁵.

'They were not bent on exercise for its own sake, but as a stimulus to the intellect.'

Morrison SC and Poulos QC bowled with plenty of flight. They kept Moorhouse (24) and Stowe in two minds as to whether to hit the ball conservatively for six over the ropes, or, with more flamboyance, onto New South Head Road. Peter Naughtin (16), a veteran of NSW Bar cricket, showed contempt for the attack until he was dismissed by Morrison to an outfield catch by White SC as he then was which surprised everyone.

The final total of 166 was no more than respectable.

What the silks needed was determination, talent and luck. One of the three would suffice. Alas, amongst the early batsmen,

only Morrison (40), Greenwood (19) and Hastings (16) showed what was required. Crowley (2/18), Newton (1/9) and Steele (1/14) wrought havoc. Behind the stumps Hugh Stowe displayed an arrogant flair designed to drive the incumbent and aged Bar wicketkeepers into retirement. The Juniors turned the screws (Naughtin, seven overs 0/8). Sullivan thoughtlessly called Ireland for runs from successive balls: forcing Ireland to retire hurt when attempting a reckless quick single from a slow hit to deep extra cover. Julian Hammond (1/28) and John Azzi (3/21) teased out the tail. Through it all Morrison stood firm. But his call for fresh troops was unavailing.

When all was done the juniors had won convincingly by 36 runs. With relief, the cricketers turned to their preferred pastime⁶.

Full credit is due to Julian Hammond for organising the day. As the Bar gets bigger and more fragmented occasions such as this are vital. He is to be congratulated and thanked for his enterprise.

* Now the Hon Justice White of the New South Wales Supreme Court

¹ *Miller v Jackson* [1977] 1 QB 966 per Lord Denning MR at 976.

² Fraser, *Cricket and the law*, Institute of Criminology monograph series no 4, 1993, p.14.

³ See addresses on the occasion of the retirement of the Honourable Justice R P Meagher, 15 March 2004.

⁴ *Trevali Pty Limited v Haddad* (1989) Aust Torts Rep 80-286 at 60,036.

⁵ Ireland's wicketkeeping was a feature of the game. The ball had to be very wide indeed to get past him.

⁶ That is, for the sceptics, deconstructing legal texts and debating the proper classification of jurisdictions, rules, principles, norms, duties, rights, powers and discretions.

NSW Bar v Qld Bar

On 27 March 2004 the NSW Bar played against the Qld Bar at Camperdown Oval.

The toss was won by Queensland, who had no hesitation in sending the home team in on a wicket which looked to have something in it for the Queensland quicks, that term being used in a relative sense.

Dagleish and Durack saw off the Queensland opening bowlers and things were looking promising at 0/47 after 10 overs. Durack fell shortly afterwards for a well compiled 30 and Dagleish, setting himself for a big innings, was joined by Steele making his debut for the side.

Dagleish's fine hand of 47 came to an end shortly after, and then Steele took the long handle to the Qld bowlers hitting three sixes on his way to a stylish 50. He was ably supported by Foord and Burge in getting the score up to 3/150.

The now customary middle order collapse followed, but a rearguard action by Neil and Scruby, the latter managing to take 16 off the last over, saw the home team reach 8/186 after the allotted 40 overs.

The Qld innings got underway and Naughtin and King SC, improving each season like a couple of good reds, delivered a miserly opening spell to have Qld 3/51 after 16 overs, with Qld mainstay Taylor at the crease. The next few overs were to prove crucial as Gyles snuck one through Taylor's defence, and a couple of balls later had the gun Queensland bat Traves



The NSW Bar has won back the Callinan trophy.

stumped by White SC (as he then was), the high point of what has turned out to be the stalwart White's final game for the Bar.

Foord, Durack and Hastings QC then put the screws on the Queensland tail, and in combination with some athletic fielding in the deep by Steele and Scruby, saw the Queenslanders restricted to 7/174 when the final ball was bowled.

The Callinan trophy now safely back on this side of the border, we look forward to repeating the performance next season and recording our first away win since 1993.

The Crown Cup

By Andrew Givney

The day after the interstate Bar cricket match at Camperdown Oval on 27 March 2004, the barristers and solicitors of western Sydney played for the Crown Cup.

The Bar was captained by Givney and the solicitors by Ric Gonzalez. The match commenced at eleven-ish.

Players were suitably attired in shirts embossed with the players of yesteryear - Benaud, Simpson, Laurie, O'Keefe, together with caps appropriately emblazoned with the coat of arms.

Berry and Heazlewood resolutely umpired under a boiling sun. Various interlopers joined the match, including Morrison SC.

Naughtin, having played for the Bar on the Saturday, formed the view that he was living at Camperdown. His perseverance was rewarded by removing solicitor Tilley twice in the opening over for the Bar.

The Bar batted first due to the late awakening of some older members, and scored one hundred and fifty-ish.

Luncheon was taken at one-ish, as catered by solicitor Susan Warda under the splendour of a century-old fig tree.

Each batsman strode to the crease to an appropriate tune, as selected and played by Karen Haga.

Sadly, chasing the massive total obtained by the Bar, the solicitors failed to reach the mark, although Glenn Walters did club two sixes and three fours in rapid time before being brilliantly caught by McElhenny of the National Australia Bank, to whom many from the Bar are indebted in more ways than one.

Thus, the Bar reclaimed the Crown Cup.

The match was completed by four-ish, and drinks were taken and presentations made. Luke Jokovic (son of solicitor Michael Jokovic) was Man of the Match. In passing, however, Viney played above his abilities, being outstanding in batting, bowling and keeping.

Drinks were completed latish.

Words fail me

Keith Chapple experiences the honkey stomp

The Iraq war, terrorism, cannibalism in Germany, Janet Jackson's breast.

It has been a rugged 12 months or so and some days I have to steel myself to pick up a newspaper.

Saddam and Osama have had plenty of publicity but the most gripping articles seem to involve the human body.

Of course, Janet was the most important story. After her and Justin Timberlake's bodice ripping exercise ('lewd and sexually explicit conduct') during the half-time show in the American Super Bowl in January someone from Knoxville, Tennessee is apparently suing CBS and Janet and Justin and whoever else on behalf of 80 million people who suffered 'outrage, anger, embarrassment and serious injury'.

If it is all for real, the most extraordinary thing about the recently published pleadings are the plaintiff's 'factual allegations' that claim that the Super Bowl is 'a uniquely American cultural event' and 'an American celebration of our nation's many blessings, many gifts and talents'.

I think there was a football match going on as well on the same day if anyone was interested.

Across the Atlantic, disturbing reports from Berlin about the complex case of Adrian Meiwes provide the strongest support yet for remaining computer illiterate.

Herr Meiwes, described as a 'gentleman of the old school' was charged with murder after successfully advertising on the Internet for a fit man to eat - literally. Somebody replied, they met and only one survived.

According to Meiwes's lawyer, many have similar interests. 'In Germany, about 200 hundred people were offering on the Internet to be slaughtered, 30 were ready to do the slaughtering and 10 to 15 wanted to watch,' he said.

No doubt it is difficult to find anyone willing to share a cell with the accused now. You would never go to sleep.

My neighbour in chambers, Mandible, suggested to me the other day that the best way to relieve 'post traumatic news disorder' was to listen to soothing music.

Mandible's room is the one closest to the kitchen and they say he had a very big 'broken bones' practice. He has been oversolicitous about my health and svelte figure recently and drops IT magazines on my desk every day.

I was working late the other evening, bogged down with some dictation, when Mandible followed up on his musical therapy advice.

Knowing I was a Carl Orff fan from way back, he tossed a CD of 'Carmina Burana' through my door together with Volume 75 of the *Federal Court Reports* with a yellow sticker in it. He mumbled something about the Federal Court cover version of 'O Fortuna' as he went off to e-mail someone about dinner.

I put the disc in the machine and settled back with a Black Label.

Nothing could have prepared me for what followed. Expecting the restful chorus of 'O Fortuna' to envelop me I had cranked up the volume without knowing that Mandible had snared a copy of the techno mix variant reviewed in *Schott Musik International GMBH & Co and Others v Colossal Records of Australia Pty Ltd and Others*: (1997) 75 FCR 321.

'Techno music' figured largely in the case and for the uninitiated was described by the trial judge Tamberlin J as follows:

The evidence indicates that the 'techno' genre is a form of music particularly favoured at 'raves' which have been described in evidence as all-night dance sessions where loud pulsating music is played. It is said that the techno genre embodies a 'slavish' devotion to the use of rhythm as a hypnotic tool that is, largely, if not primarily, interpreted by electronic means.

On appeal, Hill J dealt with the techno improvements on the rather staid original of 'O Fortuna' thus at 325:

It is difficult in words to compare the techno adaptation to the original. The ear is a better means of comparison. ... but the changes made include electronic sounds, transposition, electronic distortion giving a harshness to the choral voices, pumping rhythms, various voices interspersed, including at one stage a voice saying 'do the honky stomp, do the honky stomp, do the honky, do the honky, do the honky, do the honky stomp', piano riffs and a variety of electronic effects.

It was torture. I felt like I'd been lifted from my seat and flung around the room. I think my ears were bleeding.

I could hardly hear Mandible when he returned - I was still in pain - but it seems he thought the Federal Court had got it right and basically Carl Orff needed a bit of souping up. He agreed with Mr Toop from the Musicology Unit of the Conservatorium who said that the original was 'kitsch' anyway and not susceptible to debasement.

I was in no physical condition to argue and Mandible had to leave.

He told me he didn't want to be late home for his dinner date as he had a real surprise in mind. That's why I call him a proper gentleman.

I wonder if he can get hold of the Federal Court video for me - so I can follow the music without suffering outrage, anger, embarrassment or serious injury.

Kingsleys Steak & Crabhouse

Chris Hickey and Mark Howard, a solicitor from Goulburn, recently concluded a line of bushfire burn cases and were in a mood to celebrate.

Over the year, Chris and I had substantially defeated the bookmaker - wagering only on rugby. Accordingly, we three repaired, along with Mark's fiancé, Melissa, to the Kingsleys Steak & Crabhouse. The restaurant is the furthest north on the wharf at 9 Cowper Wharf Road, just past Manta Ray and Otto's. The setting was lovely, with the Domain in the background and the marina just outside. It was a very brisk and busy Friday, two weeks before Christmas. Despite the busyness of the season, the service was attentive, although the meal itself was slow - but who was in a hurry?

After beer and a nibble of bread, we ordered.

Chris had salt and pepper calamari. This was wide strips of beautifully tender calamari with a crisp finish of salt, pepper and chilli.

I had *mussels marinere*. These were small, local black mussels, perfectly steamed and doused in a sauce of white wine, garlic, chilli, tomato and cream(!). They were absolutely delicious and the sauce slipped down very, very nicely.

Mark and Melissa skipped entrées because they are big on meat and sweets. No-one had the crab and it was a Goulburn meat-eaters' lunch. Chris had 150-day grain-fed rump which came, as ordered, rare, and served with an enormous baked potato. He munched his way through this dish very happily indeed.

Mark had a Riverina grass-fed T-bone and Melissa something similar. I had a Burrawang porterhouse from northern New South Wales, ordered rare to medium rare. This was the only flaw in an otherwise fabulous meal, because it turned up closer to medium than I like and therefore a bit dry.

The side orders were all superb. An iceberg lettuce, tomato and Spanish onion salad with a frothy, light Belgian-style mayonnaise was very tasty and a good complement to the meat.

Next, a small pot of mushrooms braised with garlic, which were lovely. Also, we succumbed to one serve of chips between the four of us.

Some Petaluma riesling and a Margaret River shiraz helped with all of that and then we embarked upon sweets.

The country folk went for sticky-date pudding, which they shared, and Chris and I each had the special of the day, which was sorbet of three fruits: mango, lemon and apricot. These were light and delicious and made armagnac seem very appropriate.

Not cheap, but wonderfully presented by very cheerful and pleasant staff in very nice surroundings.

Kingsleys Steak & Crabhouse

9 Cowper Wharf Road

Woolloomooloo

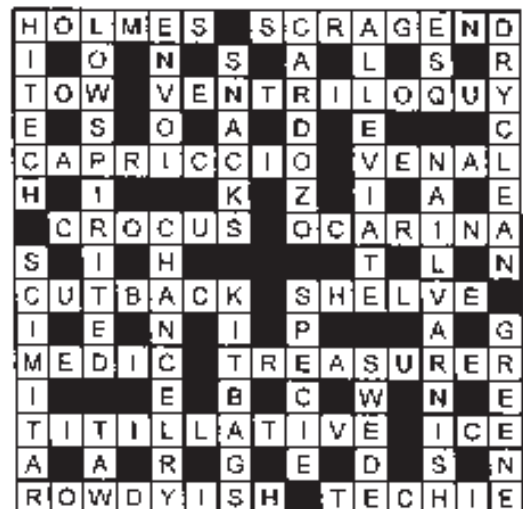
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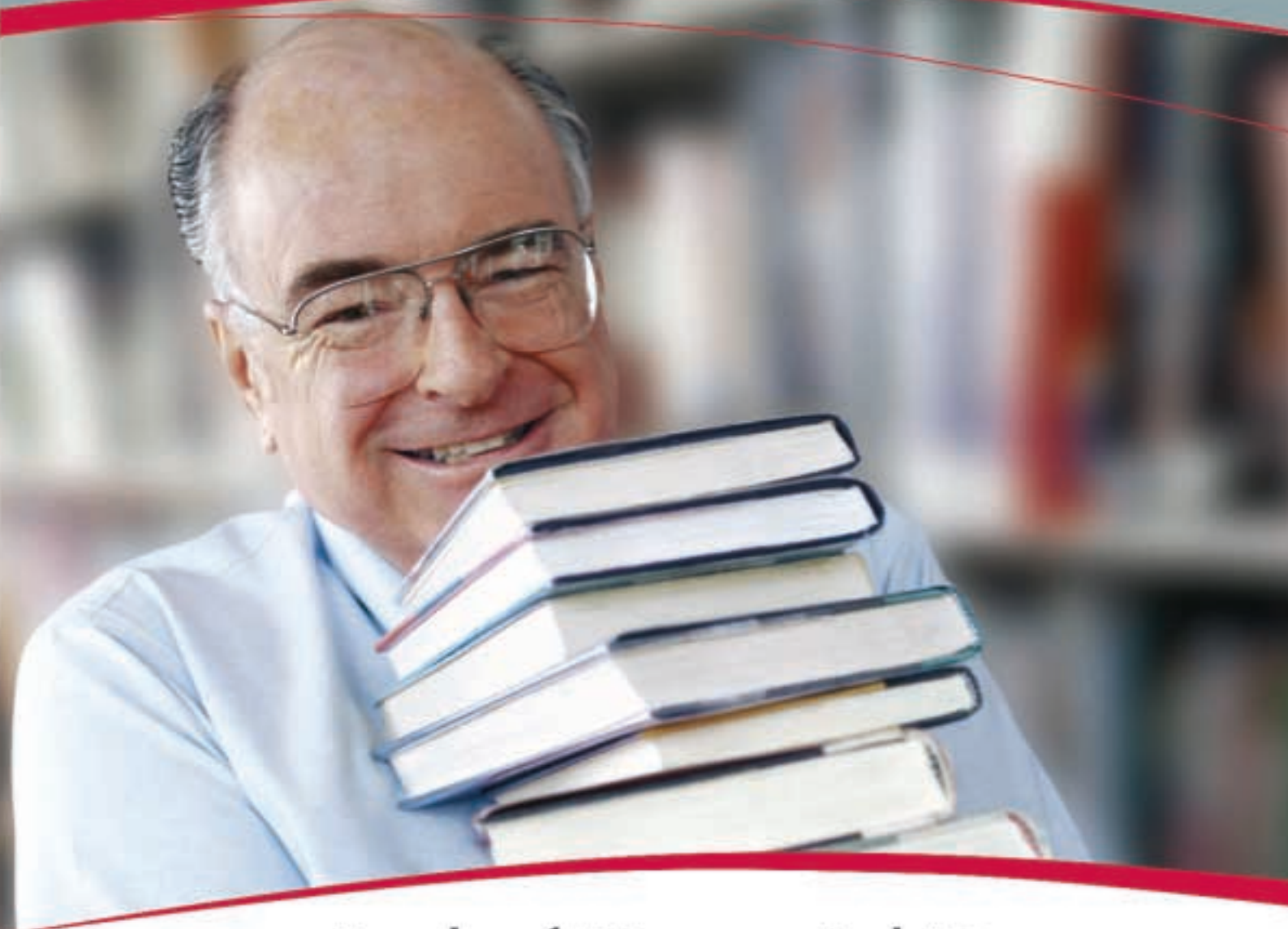
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John Coombs QC

19 December 2003





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