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Welcome to the new President

On 9 November 2001 the new Executive of the New South Wales Bar Council was elected. It comprises Walker S.C. as President, Harrison S.C. as Senior Vice President, Slattery Q.C. as Junior Vice President, Bathurst Q.C. as Treasurer and Gormly S.C. as Secretary.

This issue contains an interview by Rena Sofroniou with Ruth McColl S.C., the immediate past-president. The New South Wales Bar is grateful for her tireless efforts on behalf of the Bar over the last two difficult years.

On 9 November 2001, one day after his election, Walker S.C. spoke to *Bar News* about his presidency of the Bar.

Gleeson: Could you tell us what are some of the objectives of your presidency?

Walker: I would like the Bar Council to maintain its professionalism in questions of discipline and ethics. I would like the Bar generally to improve its professionalism with respect to the level of forensic skills and legal learning. If my presidency can assist in those two areas, without neglecting the continuous representative and political roles of the Bar Association, I will think it has not been a failure.

'...[we have] to start with a plain and precise statement of why the sensible use of litigation to determine entitlements to compensation for personal injury is a better choice for the community...'

Gleeson: What damage has the Bar suffered from bankrupt barristers; how can it be remedied and how quickly?

Walker: There has been a lot of damage of a general kind. It is difficult to measure it but easy to appreciate its existence. The kind of social disapproval expressed both privately and publicly is, ironically, a back-handed compliment, given the expectations it implies people have of the Bar. Unfortunately, it makes the damage more powerful to contemplate. Whether the damage can be remedied is a real question to ask, not merely how it can be remedied. The reputation of professional groups like the Bar is much more readily spoiled than enhanced. In the eyes of some people, the damage is irremediable. We must try as best we can. The first step is to be very clear and confident in the values and standards which we say are relevant to the Bar. The second step is to listen to people, both within and outside the profession, who may disagree with the way in which we articulate our standards and values. I do not think the remedy will be quick. It will be measured in years, but the process has already started and I believe that the 2001 Bar Council has commenced in the right way.

Gleeson: Could you explain why the scheme announced for continuing professional development is necessary; and what you would say to those who have doubts about the scheme, including those barristers, whether long standing, or working in heavily specialised areas, or struggling in diminishing work areas, who see that the scheme has no benefit for them?

Walker: I do believe that we need to increase the substance of our conventional description of each other as 'our learned friends' and to do so in a way which uses and enhances the collegiality suggested by the same expression. As the doctrinal part of statutes and common law becomes more copious, and new areas of law multiply, the important intellectual structures involved in our system of law become more difficult to keep under close practical contact. At the same time, the expectations upon us as barristers, particularly but not only at the appellate level, as reasonably held by judges and clients, are that barristers will continue to present arguments founded on sound bases in principle. I personally believe that human nature, professional attention and the way in which the market for legal services works, are very strong influences towards specialisation which need no further encouragement. Continuing professional development is necessary so that specialisation does not fragment the Bar's intellectual capital. There is also no doubt that important parts of professional life apart from legal development must now be the focus of explicit mutual teaching and learning. Risk management is critical as insurance premiums increase. Risk management is also critical if we are to consider statutory limitations on liability. Practice management is vital if we are to avoid other forms of financial disarray for individuals. The cliché is that as one door closes at the Bar another one or two doors open. This is too comfortable a cliché. There is no doubt that the door is closing on certain forms of personal injury litigation. This calls for a more concerted effort to polish up and possibly change the skills and knowledge of competent practitioners than ever thought necessary before.

Gleeson: Do you see it as important that the Bar maintain its role in disciplinary matters?

Walker: I think it is vital that the Bar maintain the extent of its present role under Part 10 of the *Legal Professional Act 1987*. It is the essence of any profession, particularly the legal profession, that it take responsibility not merely to react to, but to positively investigate, alleged misconduct. It is quite wrong for a profession to claim a noble status but to leave to others outside the profession the task of bringing to book those who have failed to live up to their obligations.

Gleeson: What can be done to arrest the decline of the personal injuries bar?

Walker: I think this is the most difficult political task for the new Bar Council. I believe that concern about it at the Bar generally was reflected in recent voting for Bar Councillors. Whether this is true or not, or however strong the influence was, the sheer numbers of those affected at the Bar, and more importantly the injured persons, means that it is a matter which we have to address. There is no quick fix. I believe that the political climate is very adverse. It may be that a counter-movement against what are wrongly called reforms has to start with a plain and precise statement of why the sensible use of litigation to determine entitlements to compensation for personal injury is a better choice for the community than what both major parties have decided.

Gleeson: What are some of the other matters which will inform your presidency?

Walker: The issues which I expect to arise at a political level go beyond New South Wales and I expect to be returning to the questions raised by the so-called national profession. This is especially so given the recent call by the Commonwealth Attorney-General for more uniformity across Australia in discipline and regulatory matters. Those questions do not have simple answers.

On another point, the seriousness and enthusiasm of chambers outside the City of Sydney are palpable when you visit them, let alone when you appear against the individual barristers from those chambers. I think if we could reproduce the collegiality

of those chambers in the Bar as a whole of which they are such an important part, the Bar and the community served by us would be better off.

Finally, I had pupils reading with me from 1985 – 1993. They and their colleagues and my juniors since then have persuaded me of two things. First, that I was lucky to come to the Bar before they did because they are so good. Second, there is more reason to believe that the golden age of the Bar is ahead of us, not behind us, although of course one thing I've learnt from being involved with the Bar Association is that there never was a true golden age.

Readers will note that this issue contains a series of articles with a focus on regional and security issues.

Michael Kirby writes on how our legal system should respond to the events of September 11. Nicholas Cowdrey writes on the role of an international criminal court (as opposed to war) in dealing with terrorists. James Renwick writes on the legal rules, in existence and being introduced, governing the intelligence services in Australia. Justin Young writes on the new East Timor Constitution being drafted. Sarah Pritchard writes on the issues raised by the recent Tampa decisions.

Australia's recent treatment of asylum seekers is a matter which has raised great concern among members of the community. It is far from obvious to many that the policy of the previous government (which largely had bipartisan support) provides a solution that is humane, sustainable or consistent with Australia's international obligations and long term interests. This is an issue which has not, to date, greatly activated the NSW Bar Association, although individual members may have made contributions to public debate on the topic. It cries out for more attention. Contributions from members on this or any other topics are as always greatly welcomed.

We are also fortunate to be able to reproduce the Sir Maurice Byers lecture given, this year by McHugh J.

Finally, there is the welcome return of Bullfry Q.C.. Our thanks as always to Poulos Q.C. for his drawings of Bullfry Q.C.

Justin Gleeson S.C.

Reality training

Dear Sir,

Special thanks to Bryan Pape, Rena Sofroniou and Paul Daley for their contributions to the Winter *Bar News* 2001.

There used to be a form of reality training for budding lawyers. It was called 'Articles of Clerkship'. Even 'bad' articles could, and it was not really a paradox, provide very pertinent reality training.

There has been for many years a great shortage of junior assistants. This seems to have made ordinary practice so tight that the availability of pro bono services have been curtailed at the level where people need them most - the solicitor's office.

Articles of Clerkship may not suit these times but a form of internship for law students might. The first 500 hours might be unpaid but the next, say, 1500 might be paid at reasonable junior rates. The maximum number of hours per week might be limited to 15 during any semester. UTS seems well set up to introduce such a system. Detailed safeguards would be necessary. However, it seems likely that such a system would strongly reinforce problem based learning techniques used in the Law Schools.

The fact that only a few hundred might benefit does not seem to be reason to refuse them the benefits of such a system. The reasons originally given for abolishing Articles did not seem to many of us very appealing. Is it time for another look at a modern system of workplace legal training?

David Nelson

South African Judiciary

Dear Sir,

The Hon. Justice Ipp's otherwise erudite, well structured, and commendable address entitled 'Enduring values and change' reproduced in the *Bar News* Winter 2001 edition, requires qualification and response to his observations about the behaviour, in trials of a political nature, of the South African Supreme Court judiciary in the worst periods of the apartheid regime.

His Honour's statement that appearances before judges by barristers for the defence in political trials involving terrorism and sabotage and related offences was 'really unpleasant,' and that the judges who presided over these trials, having been hand picked, 'would be extraordinarily hostile in every respect throughout the trial to counsel for the defendants'(p.40), does not accord with my experience when I appeared during the 1970s and again in the late 1980s for the accused in political trials, and for litigants in civil proceedings against cabinet ministers or organs of state.

His Honour's observation that 'practise at the Bar breeds independence of mind and attitude' and that 'subconsciously, barristers are trained to think for themselves, to be sceptical and critical, not to owe overriding allegiance to an institution or political party, and to resent and combat injustice' (p.39), although trite, deserves emphasis. All the judicial appointments to the Supreme Court Bench during the apartheid era were nominated by the minister of justice with the approval of the Cabinet and were chosen, with one exception in the case of an appointment of a particular chief justice with an academic legal background, from practising members of the various Bars. Judges were, in the main, from Afrikaans, and to lesser extent, English and Jewish backgrounds.

Supreme Court judges Boshoff, Irvine Steyn, de Wet, Henning, Auret van Heerden and Thirion, provided the best evidence and argument for appointing judges from senior and experienced barristers practising as individuals at an independent Bar. All these judges were from conservative Afrikaans backgrounds. They were members of the Bar at the time of their appointments. They were Nationalist Party (government) supporters. Notwithstanding this, and because they had come from the Bar to the Bench, they tried the cases of the kind in question in which I appeared before them without fear, favour or bias in accordance with their oaths of office and without any 'allegiance to an institution or political party'. The same was true of justices John Milne, Raymond Leon and Andrew Wilson who, from time to time, tried cases of a political nature. They were English speaking and doubtless voted for the Progressive (anti-Government) Party.

The 18 month long '*SASO*' trial early in the 1970s is a good illustration of the point I am making. Instigated by the minister of justice to eradicate and silence the South African Students Organisation (SASO) and

the Black Consciousness movement, seventeen or more young students at Black, Indian and Coloured universities were indicted on charges under prevention of terrorism legislation with conspiracy to overthrow the South African Government by violent or forceable means and other lesser altemative charges. Conviction could carry the death penalty. It was a 'showcase' political trial. The accused were a highly intelligent, articulate and vocal group of young black activists. A cheerful lot who rather enjoyed the fact that they had been charged. They were treated as arch enemies of the state. They suffered the hardships of detention by the security police with great fortitude. They were taken from gaol to and from court each day handcuffed, accompanied by a siren-wailing police escort. To suggest that they had plotted to overthrow the government of the day by violent or forceable means was sheer nonsense. Nevertheless, the attorney-general and the security police earnestly set out to prove this.

'The purpose of this letter is to demonstrate from the South African apartheid experience the case for the appointment of judges from an independent Bar.'

Justice Boshoff might have been 'hand picked' to try the case. If he was, he turned out to be a bitter disappointment to those who chose him. He was reported to be a friend of, and golf-playing partner of, the then prime minister, John Vorster. The judge made short shrift of the attorney-general's attempt to salvage his hundred or more page defective indictment on a defence motion to quash it, with the result that several of the accused were released. He allowed a defence application for the discharge of some accused at the close of the prosecution case. His decision was discretionary and the application was vehemently opposed by the attorney-general.

It seemed to me that the judge had seen through the minister's political objectives in indicting the accused on capital charges. In the result, he acquitted all the accused on the main conspiracy charge. On their convictions for making public statements likely to further feelings of hostility between race groups at public rallies and in publications, no accused was sentenced to more than the mandatory five year gaol term.

As an attempt by the minister of justice to eradicate and silence SASO and the Black Consciousness movement, the support for which had been languishing before the trial, it was a total failure. The trial was attended daily by foreign observers; it got wide national and international publicity. The organisations went from strength to strength. Several of the accused now, deservedly, hold high office in the ANC and the democratic government institutions set up in the post-apartheid era. One of the accused, a handsome young Indian poet, caught the eye during the trial of the judge's associate, a young, attractive, Afrikaans lass and the daughter of another judge of the same court. During the trial they surreptitiously exchanged notes and love letters in violation of the taboos of the time. I later learnt that the young lovers who had met in such unique circumstances went on to marry each other in the UK. The *Prohibition of Mixed Marriages Act* would have prohibited this in South Africa!

In fairness, it must be said that there were reports of South African judges, two in particular, one English, one Afrikaans speaking, both from the Transvaal Bench, who behaved in political cases in the manner described in His Honour's address. They were, fortunately, the exception not the rule.

The purpose of this letter is to demonstrate from the South African apartheid experience the case for the appointment of judges from an independent Bar at which barristers practise individually. Those who advocate to the contrary should not be listened to. It is up to the politicians to ensure that the remuneration and entitlements of judges are sufficient to elevate to the Bench the Bar's most able and experienced members. Financial sacrifice, as sometimes occurs, should not be a prerequisite to a judicial appointment.

Roy Allaway Q.C.

DPP responds

Dear Sir,

I have read in the Winter 2001 edition of *Bar News* the 'Opinion' piece at pages 20-21 by The Hon. J A Nader RFD Q.C.. In my view the article presents an inaccurate and unfair picture of the exercise by my Office of its prosecutorial discretion.

Mr Nader has never raised concerns of this kind with me; nor was his article provided to me for comment before publication. No judge has raised such issues with me. (My address is not a state secret.) I have since discovered that Acting Judge Nader made some remarks in a similar vein from the Bench in April 2001, but the transcript has only just reached me. It appears that he has not taken the trouble to consider the statistics in my Office's official records or those of the Bureau of Crime Statistics and Research or even to request information from me or my senior officers.

When Mr Nader writes of my Office he writes of me, because pursuant to the *Director of Public Prosecutions Act 1986* the decision to prosecute or to discontinue a prosecution resides with me and I delegate that power to nominated officers in particular circumstances. I am an avid defender of the just rule of law and my officers and I are guided in our decision making by the law, the evidence and my Prosecution Policy and Guidelines (a document that is publicly and freely available). We disregard entirely any clamour in the media and the manoeuvring of politicians, especially 'vocal but uninformed criticism'. We are routinely required to withstand and sometimes to put aside even trenchant criticism.

The facts should be summarised briefly.

For some ten years or more we have been presented with increasing numbers of allegations of child sexual assault. This is not confined to New South Wales – it is a national and international phenomenon. There is reason to believe that the increase is not due to increased offending (which has always been present), but is due to increased reporting. We know that there is substance in these reports – they are not the result of some mass hysteria in a section of the population. We also know that some of the reports are false.

Such offences, by their very nature,

are often committed, reported and prosecuted in the circumstances described by Mr Nader under the heading 'The general circumstances'. Is he suggesting that in all (or even most) such cases I should take the place of the jury and administratively, peremptorily determine the proceedings – despite there having been committals for trial (which, in footnote 2, the author does not criticise: for reasons that, at least to me, are far from 'obvious')?

Many cases in this category are in fact discontinued by me and my delegates in the exercise of judgment in accordance with the Prosecution Policy and Guidelines. The majority of the cases that proceed are resolved by pleas of guilty and never get to juries. Presumably (according to Mr Nader) the finding of bills of indictment in those cases has been an abuse of process as well.

The identification of meaningful statistics about criminal proceedings is a difficult and complex exercise. Each case is unique and there are many variables to be taken into account, making comparisons difficult. It is simplistic and may be misleading to say that 'Most of these trials result in acquittals by juries'. In fact, the conviction rate in child sexual assault (CSA) cases that proceed to verdict in NSW is slightly above the general conviction rate for all trials. By way of example, for the year 1999-2000 the conviction rate in all trials that proceeded to verdict was 43.7 per cent (consistently with other years). The rate of conviction in CSA trials that year was six per cent higher than in non-CSA trials.

'We disregard entirely any clamour in the media and the manoeuvring of politicians, especially 'vocal but uninformed criticism'.

Some appeals from convictions are successful – usually because the judges have been found to have erred in the admission of evidence or in their directions to juries. (The author is included in such statistics, on at least one occasion for not having sufficiently warned the jury of the dangers of convicting. And I am not aware of any case in which Acting Judge Nader has taken it upon himself to stay any such proceedings. In the case in April 2001 in which he made public remarks, the charges were not withdrawn from the jury at the end of the Crown case, nor was a 'Prasad' direction given. The trial proceeded its full length and the jury's verdict was taken.) Judges are required to give warnings to juries about acting upon various categories of evidence in all these cases, but juries still convict.

There are well established procedures in my Office for dealing with victims, in accordance with the Charter of Victims Rights and other instruments and guidelines in place (and too numerous to describe here). Despite our best endeavours, some victims do become emotionally distressed, whether or not there is an acquittal and regardless of their preparation for the trial. That experience is not confined to child sexual assault cases. My officers also suffer in these circumstances. Throughout the proceedings, my officers provide explanation and support in an appropriate fashion and we have specialist Witness Assistance Service officers on hand. (Why does Mr Nader assume that such measures are not taken?)

My Prosecution Policy 5 lays down the tests to be applied when deciding whether or not a prosecution will be commenced or continued. My officers and I follow that Policy. The fundamental question is whether or not there is a reasonable prospect of conviction by a reasonable jury properly instructed as to the law. That question is addressed in every case we prosecute, based on the available admissible evidence and the law. Naturally, in every case the answer requires the making of a judgment on the basis of what is known at the time and that judgment requires, amongst other things, that the admissible evidence available be considered in the light of the probable course of the trial and the warnings that will be given by the judge.

Mr Nader's final attack on my independence cannot pass unchallenged. I am constantly subject to 'vocal but uninformed criticism' from many quarters (now, apparently, also from Mr Nader); but in my nearly seven years in office that has never influenced my decisions one whit. He says that he 'raise[s] for consideration whether there is any connection between' what he suggests may be a policy decision to prosecute almost every case (a 'flood') of child sexual assault, regardless of the prospects of conviction, and the publicity given to unsubstantiated allegations of official protection of paedophiles. I resent and reject that suggestion. There has never been such a policy decision. Prosecution decisions have not been and are not in any way influenced by publicity of any kind.

My senior lawyers, Crown Prosecutors, the Deputy Directors and I (all but the senior lawyers being members of the NSW Bar Association) do not conduct ourselves in the way suggested by Mr Nader and we are offended by what he has written.

Nicholas Cowdery Q.C.
Director of Public Prosecutions

Bar Council 2002

Bar Council 2002: Back row, left to right: Dominic Toomey, Michael McHugh, Michael Elkaim, Justin Gleeson S.C., Alison Stenmark, Hayden Kelly, Bernie Coles Q.C., Stuart Torrington, Larry King S.C., John Fernon
Front row, left to right: Kate Traill, Anna Katzmann S.C., Philip Selth, Tom Bathurst Q.C., Ian Harrison S.C., Bret Walker S.C., Michael Slattery Q.C., Jeremy Gormly S.C., Rena Sofroniou, Chrissa Loukas.

Office holders

Office holders (left to right): Philip Selth (Executive Director), Tom Bathurst Q.C. (Treasurer), Ian Harrison S.C. (Senior Vice President), Bret Walker S.C. (President), Michael Slattery Q.C. (Junior Vice President), Jeremy Gormly S.C. (Secretary).

Australian law after September 11

The Hon Justice Michael Kirby AC CMG

* Adapted from the opening plenary address delivered to the Australian Legal Convention, Canberra, 12 October 2001. The full text with footnotes appears in the *Australian Bar Review*.

On the morning of September 11, 2001 four civilian aircraft were hijacked in the United States of America. Australians watching late night television were suddenly confronted with terrifying events. Two of the hijacked planes were shown flying directly into the twin towers of the World Trade Center in New York. Another, that had left Reagan National Airport in Washington, crashed into a section of the Pentagon. The fourth plunged into a field in Pittsburgh.

The pilot of the fourth aircraft, who had contacted his family on his mobile phone, had learnt of the fate of the other three. He indicated that he and some passengers, after saying quietly the Lord's Prayer, were going to try to regain control over their doomed aircraft. Other passengers telephoned their loved ones to ask what they should do or to say goodbye. So did unfortunate victims in the buildings that were the targets of the hijacked planes, soon a crumpled mass of steel and furnace-hot debris.

'Not a year of the century was free from terrorism'

In the aftermath of these events, that are etched on the memories of everyone who lived through them, the sequels are just as frightening. The deaths of the brave New York firemen who rushed into the twin towers even as they were about to collapse. The devastating blow to the global economy. The partial shrinkage of the world civil aviation market, as passengers proved too frightened to travel. The 'global alliance against terrorism' that Australia quickly joined. Once again, our service men and women were seen farewelling relatives as they sailed off to war; but this time against a mainly invisible enemy. The scare caused by the reports of biological agents, especially anthrax, thought to be the new weapon of terror. The fear that parts of the decaying nuclear arsenal of the old Soviet Union would fall into the wrong hands.

Suddenly, the world, in its millennial year, seemed a much more dangerous place, less full of hope. A year that had begun in Australia with fireworks over Sydney Harbour in the warm afterglow of the Olympics, and in which Australians celebrated the centenary of their Constitution, now seemed a time of pessimism and danger.

The High Court of Australia sat as scheduled on the day after the attack on America. The case was called. The argument ensued as if nothing had changed. In courtrooms and lawyers' offices throughout the nation the business of the law went on. It still does. In a sense this demonstrates once again the strength and continuity of our institutions.

In the United States, Australia and elsewhere new laws were proposed to meet the threats of terrorism. It was as if we were in a new age when the innocence of our past liberties had disappeared in the wreckage of terror and fear. But need it be so? How should we react to this terror? What, if anything, do lawyers have to add to the debates on these questions?

A century of terrorism

The last century - during which our Constitution came into force and matured - was a century of terrorism. It was not always called that. Yet from the early days - from the anarchists and communists of the turn of 1901, that was the reality.

The Great War began with an act of terrorism in 1914. The reality struck home within the British Isles in the Easter Rebellion in Dublin in 1916. Not a year of the century was free from terrorism. Mahatma Gandhi deployed a very skillful combination of peaceful resistance, sporadic violence and political showmanship ultimately to lead India, the jewel in the Crown, out of British dominion. Mohammed Ali Jinnah did the same with Pakistan. Nelson Mandela carried forward, over many decades (most of them in prison on Robben Island) his leadership of the African National Congress, modelled on that of India. For decades the ANC was called a 'terrorist' organisation. What did these three leaders have in common? All were lawyers. All were gifted communicators.

Other 'terrorist' movements were led by people who refined their skills on the battlefield - Mao Tse-tung, General Giap, Ho Chi Minh, Jomo Kenyatta, Colonel Boumedienne, Colonel Nasser. All around the world, as the old European empires crumbled, terrorists struck at their quarry. They did so against the autocratic Soviet and Nazi empires and were repaid with fearsome reprisals. They did so against the relatively benign British empire in Palestine, Kenya, Malaya, Aden, Cyprus and elsewhere. They attacked the faded glories of France in Algeria and Vietnam. The new empires that took the place of the old were themselves attacked, as in East Timor, West Irian, Chechnya, Kosovo. Terrorists mounted their separatist campaigns in Northern Ireland and Quebec. Our own region has not been spared. The successive coups in Fiji involved unconstitutional and violent means. Bougainville, the Solomons and East Timor were uncomfortably close.

Back in 1975, it was within living memory of those gathering at the last Australian Legal Convention in Canberra to recall the Cyprus campaign of General Grivas. He was a commander of no more than 250 EOKA terrorists with extreme nationalist sympathies. Those few ultimately drove 28,000 British troops from the island by destroying their political capability to wage war. The same was the fate of the French in Algeria. The same has not proved true of Northern Ireland. Yet whereas the '*colons*' constituted only 2 per cent of the population in Algeria, the overwhelming majority of the Muslims in that country had a common interest in forcing their increasingly desperate and violent French rulers to leave. Eventually they succeeded. In Northern Ireland, there always were, and still are, substantial numbers in both of the divided communities who found continuing connection with the United Kingdom acceptable and terrorism unacceptable.

Why did the Red Brigades in Italy and the Baader-Meinhof faction in Germany fail to undermine liberal democracies when other terrorist groups succeed? Are there any lessons for the law in the way different societies have tackled terrorism? Are there lessons for us in Australia as we properly address our own security after September 11?

The story of Uruguay is particularly instructive. Before 1974, it was one of the few longstanding, stable constitutional democracies of South America. It had adopted a new and stronger constitution in 1967. This document incorporated rule of law and human rights principles that were impeccable. But then Uruguay suffered a serious economic downturn that threatened its welfare laws. On top of this it had to grapple with the challenge of a small determined band of terrorists known as the *Tupamaros*.

The *Tupamaros* resorted to indiscriminate acts of violence and cruelty that shook Uruguayan society. The citizens, and especially the military, began to look around them. Coups had occurred in Brazil in 1964, in the Dominican Republic in 1965, in Chile in 1973. In Uruguay, in 1974, the military, police and their supporters struck.

After the coup, one by one, the constitutional guarantees were dismantled. More than 5,000 civilians in a country of fewer than three million inhabitants were incarcerated for very long prison terms for having committed political offences. Other detainees were kept incommunicado. *Habeas corpus* was gradually withdrawn. Immunity was granted to officials against an ever broader range of illegal acts. The country that had been known as the 'Switzerland of Latin America'[4] fell into a period of escalating lawlessness. At first, the strong tactics had much public support out of fear of the *Tupamaros*. But increasingly unaccountable power bred oppression. True, the *Tupamaros* were defeated. But it took fourteen years and enormous struggle to return Uruguay to constitutionalism. Even then, there had to be amnesties for the military, police and other officials. And a deep scar was left on the body politic.

'...those societies that have succeeded best against terrorism have refused to play into the terrorists' hands.'

Australia has had nothing like the threats of terrorism in Cyprus, Algeria, Northern Ireland or Uruguay. Naturally, everyone wants to keep it that way. It is true that at the Commonwealth Heads of Government Conference in Sydney in February 1978 a bomb exploded and three people were killed. This led to what one analyst called '[a] synthetic panic which gripped the government (and was exploited by the media)'. Leading officials 'accepted without question the assumption that there was a real and present [terrorist] threat in Australia'.

That bombing led to inquiries and legislation. Justice Hope, the Royal Commissioner, found that there was little evidence that Australia's security organisations had the qualities of mind necessary for what he called the 'skilled and subtle task' of intelligence assessment. This was unsurprising. Earlier inquiries into the special branch files of police in New South Wales and South Australia - the latter conducted by Justice Michael White - found ludicrous biases in the identification of the supposed threats to security. According to Justice White, all State Labor leaders automatically became the subjects of index cards as suspected 'subversives'. As he put it, 'Like the *Maginot Line* all defences against anticipated subversion, real or imagined, were built on one side'. This reflected, in the antipodes, the preoccupations of the Federal Bureau of Investigation in the United States where the ratio of files on left versus right-wing organisations was a hundred to one. The Police Commissioner of South Australia defined subversion as '… a deliberate attempt to weaken public confidence in the government'. Which is exactly what, in a constitutional democracy, Opposition parties are supposed to do, do all the time and will be doing in the current Australian general election with rare abandon.

So if we ask why did terrorism succeed in Cyprus and Algeria but had only limited success in Ulster and Quebec and failed abysmally in Italy, America (and to the extent that it has occurred) Australia, the answers are complex. But they can be found. The most important is that those societies that have succeeded best against terrorism have refused to play into the terrorists' hands. They have rejected the terrorist paradigm. As the Rand Corporation's analyst, Brian Jenkins has pointed out 'terrorists want a lot of people watching and a lot of people listening and not a lot of people dead'. They want publicity, the last thing that most perpetrators of non-political violence seek. They form a symbiotic relationship with media. They create media events. Kidnapping, hijacking and suicide bombs introduce elements of high tension, as does indiscriminate brutality.

Free societies must, do and will cover such events in their media - which is itself now particularly adapted to vivid images and to sites of death and suffering. But keeping such visual horror in perspective is an important clue to defeating terrorists at their game. So is keeping one's sense of balance and priority. So is analysing the reasons, that may lie behind some the acts of terror, to see if some of them reflect grievances that need to be addressed.

According to Justice Hope's review, between 1968 and 1977 1652 deaths could be attributed to international terrorism. Such losses, appalling though they are (and worse still when they are multiplied), pale into insignificance beside other global causes of death and suffering. The 20 million dead from HIV/AIDS. Dead to the general indifference of humanity. The millions dying, mostly in developing countries, from nicotine addiction and its consequences. From malaria. From lack of water and food. Millions dead in state-run wars. Millions in refugee camps. Anonymous dead and living. Few vivid images. Boring reality. No media interest. No news. Relatively little political appeal. Victims of compassion fatigue.

The countries that have done best against terrorism are those that have kept their priorities, retained a sense of proportion, questioned and addressed the causes of terrorism, and adhered steadfastly to constitutionalism and the rule of law.

Internal security

Exactly fifty years ago, the Australian Constitution received what was probably its most severe test in peacetime. The enemy then was viewed as a kind of global terrorist and widely hated. His ideas were subversive, methods threatening and goals alarming. I refer to the communists. Of course, the communists did not fly commercial aircraft into targets in crowded cities. But they did indoctrinate their young. They had many fanatical adherents. They divided the world. They were sometimes ruthless and murderous. They developed nuclear and biological weapons. They had a global network. They opposed our form of society.

Out of fear, governments around the world rushed to introduce legislation to increase powers of surveillance, restrictions on democracy and deprivations of civil rights. In South Africa, the *Suppression of Communism Act 1950* became, before long, the mainstay of the deteriorating legal regime that underpinned apartheid and brought forth Nelson Mandela and the ANC 'terrorists'. In Malaya, Singapore and elsewhere, the colonial authorities introduced the *Internal Security Acts* which is what the South African Act was later called. Sadly, many of those statutes

remain in place, post-independence, to oppress dissident opinion.

In the United States of America, the *Smith Act* was passed by the Congress to permit the criminal prosecution of members of the Communist Party for teaching and advocating the overthrow and destruction of the government. The law was challenged in the courts of the United States. The petitioners invoked the First Amendment guarantees of freedom of expression and assembly. But in 1950 in *Dennis v United States*, the Supreme Court, by majority, upheld the Smith Act. They held there was a 'sufficient danger to warrant the application of the statute … on the merits'.

Dissenting, Justice Black drew the line between overt acts designed to overthrow the government and punishing what people thought and wrote and said. Those things, he held, were beyond the power of Congress. Also dissenting, Justice Douglas acknowledged the 'popular appeal' of the legislation. But he pointed out that the Communist Party was of little consequence in America:

> Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or State which the communists could carry. Communism in the world scene is no bogeyman; but communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party.

History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States.

A few months after *Dennis* was decided, a similar challenge came before the High Court of Australia. There was no First Amendment. There was no established jurisprudence on guaranteed free expression and assembly. Most of the judges had had no political experience. Most of them were commercial lawyers whose professional lives had been spent wearing black robes and a strange head adornment. An Australian contingent was fighting communists in Korea. The federal government had a mandate for its law. Most Australians saw communists as the bogey-man - indeed their doctrine of world revolution and the dictatorship of proletariat was widely viewed as a kind of political terrorism.

Chief justice Latham, like his counterpart in the United States, upheld the validity of the Australian law. He quoted Cromwell's warning: 'Being comes before well-being'. He said that his opinion would be the same if the Parliament had legislated against Nazism or Fascism. But the rest of the Court rejected the law. Justice Dixon pointed out that:

> History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power … [T]he power to legislate for the protection of an existing form of government ought not to be … only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them in the form of government they defend.

So far as Dixon was concerned it was for the courts to ensure that suppression of freedoms could only be done within the law. The Constitution afforded ample powers to deal with overt acts of subversion. Responding to a hated political idea and propagation of that idea was not enough for validity of the law.

Given the chance to vote on the proposal to change the Constitution, the people of Australia, fifty years ago on September 22, 1951 refused. When the issues were explained, they rejected the enlargement of federal powers. History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States.

Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. We should not forget these lessons. In the United States, even in dark times, the lessons of *Dennis* and of *Korematsu* need to be remembered. Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately. If emergency powers are clearly required, it may be appropriate to subject them to a sunset clause – so that they expire when the clear and present danger passes. Always it is wise to keep our sense of reality and to remember our civic traditions, as the High Court Justices did in the *Communist Party Case* of 1951.

Denouement

When the United States Supreme Court assembled on October 1st, for the first time since September 11, 2001, the Chief Justice led everyone in the courtroom in a moment of silence in remembrance of the disasters in Virginia, New York and Pennsylvania. 'Our hearts go out to the families of the killed and injured', he said. Sitting at the Bar table was the Solicitor-General of the United States (sometimes called the 'tenth Justice') whose wife, Barbara Olsen, was a passenger in the plane that crashed into the Pentagon.

Our hearts too go out to all the American victims. To every victim of terror in every land. And to those who suffer needlessly in every way. But as lawyers, we can join in the words of Justice Sandra Day O'Connor of the United States court. Diverting from a function to launch a new law school building in New York, she visited the ruins of the World Trade Centre and said:

> We wish it were not necessary. We wish we could put the clock back. But to preserve liberty, we must preserve the rule of law.

In the course of the century of the Australian Commonwealth, we, the lawyers of Australia, have made many errors. We have sometimes laughed at and belittled citizens who, appearing for themselves, fumbled and could not reach justice. We have sometimes gone along with unjust laws and procedures. We have occasionally been instruments of discrimination and it is still there in our law books. We have not done enough for law reform or legal aid. We have not cared enough for justice. We have been just too busy to repair the wrongs that we saw. Yet at critical moments in our nation's story, lawyers have upheld the best values of our pluralist democracy. In the future, we must do so more wholeheartedly. To preserve liberty, we must preserve the rule of law. The rule of law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession. It is our continuing challenge after September 11, 2001.

Intelligence Services Act 2001

By James Renwick

James Renwick analyses recent legislative measures aimed at overseeing Australia's intelligence services.

The shocking events of 11 September 2001 in New York City and Washington DC have had many consequences, including for Australia. From an international law perspective, the events were treated by Australia and the United States of America as an 'armed attack' upon the latter within the meaning of the ANZUS Treaty.[1] Australia consequently acted on a request by the USA to meet 'the common danger'[2] by committing over 1500 members of our Navy, Army and Airforce to an unconventional and difficult military operation whose duration cannot be foreseen.

'National security is located at a point where law, politics, international relations, defence and, on occasion, individual freedoms intersect.'

The effects on domestic law may also be serious. Certainly, the imperative to detect and prevent future terrorist acts has led to many countries, including Australia, suggesting law reform[3]. It seems likely that such law reform proposals will awaken interest in an almost forgotten area of domestic law, namely, the topic of national security law.

National security is located at a point where law, politics, international relations, defence and, on occasion, individual freedoms intersect and where, therefore, difficult and sometimes controversial legal and policy choices must be made by parliaments, judges and policy-makers to protect the nation while preserving what is precious in its democratic life and that of its citizens.

While one can readily agree with Justice Kirby of the High Court of Australia when he recently wrote that: 'the countries that have done best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered steadfastly to constitutionalism',[4] the topic becomes harder when one turns to the detail.

Furthermore, as much of the practice in this area remains unknown, even to Parliament, national security requires a measure of trust in the executive government and its national security agencies. As trust is sparingly given and easily lost in this area, careful consideration needs to be given to what is known, for example, the legal basis, functions and powers, and accountability mechanisms for national security agencies.

This article first notes the significant proposal to give the Australian Security Intelligence Organisation (ASIO) new powers. The article also examines the terms of the *Intelligence Services Act 2001* (Cth) which came into force on 1 October 2001, and the components of the Australian intelligence community ('AIC').

Proposed new powers for ASIO

On 2 October 2001, the Commonwealth Attorney-General announced[5] that the Federal Government would:

- supplement the existing warranting regime under which the Australian Security Intelligence Organisation exercises special powers;
- create a new general offence of terrorism and an offence related to preparing for, or planning, terrorist acts; and
- amend the *Proceeds of Crime Act 1987* to allow terrorist property to be frozen and seized.[6]

As to the first matter, is proposed that:

> the Director-General of Security will be able to seek a warrant from a federal magistrate, or a legal member of the Administrative Appeals Tribunal, that would require a person to appear before a prescribed authority (such as a federal magistrate or a legal member of the Administrative Appeals Tribunal), to provide information or to produce documents or things. These reforms would allow ASIO, before a prescribed authority, to question people not themselves suspected of terrorist activity, but who may have information that may be relevant to ASIO's investigations into politically motivated violence. The legislation would also authorise the State or federal police, acting in conjunction with ASIO, to arrest a person and bring that person before the prescribed authority. Such action would only be authorised where the magistrate or tribunal member was satisfied it was necessary in order to protect the public from politically motivated violence.[7]

The Attorney notes that 'these are significant new powers, to deal with significant new threats'. He also says that 'stringent safeguards will be introduced in relation to the exercise of these powers.'[8] While it could be argued – and no doubt will be -that some these proposed powers would be no greater than those conferred on the NSW Crime Commission[9] or the National Crime Authority,[10] the terms of any Bill will be awaited with interest. In particular, it will be important to discover whether any Bill proposes that the person questioned is to be held incommunicado, even from his or her lawyer.

The Intelligence Services Act

The *Intelligence Services Act 2001* (Cth) ('the IS Act') and the *Intelligence Services (Consequential Amendments) Act 2001* (Cth) came into force on 1 October 2001. In summary, the IS Act:

- puts the Australian Secret Intelligence Service (ASIS) on a statutory footing for the first time, and
- sets out the functions of ASIS and the Defence Signals Directorate (DSD);
- provides immunities for officers of both organisations in respect of the proper conduct of their functions,
- provides rules to protect the privacy of Australian citizens,
- creates a parliamentary joint committee for ASIS and ASIO which will examine expenditure and administration of each agency,
- protects the identity of ASIS staff in the same manner as ASIO officers, and
- extends the oversight of each agency by the Inspector-General of Intelligence and Security (IGIS).

The Australian intelligence community

The AIC includes :

- ASIS
- ASIO
- the Office of National Assessments (ONA)
- DSD
- The Defence Intelligence Organisation (DIO)
- The Defence Imagery and Geospatial Organisation (DIGO)
- the Inspector-General of Intelligence and Security (IGIS)

ASIS

ASIS was established by, and was, until passage of the IS Act, maintained under the authority of, s61 of the Constitution. It was established in 1952. Its functions embrace 'The collection and distribution of secret foreign intelligence, associated counter-intelligence activities, and liaison with similar organisations'.[11]

ASIS has no para-military functions and does not employ force or lethal means in carrying out its tasks. ASIS is responsible to the Parliament through the minister for foreign affairs and, under the directive issued by the minister to the director-general of ASIS, it accepts guidance on targets and priorities issued from time to time by the Security Committee of Cabinet.

ASIS' operations were examined in 1995 by the *Commission of Inquiry into the Australian Secret Intelligence Service* (The Samuels Report). The Samuels Report concluded that it was appropriate for ASIS to be put on a legislative footing. One of the purposes of the IS Act was to achieve that aim.

ASIO

ASIO is Australia's domestic security intelligence organisation with responsibility for protecting Australia and its inhabitants from espionage, sabotage, political motivated violence, the promotion of communal violence, attacks on the Australian defence system or attacks of foreign interference. It is expressly not concerned with lawful dissent.

While originally established by executive order in 1949, it was continued in existence by the Australian Security Intelligence Organisation Acts of 1956 and 1979: the latter Act is discussed for example by the High Court in *Church of Scientology Inc. v Woodward* (1981) 154 CLR 25.

ASIO officers and agents other than the director-general have the protection of a criminal sanction if their identities are revealed publicly. There is a parliamentary joint committee which examines its administrations or finances although, unlike its US counterparts, not its operations.

ONA

The Office of National Assessments is established by the Act of that name in 1977. It is an independent body within the prime minister's portfolio with a function of assembling, collating and reporting on information relating to international matters that are of political, strategic or economic significance to Australia. It has an important role of tasking intelligence activities and assessing what is produced by the ONA or by the committees and processes it chairs and directs.

DSD

The DSD, whose functions are also set out in the IS Act, exists to obtain intelligence about the capabilities, intentions or activities or people or organisations outside Australia from foreign signals intelligence. It also ensures sensitive Australian electronic information systems are not susceptible to unauthorised access, compromise or disruption.

DIO

The DIO provides intelligence to inform defence and government policy planning and to support the Australian Defence Force. It assesses rather than collects intelligence.

DIGO

The Defence Imagery and Geospatial Organisation collects and analyses images of foreign and domestic subjects for various Commonwealth agencies and for the Australian Defence Force.

IGIS

Overseeing all of these organisations, which are not subject to oversight for example by the Commonwealth ombudsman, is the inspector-general of intelligence and security, set up by the Act of that name in 1986. He oversees and reviews the activities of the six agencies just mentioned. He may undertake an inquiry as a result of a reference from a responsible minister or may independently initiate inquiries provided the complainant is an Australian citizen or resident, or the complaint or matter of concern involves a possible breach of Australian law.

The IS Act

Section 6 of the IS Act sets out the functions of ASIS as, relevantly

1) The functions of ASIS are:

a) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and

b) to communicate, in accordance with the Government's requirements, such intelligence; and

c) to conduct counter-intelligence activities; and

e) to liaise with intelligence or security services, or other authorities, of other countries; and

f) to undertake such other activities as the responsible minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.

By s6(4) it is provided that in performing its functions 'ASIS must not plan for, or undertake, paramilitary activities or activities against the person or the use of weapons.'

Section 7 sets out the functions of DSD as follows:

7) The functions of DSD are:

a) to obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia in the form of electromagnetic energy, whether guided or unguided or both, or in the form of electrical, magnetic or acoustic energy, for the purposes of meeting the requirements of the Government, and in particular the requirements of the Defence Force, for such intelligence; and

b) to communicate, in accordance with the Government's requirements, such intelligence; and

c) to provide material, advice and other assistance to Commonwealth and State authorities on matters relating to the security and integrity of information that is processed, stored or communicated by electronic or similar means; and

d) to provide assistance to Commonwealth and State authorities in relation to cryptography and communications technologies.

Sections eight and nine of the Act set out important and desirable accountability mechanisms. First s8 requires the responsible minister (the foreign affairs minister for ASIS, the defence minister for DSD) to issue a written direction specifying when prior authorisation under s9 must be obtained from the minister. When that authorisation is sought, in every case the minister is required to be satisfied that the activities would be necessary for the proper performance of a function of the agency concerned, that there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for that proper performance and that there are satisfactory arrangements to ensure the nature and consequences of the acts done in reliance on the authorisation will be reasonable.

Section 11 sets out limits on what the agencies can do. Section 11(1) provides 'the functions of the agencies are to be performed only in the interest of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.'

It is expressly provided that the functions do not include police functions or otherwise enforcing the law, although that does nor prevent passing on intelligence otherwise properly obtained it is relevant to serious crime, to the appropriate law enforcement authority.

One of the most important provisions is s14. It states:

14 Liability for certain acts

1) A staff member or agent of an agency is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.

2) A person is not subject to any civil or criminal liability for any act done inside Australia if:

a) the act is preparatory to, in support of, or otherwise directly connected with, overseas activities of the agency concerned; and

b) the act taken together with an act, event, circumstance or result that took place, or was intended to take place, outside Australia, could amount to an offence; but in the absence of that other act, event, circumstance or result, would not amount to an offence; and

c) the act is done in the proper performance of a function of the agency.

2A ...

2B The Inspector-General of Intelligence and Security may give a certificate in writing certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency.

2C In any proceedings, a certificate given under subsection (2B) is prima facie evidence of the facts certified...

The rationale for this provision was described in the explanatory memorandum of the Bill as:

> The purpose of the clause is to provide immunity in a limited range of circumstances [principally conspiracy laws] directly related to the proper performance by the agencies of their function. It does not provide a blanket immunity from Australian laws for all acts of the agencies. This limited immunity is necessary as certain Australian law, including State and Territory law, could impose liability on the agencies.

There are some analogies with this provision. So, the *Crimes Act* (Cth) provides for 'controlled operations' giving federal law enforcement officers immunity from State drug possession offences, when certain pre-conditions are met.[12] Further, the provision finds its counterpart in relation to the *Cyber Crime Act 2001* (Cth) division 476.5 which deals with computer related acts for example covertly intercepting e-mails or reading the hard drive of a computer.[13]

The Joint Select Committee on the Intelligence Services, which was the parliamentary committee considering the IS Bill, regarded s14 as the most controversial provision in the Bill. They were obviously concerned about the potential abuse of s14 and they successfully recommended both amendments to clause 14 to ensure that immunity can only be granted where an act is done in the proper performance of a function of the agency; and that protocols for the operation of both clause 14 and its Cyber Crime Bill counterpart be written and approved by the relevant ministers, and the attorney-general and then given to IGIS.

Generally, the Joint Select Committee approved of the Bill for the IS Act, thus continuing the bi-partisan approach by the major political parties in the national security area.

The IS Act provides for the establishment and operation of a Parliamentary Joint Committee on ASIO and ASIS (PJCAA). The PJCAA's main function is to review the administration and expenditure of ASIO and ASIS.[14] The

functions of the PJCAA do not include scrutiny of the agencies' activities or operations: that is a matter for IGIS. In this regard, the position differs from that pertaining in the United States.

It is perhaps significant that when the Bill for the IS Act was being debated, which was well before 11 September, its contents provoked little controversy. While this probably reflects the bi-partisan approach on this topic of the major political parties, it also suggests that the IS Act establishes an appropriate framework for ASIS and DSD.

In the opinion of the author, the IS Act properly implements key recommendations of the Samuels Inquiry. The legislative framework, particularly the IS Act and the IGIS Act contains appropriate safeguards to ensure that ASIS and DSD behave lawfully.

The AIC together with the Australian Defence Force and the Australian federal, State and Territory police, constitute Australia's defences against terrorism. The events of 11 September will continue to provoke debate as to how these institutions, and the laws they operate under or administer, might be changed to better protect the nation and its citizens.

1 Security Treaty between Australia, New Zealand and the United States of America [ANZUS], made at San Francisco, 1 September 1951, Australian Treaty Series 1952 No. 2.

2 Ibid., Article IV.

3 The term 'terrorism' was apparently first used in relation to 'The reign terror' of the French revolutionaries of 1793-4. Mathew Parris of The London *Times* wrote on 22/10/01 'Terrorist' might be thought a recent expression but goes back at least as far as 1795 when it was used in England to describe the Government of France unleashing 'the Terror' on its citizens..'

4 Law Council Of Australia; 32nd Australian Legal Convention Canberra, 11 October 2001; *Australian Law - After September 11, 2001;* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm

5 Press release at see also http://www.ag.gov.au/ministers/attorney-general/transcripts/asiopowers.html

6 Ibid.

7 Ibid.

8 Ibid.

9 *NSW Crime Commission Act* (NSW) s16.

10 NCA Act s28.

11 Samuels Report pp. 1-2.

12 Part 1AB.

13 Senate Legal and Constitutional Legislation Committee, Consideration of legislation referred, to the Committee Inquiry into the Provisions of the Cybercrime Bill 2001, August 2001

14 s29 of the IS Act.

Enduring law

By N R Cowdery Q.C., Council Member, Human Rights Institute President, International Association of Prosecutors

Nicholas Cowdrey argues the case for the alleged terrorists to be prosecuted in an International Criminal Court.

This was criminal conduct on a large scale and with a significant international dimension.

On 11 September 2001, attacks were made by individuals (some identified, some not) against property in the United States of America, against persons in the US and against aspects of the fabric of US society. Over 5,000 individuals from over 80 countries were killed.

This was criminal conduct on a large scale and with a significant international dimension.

These actions provoked understandable human responses including (as for many crimes) outrage and a desire for revenge. In response, the government of the US acted against its main suspect, his associates and the government of the country believed to be sheltering him. A 'war against terrorism' was declared (to be known first as Infinite Justice, then as Enduring Freedom). The US purported to exercise its right to individual or collective self-defence under customary international law and Article 51 of the United Nations Charter and set about building a coalition of nations under various agreements and relationships.

It should be noted, however, that Article 51 allows such measures against armed attack 'until the Security Council has taken measures necessary to maintain international peace and security'.

A few weeks later the UN and its Secretary General were awarded the 2001 Nobel Peace Prize. Kofi Annan wishes the UN to be the centre of a 'global coalition against terrorism'. A useful first step would be for the Security Council to act under Chapter Seven of the UN Charter - by taking such action as may be necessary to restore international peace and security and by establishing an international tribunal to try those identified as the surviving perpetrators of these crimes.

Although the attacks on 11 September had warlike features and consequences, they were criminal actions. A criminal law response is the most appropriate one and the mechanism exists for it to be made. Such a response enables the guilty to be identified, targeted and dealt with under the rule of law. The highly successful Lockerbie trial is an example of what can be achieved by such means. A warlike response is less discriminating and open to allegations of the pursuit of ulterior objectives, especially in the absence of UN Security Council direction. It allows those against whom the 'war' is waged to trade on the injustices that it will necessarily produce. It also introduces superfluous allegations against the principal wager of the war – in this case, the world's only superpower.

Domestically, members of the coalition that has been formed have introduced emergency measures to address the continuing threat of terrorism. Care must be taken to ensure that such measures are proportionate to the threat and that they do not extend beyond the term of any clear and present danger.

It is disturbing that the 'war' is being directed by a country that is so opposed to the establishment of the International Criminal Court. The ICC will be created and it will supersede the presently under-resourced tribunals at The Hague. It will have jurisdiction over crimes like these if countries otherwise having jurisdiction are unable or unwilling to try the offenders. It will assist in avoiding wars.

The Tampa crisis:

The Federal Court's consideration of the lawfulness of the Commonwealth's actions

By Sarah Pritchard

Background

On 26 August 2001, Captain Arne Rinnan, Master of the Norwegian container ship the *MV Tampa*, received a request from the Australian authorities to rescue a ship in distress. Captain Rinnan was guided to the sinking ship by the Australian Coast Guard. The *MV Tampa*, licensed to carry no more than 50 people and with a crew of 27 on board, rescued 433 people in international waters near Christmas Island. On 29 August, Captain Rinnan concluded that some of the rescuees required urgent medical treatment. When no assistance was forthcoming, he took the *MV Tampa* into Australian territorial waters about four nautical miles off Christmas Island. The Australian authorities subsequently declined to permit the rescuees to land on Christmas Island.

MV Tampa off Christmas Island. *Photo: Mike Bowers/Sydney Morning Herald*

The proceedings before North J

On 31 August 2001, the Victorian Council for Civil Liberties Incorporated and Mr Eric Vadarlis, a solicitor practising in Melbourne who desired to provide free legal advice to the rescuees on migration matters ('the applicants'), commenced proceedings in the Federal Court against, amongst others, the Minister for Immigration and Multicultural Affairs and the Commonwealth of Australia (collectively 'the Commonwealth'). Leave was also granted to Amnesty International Limited and the Human Rights and Equal Opportunities Commission ('HREOC') to intervene. Shortly after the case commenced to be heard at 11.00 am on Saturday, 1 September, the Solicitor-General for the Commonwealth read to the Court an announcement just made by the Prime Minister concerning an agreement with the governments of New Zealand and Nauru for the processing of the rescuees.

The arguments of the applicants

Before Justice North, the applicants argued that the provisions of the *Migration Act 1958* (Cth), especially ss189 and 245F(9), imposed a duty on the Commonwealth to detain the rescuees and at the same time to accord to them various rights under the Act, including the right to apply for protection visas as refugees. The applicants sought orders that the rescuees be brought ashore to the Australian mainland and that they be allowed to make applications for protection visas. In the alternative, the applicants contended that if the Migration Act did not apply, then the rescuees were detained without lawful authority. It followed that relief in the nature of *habeas corpus* should be available to compel the Commonwealth to release the rescuees from unlawful detention. Mr Vadarlis pursued several additional claims, arguing in particular that he had been prevented from communicating with the asylum seekers and that this amounted to an infringement of his implied constitutional freedom of communication

Mediation

After the conclusion of argument, North J referred the proceedings to mediation. At mediation it was agreed that the rescuees would be transferred from the *MV Tampa* to the *HMAS Manoora*, with no person being required to leave the *HMAS Manoora* until the determination of the proceedings before the trial judge or any appeal to the Full Federal Court. Following the agreement, the *HMAS Manoora* commenced the voyage towards Port Moresby.

The reasons of North J

In reasons handed down on 11 September 2001 (*Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* [2001] FCA 1297 (11 September 2001), North J rejected the applicants' arguments concerning the application of the Migration Act to the situation of the rescuees. He also rejected Mr Vadarlis' argument in relation to freedom of political communication, noting that the constitutional freedom could only be claimed for the benefit of Australian citizens and not aliens. In so far as Mr Vadarlis also rested this claim on his own freedom of political communication, North J accepted the

Commonwealth's submission that the freedom is not a right to require the Commonwealth to facilitate communication: *McClure v Australian Electoral Commission* (1999) 163 ALR 734 at 740-1.

North J accepted, however, that the rescuees were held in detention without lawful authority. Applying *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19, 63 and *Re Bolton & Another; Ex parte Beane* (1987) 162 CLR 514 at 528-9, North J rejected the distinction urged by the Commonwealth between partial and total restraint of freedom:

> It may be accepted that as far as the respondents were concerned the rescuees were free to go anywhere other than Australia and hence were only partially restrained. But the question here is whether that freedom is real or illusory. As Townley J said in Burton v Davies and General Accident Fire and Life Assurance Corporation Ltd [1953] StRQd 26 at 30: 'If I lock a person in a room with a window from which he may jump to the ground at the risk of life or limb, I cannot be heard to say that he was not imprisoned because he was free to leap from the window.'

North J also rejected the contention that the Court must view the opportunities for escape from custody against the background of the circumstances in which the custody arose, in particular that the custody of the rescuees was 'self-inflicted'. He stated: 'To describe the plight of the rescuees as self-inflicted is not a balanced view of the full circumstances of their situation.' Nor did North J accept the argument that that the rescuees were not detained because there were avenues of escape open to them:

> One of the means of escape was to leave with anybody who was prepared to take them from the *MV Tampa*. There is no evidence that there is any such person or body. None has so far come forward. The chances of any such offer being made is limited because the number of rescuees is so large. The nearest port was closed by the respondents to stop any local ships approaching. There was a limit on how long the rescuees could remain on board the *MV Tampa* as it could not accommodate them for long. They stayed on the deck under a tarpaulin and in five empty shipping containers. The suggested means of egress was not a real option. In the circumstances it is mere speculation.

Nor did North J accept that the Commonwealth could rely on the rescuees leaving on the *MV Tampa* as a means of escape. He noted that Captain Rinnan had come into territorial waters only in response to what he regarded as a medical emergency, that the *Tampa* was not equipped to accommodate such a large number of people, and that it was engaged in a high value commercial operation which had already been interrupted by events. His Honour also rejected the Commonwealth's suggestion that the rescuees could leave pursuant to the Nauru/NZ arrangements: 'In assessing whether there is a reasonable means of egress, a relevant matter is the knowledge of the rescuees of any such means. The presence of 45 SAS troops, armed and in combat fatigues, is likely to have led the rescuees to the conclusion that they were bound to do as they were told. Indeed one of the agreed facts is that the SAS troops control the movements of the rescuees on board the *MV Tampa*.' There was in reality a total restraint on the freedom of the rescuees:

> In my view the evidence of the respondents' actions in the week following 26 August demonstrate that they were committed to retaining control of the fate of the rescuees in all respects. The respondents directed where the *MV Tampa* was allowed to go and not to go. They procured the closing of the harbour so that the rescuees would be isolated. They did not allow communication with the rescuees. They did not consult with them about the arrangements being made for their physical relocation or future plans. After the arrangements were made the fact was announced to them, apparently not in their native language, but no effort was made to determine whether the rescuees desired to accept the arrangements. The respondents took to themselves the complete control over the bodies and destinies of the rescuees. The extent of the control is underscored by the fact that when the arrangements were made with Nauru, there had been no decision as to who was to process the asylum applications there or under what legal regime they were to be processed. Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained.

Asylum seekers arrive in Nauru. *Photo: Angela Wylie/Sydney Morning Herald*

North J also considered argument concerning the Commonwealth's power to remove the rescuees from Australian territorial waters pursuant to the Nauru/NZ arrangements. The Commonwealth did not rely on any statutory power to expel the rescuees, rather contended that

the expulsion was a valid exercise of prerogative power. North J concluded that the Migration Act contains comprehensive provisions concerning the removal of aliens (ss198-9), and was intended to regulate the whole area of removal of aliens. It left no room for the exercise of any prerogative power on the subject: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

The proceedings before the Full Court

The Commonwealth and ministers concerned appealed against North J's decision. On 12 September 2001, an application for an urgent hearing of the appeals was granted. The Full Court, comprising Black CJ and French and Beaumont JJ, sat until late the following day to hear submissions. The decision of the Full Court was announced on 17 September 2001, with its reasons published on 18 September: *Ruddock v Vadarlis* [2001] FCA 1329. The key issues on the appeal were (a) whether the executive power of the Commonwealth authorised and supported the expulsion of the rescuees and their detention for that purpose; and (b) if there was no such executive power, whether the rescuees were subject to a restraint attributable to the Commonwealth and amenable to *habeas corpus*. By a majority comprising Beaumont and French JJ, the Court determined that the appeals should be allowed and set aside the decision of North J.

'...the Federal Court proceedings have exposed a significant gap between the obligations of Australia under the Convention relating to the Status of Refugees nor the Protocol Relating to the Status of Refugees ('Refugees Convention') and the rights of asylum seekers...'

French J (Beaumont J agreeing)

French J (with whose reasons Beaumont J agreed) undertook an analysis of the source and general character of the executive power of the Commonwealth, the primary source of which is s61 of the Constitution, and which power is subject to abrogation, modification or regulation by laws of the Commonwealth. His Honour reviewed the various authorities concerning the requirement for clear intention to displace the power, noting that:

> The greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power. In such a case close scrutiny will be required of any contention that a statute, without express words to that effect, has displaced the operation of the executive power by virtue of 'covering the field' of the subject matter.

His Honour opined that the scope of the executive power conferred by s61 is to be measured by reference to Australia's status as a sovereign nation and by reference to the terms of the Constitution itself. His Honour identified (par 192) a range of legislative powers central to the expression of Australia's status and sovereignty as a nation, including the powers to make laws with respect to naturalisation and aliens (s51(xix)), immigration and emigration (s51(xxvii)) and the influx of criminals (s51(xxviii)):

> Australia's status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not. That power may also be linked to the foundation of the Constitution in popular sovereignty implied in the agreement of the 'people' of the pre-federation colonies 'to unite in one indissoluble federal Commonwealth'. It may be said that the people, through the structures of representative democracy for which the Constitution provides, including an Executive responsible to the Parliament, may determine who will or will not enter Australia. These powers may be exercised for good reasons or bad. That debate, however, is not one for this Court to enter.

French J concluded that absent statutory extinguishment or abridgement, the executive power of the Commonwealth would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion. He was not satisfied that the provisions of the Migration Act evinced 'a clear and unambiguous intention to deprive the Executive of the power to prevent entry into Australian territorial waters of a vessel carrying non-citizens apparently intending to land on Australian territory and the power to prevent such a vessel from proceeding further towards Australian territory and to prevent non-citizens on it from landing upon Australian territory.' The Act, by its creation of facultative provisions the object of which is to control entry, could not be taken as intending to deprive the Executive of the power necessary to do what it has done in this case. The steps taken in relation to the *MV Tampa* which had the purpose and effect of preventing the rescuees from entering the migration zone and arranging for their departure from Australian territorial waters were within the scope of executive power.

Nor did French J accept that on the facts of the case, the rescuees were subject to a restraint on liberty not authorised by law and amenable to *habeas corpus*. He acknowledged that to the extent that the Commonwealth prevented the rescuees from landing on Australian soil, it closed a possible avenue out of a situation in which they had been placed by other factors. However, the rescuees had no right to land, and the closure of the port and the orders made by the Harbour Master were done under statutory authority, the validity of which was not challenged. The actions of the Commonwealth were 'properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go'. Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth. The Nauru/NZ arrangements of themselves provided the only practical exit from the situation: 'Those arrangements did not constitute a restraint upon freedom attributable to the Commonwealth given the fact that the Captain of the *Tampa* would not sail out of Australia while the rescuees were on board. … [T]aken as a whole, there was no restraint on their liberty which could be attributed to the Commonwealth.'

Black CJ

The Chief Justice dissented, taking the view that whilst the power to expel people entering Australia illegally cannot be doubted, it is a power that derives only from laws made by the Parliament and not from prerogative powers otherwise exercisable by the executive government under s61. The Chief Justice concluded that since the Commonwealth had not relied

on the powers provided in the Migration Act, it had no power to detain those rescued from the *Tampa*.

Black CJ undertook a detailed review of judicial authority and scholarly commentary concerning the power or prerogative of the Crown to exclude aliens. It was, 'at best, doubtful that the asserted prerogative continues to exist at common law', although it was not necessary to express a concluded view. The Chief Justice then turned to consider whether, if there is any prerogative or other non-statutory executive power, it had been abrogated by the Parliament through the enactment of the Migration Act. Black CJ accepted the test as stated in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 ('*De Keyser's*'), namely whether the legislation has the same area of operation as the prerogative. After examining the relevant provisions of the Migration Act, as amended by the *Border Protection Legislation Amendment Act 1999* (Cth), he concluded that the Act showed a regime that is comprehensive in its coverage of powers of apprehension and detention:

> The conclusion to be drawn is that the Parliament intended that in the field of exclusion, entry and expulsion of aliens the Act should operate to the exclusion of any executive power derived otherwise than from powers conferred by the Parliament. This conclusion is all the more readily drawn having regard to what I have concluded about the nature and the uncertainty of the prerogative or executive power asserted on behalf of the Commonwealth.

Black CJ next considered the alternative arguments that no order for release should have been made. In relation to the Commonwealth's argument that any restraint to which the rescuees were subjected was not a total restraint of movement, that a partial restraint was to be distinguished from detention, and that in the circumstances there was no detention such as to provide a foundation for the issue of a writ of *habeas corpus*, he concluded that 'the question should not be, "Would the person be free if they went somewhere else?" rather "Is the person detained here and now?". If so, prima facie, the detention is unlawful unless legally justified.' It was important to focus not on the lack of any right of the rescued people to enter Australia, but on whether the rescued people were, in a real and practical sense, detained by the Commonwealth. The conclusion was inevitable that, viewed as a practical, realistic matter, the rescued people were unable to leave the ship that rescued them on the high seas when the wooden fishing boat in which they were travelling began to sink'. In relation to the Nauru/New Zealand arrangements, Black CJ considered that it was open to French J to find that: 'Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained.'

HMAS Manoora off Nauru. *Photo: Angela Wylie/Sydney Morning Herald*

Application for special leave to appeal to the High Court

On 29 October 2001, Hayne J granted an application for expedited hearing of Mr Vadarlis' application for special leave to appeal to the High Court from the decision of the Full Court. The special leave application has been set down for hearing on 14 December 2001.

Conclusions

It remains to be seen whether the High Court will grant special leave to appeal in order to consider the important questions raised by the *Tampa* proceedings; namely the scope of the executive power in preventing the entry of non-citizens into and effecting their exclusion from Australian territorial waters, and the availability of *habeas corpus* in the circumstances of the *Tampa* rescuees. It is premature to preempt the outcome of any consideration by the High Court of these matters. It can be said, however, that the Federal Court proceedings in relation to the rescuees on board the *MV Tampa* have exposed a significant gap between the obligations of Australia under the Convention relating to the Status of Refugees and the rights of asylum seekers recognised in and made enforceable through Australia's Migration Act. The proceedings have underlined the incapacity of persons within Australia's territorial waters to avail themselves of the obligations imposed upon Australia under the Refugees Convention outside the procedural framework set out in the Migration Act. The proceedings again reveal the limited incorporation by the Commonwealth Parliament of Australia's international obligations, and the lack of justiciability of international norms in Australian courts. International human rights jurisprudence, in particular, as sought to be canvassed before the Full Court by HREOC, provides support for a conclusion that the rescuees were unlawfully detained on board the *Tampa* and should have been provided with assistance in making applications for refugee status. In *Amuur v France*[1] the issue of what constitutes detention contrary to article 5 of the European Convention on Human Rights ('European Convention')

arose in the context of the confinement of four Somali asylum seekers in the transit zone of Paris-Orly airport for some twenty days.[2] The European Court of Human Rights noted that whether a person has been deprived of his or her liberty contrary to article 5 involves considering criteria such as the type, duration, effects and manner of implementation of the measure in question.[3] In finding that the Somali asylum seekers had been deprived of their liberty in violation of article 5, the Court took note of various matters, including that the asylum seekers had been subjected to strict and constant police surveillance, and that they had been deprived of legal and social assistance. The Court was especially concerned that the applicants were denied, until 5 days prior to their deportation, assistance in relation to the completion of formalities relating to an application for refugee status.[4] The Court specifically rejected an argument that the asylum seekers could have removed themselves from the restrictive measures applied by the French Government by flying to Syria:

> The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4).[5] Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees. [6]

The European Court's analysis is consistent with the reasoning of North J and Black CJ in rejecting the Commonwealth's contention that the asylum seekers were not detained because they could escape pursuant to the Nauru/NZ arrangements. It is noteworthy that Syria, like Nauru, is not a party to the Refugees Convention. Amuur was most recently cited with approval by the UK High Court in *Saadi v Secretary of State for the Home Department*.[7] There, Collins J held the detention of four asylum seekers to be unlawful by reason of the operation of article 5 of the ECHR. His Honour cited with approval the decision in Amuur, stating that the European Court 'unsurprisingly decided that [the asylum seekers in Amuur] had been deprived of liberty and so fell within the protection of Article 5 and that the failure to allow access to legal or other advice for 15 days made the deprivation of liberty not compatible with Article 5.1.'

Other international standards arguably applicable to the situation of the asylum seekers on board the *Tampa* include the Refugees Convention itself, article 16(1) of which provides that a refugee shall have free access to the courts of law on the territory of all contracting States, as well as the United Nations High Commissioner for Refugees' *Guidelines on applicable criteria and standards relating to the detention of asylum-seekers* (1999). These *Guidelines* define detention as confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave such limited area is to leave the territory. The Guidelines affirm that the only permissible grounds for detention are the four grounds provided for in EXCOMM Conclusion No.44 (XXXVII).[8] Importantly, the Guidelines confirm that detention cannot be used to inhibit a person's opportunity to apply for asylum (Guideline 5). Detention of asylum seekers for any other purpose, 'for example as part of a policy to defer future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country, and should be avoided for failure to comply with administrative requirements or breach of reception centre, refugee camp, or other institutional restrictions' (Guidelines 3).

Apart from questions concerning the status in Australian law of international norms of human rights and refugee law, the *Tampa* proceedings raise important questions concerning the role of third parties interested to act in the enforcement of law in the public interest for those otherwise unable to bring proceedings themselves. These questions arise not only in relation to the approach taken to the standing of Mr Vadarlis and the VCCL both by North J at first instance and Black CJ in the Full Court, as well as by Beaumont and French JJ in the Full Court.[9] There must be particular concern in relation to the treatment of the lawyers who appeared pro bono against the Commonwealth. These included senior counsel such as Gavan Griffith Q.C., Jack Fajgenbaum Q.C., Julian Burnside Q.C. and Chris Maxwell Q.C., all of whom were subjected to malicious media reports. The Commonwealth is currently seeking to recover costs against Mr Vadarlis and the VCCL, apparently disregarding the counsel of French J who said in the Full Court:

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they have served the rule of law and so the whole community.

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1 (1992) 22 EHRR 533.

2 Article 5 of the ECHR has its equivalent in article 9 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which treaty Australia is a party.

3 Para 42.

4 Para 45.

5 Protocol No 4 to the ECHR has its equivalent in article 12(2) of the ICCPR.

6 Para 48.

7 Unreported O/0074/01, CO/4559/00, CO/4553/00, 7 September 2001, Collins J.

8 These grounds are (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is bases; (iii) in cases where asylum-seekers have destroyed their travel/and or identity documents or used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; and (iv) to protect national security and public order.

9 It was held by both the trial judge and by the Full Court that the standing of the applicants extended only to seeking relief in the nature of *habeas corpus*.

A Constitution for East Timor

By Justin Young*

Justin Young reflects on the task facing East timor's Constituent Assembly in drafting a constitution for the world's newest nation within a 90 day timeframe.

'I do not know a lawyer in the world who would not jump at the chance to draft a Constitution', said Peter Galbraith from behind a desk in the United Nations headquarters in Dili. Galbraith, son of the renowned economist John Kenneth Galbraith, former United States Ambassador to Croatia during the Balkans war and to the United Nations during the bombing of Kosovo, is now United Nations Special Envoy in East Timor. He is also a lawyer.

Between trips to Canberra and Jakarta, where he has been negotiating amendments to the Timor Gap Treaty on behalf of the East Timorese to provide a sustainable income to build an independent East Timor, he has been overseeing the development of its Constitution. For Galbraith, 'overseeing' is probably too strong a word: 'This will be an East Timorese Constitution,' he says.

'Not long enough,' I thought again.'

At the time of writing, the Constituent Assembly in Dili, elected through the country's first free and fair elections in August, is embarked upon the task of drafting a Constitution for the people of East Timor.

It has ninety days to complete the task.

'Not long enough,' is the view often expressed by many involved in the East Timorese constitutional development process. It was the view of the East Timorese Jurists Association, the fledgling 'Law Society' of East Timor, when they decided to withdraw from a formal role in the United Nations' constitutional education process earlier this year. It was the view of many of the overworked (and somewhat shell-shocked) officers, many Australian, of the United Nations Department of Legal Affairs in Dili.

And it was my view, as I arrived in Dili last May, one of the constitutional trainers brought in by the United Nations in my capacity as a member of an Australian non-government organisation ('NGO'), one of the many offering support to the East Timorese people as they rebuild their nation.

I was there as a result of the promulgation on 30 March 2001 of a Directive entitled *On the establishment of constitutional commissions for East Timor*. This was, like all such Directives, promulgated by the Special Representative in East Timor of the Secretary-General of the United Nations, and head of the UN Transitional Administration in East Timor ('UNTAET'), Sergio Vieira de Mello ('the Administrator').

The Directive provides for the setting up, in each of the thirteen provinces of East Timor, of constitutional commissions to conduct public meetings in the period leading up to the elections. The purpose of these meetings was to educate, and elicit the views of, the East Timorese people about their constitutional options. The commissions were charged with the responsibility of reporting the views of the people of each province back to the Constituent Assembly, once elected. The Directive also contemplated some basic training of the constitutional commissioners before the public hearings took place.

The Directive recites UNTAET Regulation 2001/2 of 16 March 2001. This is entitled: *Election of a Constitutional Assembly to prepare a Constitution for an independent and democratic East Timor*. It is this document, also promulgated by the Administrator, that establishes the mechanism for the creation of an independent East Timor. It provides for the election of a body to be known as the Constituent Assembly whose role is to produce, within ninety days, a Constitution for East Timor that meets the approval of sixty of the eighty-eight members of the Assembly. It further confers power upon the Assembly to transform itself into the country's first parliament if the Constitution it creates so provides.

'Not long enough,' I thought again as I read the Directive sitting in a sparse room of the old Presidential Palace now occupied by UNTAET.

The Directive also recites UNTAET Regulation 1999/1 of 27 November 1999. This Regulation is entitled: *Authority of the Transitional Administration in East Timor*. This is the founding regulation of the transitional administration. It sets out the powers and responsibilities of UNTAET.

Finally, the Directive recites UN Security Council Resolution 1272 (1999) of 25 October 1999; the UN resolution that created the United Nations' mission in East Timor.

It was through the matrix of this and other legislation that East Timor has functioned for two years and will continue to function until UNTAET withdraws. This will be in May 2002 according to a recently announced agreement between UNTAET and the East Timorese leadership to the effect that, after expected presidential elections early next year, the executive authority currently exercised by UNTAET will be handed over to the new constitutional head of state.

Thus, an interesting constitutional situation pertains: the Constituent Assembly, established through democratic elections, is in the process of drafting a Constitution for East Timor that will, some time early next year, be adopted by a vote of that Assembly. That Constitution is likely to make provision for the election of a president by May next year. Of interest is that, notwithstanding the clear mandate given to the Constituent Assembly through the election process, the Assembly nevertheless remains the creature of an UNTAET Regulation and will remain that way until, by way of further promulgation in May next year and in conjunction with the swearing in of the new president, it declares itself defunct. The Constituent Assembly is a body, in effect, created and destroyed by the

* The views expressed in this article are the author's alone and not those of any organisation.

pen of one person, the Administrator.

I mused on this at the beginning of my stay. Dili remains a city of charred skeletal buildings, traumatised faces and crowds of refugees packed into Dili' s central market. Electricity and water supplies are unreliable. Shops are closed. People in the countryside, their houses burnt, had walked for days to come to Dili where there was some hope of work and safety. But Dili is also a place of UNTAET vehicles rushing around from one dusty building to another and well-dressed UN and NGO officials spending Australian or American dollars and speaking English. The night time vista of central Dili is of a tropical, humid place dominated by the brightly lit and air-conditioned UNTAET headquarters.

The contrast between the world of UNTAET and that of the local people is stark: it is no more obvious than in the presence near the UNTAET headquarters of a new underclass of street kids, dirty, cheeky, approaching passers-by, trying to sell them cigarettes and phone cards or to exchange money. These children are the creatures of a clash of cultures and the poverty of an oppressed and war-ravaged people.

'If they are given a Constitution which they do not own, they will ignore it.'

But the process goes on. The Constituent Assembly elections took place in August without incident. The worst fears of the people - that the Indonesian militia would return or that minority political parties disgruntled with the election process would cause bloodshed - proved unfounded. Fretilin, by far the biggest political force in East Timor, polled well but fell short of the sixty members it needed to push its constitutional model through. As a result, a genuine constitutional development process is currently under way. The Assembly has established various working groups, each to consider discrete aspects of the proposed Constitution.

In the meantime, the workings of government in East Timor continue. The Administrator continues to occupy his position of *de jure* absolute sovereign, promulgating regulations and ensuring East Timor functions on a day-to-day basis. His unfettered power is tempered by a National Council, a body of East Timorese luminaries appointed by the Administrator and with whom he consults. This is the body of which Xanana Gusmao, before he resigned, was part and of which Hose Ramos Horta is 'Foreign Minister.' This Council will cease to exist along with UNTAET's withdrawal.

East Timor's security concerns become smaller and smaller as each day passes. The soldiers of Australia and New Zealand (and, to a lesser extent, other countries) continue to patrol the border with Indonesia and other hot spots. The isolated skirmishes becoming fewer and farther between. The Australian contingent has plans to remain in East Timor until at least 2005, with an objective of promoting a secure environment in which the fledgling state can develop. Quite what mandate it will operate under after the UNTAET withdrawal is not clear.

What type of Constitution East Timor will adopt is an interesting question. Fretilin has had a draft in circulation for some time. It opens with the declaration:

> The Democratic Republic of East Timor is a democratic state, sovereign and independent, that is based upon the rule of law, the dignity of the human person and the will of the people.

Although these words are borrowed from the Portuguese Constitution, one cannot help but feel that they will linger long on the lips of the East Timorese, so long deprived of the sentiments they express.

The politics of the Constituent Assembly will play their part. The Australian Section of the International Commission of Jurists is working with interests in East Timor to create a practical workable constitutional model in an environment where the focus of the debate has been on the more general issues of human rights, democracy, the rule of law and the like. Although the full range of constitutional models is available to the Assembly, almost certainly a presidential system will be adopted. It is equally certain that Xanana Gusmao, now that he has stated he is willing to stand, will be East Timor's first president. He will receive the baton passed to him by the Administrator.

Not long enough? Peter Galbraith does not agree.

> It is for the East Timorese to decide. If they would like assistance, we will provide it. But it is their Constitution. Anyway, if they are given a Constitution which they do not own, they will ignore it and if their own Constitution falls short of the mark, they will find a way to make it work.

There are many different views on this subject. The Australian Constitution is a creature of many years' deliberation by people well versed in constitutional and governmental affairs and with a prosperous nation's resources at their command. Many are afraid that a solution for East Timor that is seen by some to be imposed from above and in such a short time frame is a recipe for future instability and chaos.

But all things depend on their contexts. The constitutional development process began at a time when Dili's buildings were still burning. A good number of the UNTAET officers now presiding over the constitutional development process first stepped ashore at Dili Harbour when the only security came out of the barrel of an INTERFET gun. When building a society has to start with putting out the smouldering embers of the society whose place it is taking, time is a commodity to be used sparingly.

The people of East Timor have already experienced instability and chaos far worse than anything that might arise out of defects in a Constitution. They have already endured years of foreign rule far less respectful of their interests than the legislation promulgated by the UNTAET Administrator.

And they have waited long enough for their independence.

Should New South Wales have a Bill of Rights?

Report of the Legislative Council Standing Committee on Law and Justice A NSW Bill of Rights: Report 17, October 2001

By Christopher O'Donnell

In October 2001 the Standing Committee on Law and Justice of the New South Wales Legislative Council released the report resulting from its inquiry into whether it is appropriate and in the public interest to enact a statutory NSW Bill of Rights and/or whether amendments should be made to the *Interpretation Act 1987* to require courts to take into account rights contained in international conventions. In a majority report, four members of the Committee found that it is not in the public interest for the NSW Government to enact a statutory Bill of Rights[1]. The dissenting committee member, The Hon. Peter Breen MLC, disagreed with this finding[2].

'The majority expressed fears that a Bill would see politically active judges make decisions with a substantial impact on the allocation of resources within the community.'

The Committee's terms of reference were wide-ranging in some respects. Importantly, however, the principal term was limited to the question of whether a *statutory* Bill, such as those found in New Zealand and the United Kingdom, should be enacted. The suitability of a *constitutionally* entrenched Bill such as the United States Bill of Rights or the Canadian Charter of Rights and Freedoms was not referred to the Committee. Nevertheless, the Committee considered arguments on the relative merits of the statutory and the constitutional models, as a number of submissions argued strongly that a statutory Bill provided insufficient protection. The majority report clearly shows that it found the constitutional model even less acceptable than the statutory model.

The choice between these opposing models raises the central question of where to place the balance between parliamentary supremacy and the power of judicial review. Some arguments about the effectiveness of limitation clauses in protecting the supremacy of Parliament, such as the Canadian 'reasonable limits' provision, were considered. But the narrow reference on the question of a proposed model pre-empted a full debate on the question in evidence and submissions before the Committee. Because of its finding on the principal term of reference – whether there should be a statutory Bill of Rights – the majority of the Committee did not make findings on the nine terms of reference dealing with specific aspects of a Bill.

The majority of the Committee found the most significant arguments in favour of a NSW statutory Bill of Rights to be:

- at present there are inadequate protections of human rights for the community, due to gaps in current legislation and the uncertainty of the common law;
- at present there is inadequate protection of minorities in society in the absence of a Bill;
- a Bill of Rights would have educative value in political debates, thereby developing greater understanding of human rights within the community;
- there is a risk of international isolation of the development of domestic law in the absence of a Bill of Rights; and
- a Bill of Rights can facilitate a constructive dialogue between the Judiciary and the parliament.

The majority found the most important arguments raised by opponents of a Bill to be:

- a Bill would increase the power of the courts at the expense of Parliament, undermining Parliamentary supremacy and leading to a politicisation of the Judiciary;
- a Bill would increase uncertainty in the law because rights are widely defined, requiring judicial interpretation to give them content;
- there is no consensus as to which rights should be protected;
- a Bill could lead to an increase in litigation and associated costs;
- a Bill could be used to intrude on the activities of private businesses and associations; and
- a focus on rights can lead to a lack of acceptance of responsibilities.

Despite acknowledging the existence of examples of the neglect of human rights of minority groups and individuals and agreeing that the common law is not a sufficient protection of individual rights in the absence of legislative action, the majority of the Committee did not support the solution proposed for the principal reason that[3]:

> A statutory Bill could lead to some improvement in human rights protections in some instances. However, the cost of this uncertain marginal improvement is a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system. The independence of the Judiciary and the supremacy of Parliament are the foundations of the current system; the Committee is particularly concerned at the change over time that a Bill would make to these respective roles. The Committee believes a Bill of Rights could undermine the legitimacy of both institutions.

A significant underpinning for this belief is the majority's fear that increasing the scope for judicial decision-making into an area of broadly defined rights would lead to an increasing politicisation of the unelected Judiciary and increase conflict, rather than facilitate dialogue, between the Judiciary and the legislature. The majority expressed fears that a Bill would see politically active judges make decisions with a substantial impact on the allocation

of resources within the community. This type of resource allocation is something the Judiciary are neither trained nor elected to undertake.

The majority also found that an inevitable consequence of the enactment of a Bill would be increasing uncertainty in the law for an extended period as a result of 'speculative litigation' based on the Bill, particularly in the criminal jurisdiction. The problem of what rights to include in a Bill troubled the majority. Should a Bill of Rights be confined to the fundamental human rights enumerated in the 1948 United Nations Declaration of Human Rights? Or should a Bill more comprehensively include the civil and political rights set out in the 1966 International Covenant on Civil and Political Rights (ICCPR) or the economic, social and cultural rights declared in the International Covenant on Economic, Social and Cultural Rights (ICESR) of the same year? The majority chose not to answer these fundamental questions, concluding that[4]:

> Inadequacies in the protection of human rights may exist in New South Wales but the Committee believes the Bill of Rights as a solution raises more problems than it resolves. It is preferable that Parliament become a more effective guardian of human rights rather than handing over this role.

'Two areas of particular concern to Breen were the lack of any effective existing provisions to ensure access to justice and the protection of minorities.'

A notable model for a 'minimalist' Bill with enhanced prospects of gaining community acceptance was proposed to the Committee by Professor George Williams of the University of New South Wales. Williams argued that a statutory Bill should initially only include those few rights for which there was widespread community support[5]. He suggested consolidating existing anti-discrimination legislation and other commonly accepted rights such as freedom of speech, freedom of association and the right to vote in a minimalist Bill. Rights affecting the criminal law, such as those in the ICCPR, could be deferred to ensure an initial Bill maximum support. Williams did not advocate the inclusion of economic, cultural and social rights in a Bill because of the difficulty of formulating these to avoid intruding into the role of elected governments in determining resource and policy issues. The majority's concerns about the impact of any Bill on the existing balance of power between the legislature and the Judiciary led it to reject even this minimalist and gradualist approach to enacting a Bill of Rights.

In his dissenting report Peter Breen MLC disagreed with the primary finding of the majority of the Committee that the public would not be served by a statutory Bill of Rights[6]. Two areas of particular concern to Breen were the lack of any effective existing provisions to ensure access to justice and the protection of minorities. He was also concerned about the level of protection from discrimination on the grounds of race. However, Breen's assertion that 'one right that the Australian Constitution does preserve (although hardly a 'human' right) is the right of state governments to pass racist laws'[7] is questionable in the light of the *Racial Discrimination Act 1975* (Cth) and the High Court's decisions in *Koowarta v Bjelke-Petersen*[8] and *Tasmanian Dams*[9]. Interestingly, Breen reports that the draft of the Australian Constitution prepared by Tasmania's Inglis Clark included twelve citizens' rights but that 'most of these rights had to be removed from the draft Constitution because they contradicted our racist factory and immigration laws, not to mention laws discriminating against Aboriginal people'[10].

Breen did not share the Committee majority's pessimism about the effect a Bill might have on the certainty of the law, the volume of litigation, the intrusion of judges into questions of resource allocation and tension between politicians and judges over their respective powers. His dissenting report includes some analysis of how the structure of a Bill of Rights might deal with these concerns[11]. Importantly, he notes that all of these concerns can be met by the inclusion of guidelines in a Bill of Rights requiring judges to refer back to Parliament any question of incompatibility between the objectives of the impugned legislation and its application in particular circumstances asserted to be contrary to rights enumerated in the Bill. In this way Parliament retains its primacy, but the ante is upped on the question of protecting rights.

The Committee referred to a number of overseas models where the potential conflict between judicial review and parliamentary supremacy has been resolved in favour of Parliament. The Canadian Charter allows the legislature, by express declaration in a statute, to override rights enshrined in the Charter. The extent of any override is confined, however, by the 'reasonable limits' clause, which guarantees the rights and freedoms set out in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'[12]. There has been considerable judicial discussion of what constitutes 'reasonable limits' in the Canadian courts.

Another interesting compromise on this issue was achieved in the United Kingdom on 2 October 2000, when the British *Human Rights Act* came into effect. The Act was introduced by the Blair Government in 1997 for the purpose of incorporating into British domestic law the major rights and freedoms set out in the European Convention on Human Rights and Fundamental Freedoms (ECHR). The UK Government's acceptance of the compulsory jurisdiction of the European Court of Human Rights in 1966 had led to a string of embarrassing findings by that Court in the 1980s and 1990s that decisions of English courts were in breach of ECHR standards. The Blair Labour Government responded with a White Paper entitled *Rights Brought Home* and the *Human Rights Act* followed. The *Human Rights Act* preserves the validity of primary legislation but permits a higher court to make a declaration that the legislation is incompatible with ECHR rights. This then initiates a 'dialogue' between the Judiciary, Parliament and the Executive. A Minister may seek parliamentary approval for a remedial order to amend the legislation to make it compatible. Alternately, the executive arm of government may ignore the declaration of incompatibility.

Despite dissension on the fundamental question, the NSW Legislative Council's Standing Committee on Law and Justice made two unanimous recommendations. The first was for the establishment of a Scrutiny of Legislation Committee, similar to the Senate Scrutiny of Bills Committee established in 1981. The purpose of the recommended committee is to review systematically NSW legislation upon its introduction to

detect and alert the Parliament to possible breaches of individual rights and liberties, and to provide ministers with the opportunity to argue why they consider such breaches to be necessary. The second recommendation of the Committee is the amendment of the *Interpretation Act 1987* so as to allow judges to consider international human rights instruments in trying to understand legislation where the meaning is ambiguous. The majority of the Committee noted in relation to this recommendation that[13]:

> Judges currently have this option in any case under common law statutory rules of interpretation. This amendment provides parliamentary endorsement of the common law position.

Peter Breen MLC, while supporting the recommendation, made these comments[14]:

> I wonder about the value of such a provision in the absence of a Bill of Rights. What benchmark would the judges use to decide a question of human rights that was not part of domestic law for example? Many treaty laws are subscribed to by the executive government with little or no scrutiny by the legislature.

The Committee's report would appear to have moved the question of a Bill of Rights off the present NSW Parliament's agenda. Advocates for a Bill of Rights may now have to look to the federal sphere to achieve their aims.

1 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, p 114.

2 Peter Breen's Dissenting Report is published as Appendix 9 to the Report.

3 Ibid p xiii.

4 Ibid, p xiv.

5 Ibid, p 43.

6 Ibid, Appendix 9, p 1.

7 Ibid, Appendix 9, p 3.

8 (1982) 153 CLR 168.

9 (1983) 158 CLR 1.

10 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, Appendix 9, pp 3-4.

11 Ibid, pp 5-9.

12 *Canadian Charter of Rights and Freedoms*, section 1.

13 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, p xiv.

14 Ibid, Appendix 9, p 1.

Recent High Court criminal cases

by Christopher O'Donnell

Adam v The Queen – [2001] HCA 57 (11 October 2001)

The appellant was charged with the murder of an off-duty police constable, David Carty. During the trial the prosecution led evidence from Thaier Sako, who had been wounded during the events that culminated in Carty's death. Three days after the murder Sako declined to be interviewed by police. He was charged with Carty's murder the next day. Six weeks later he requested an interview with police, which took place shortly afterwards. The interview was recorded and about a fortnight later the appellant was charged with Carty's murder. Some time afterwards Sako participated in another recorded interview with police and two weeks later the murder charge against Sako was dropped.

During the eighth week of the appellant's trial the prosecution granted Sako a conditional immunity from prosecution for any common assault or 'any associated offence' *except* murder in relation to evidence he might give in the trial. By the time Sako was called as a witness in the trial itself it was apparent that his testimony would be that his evidence of the events was based on what he had been told by others after those events. During his first full interview with the police he had stated that he was recalling his own observations. The trial judge granted Sako a certificate under s128 of the *Evidence Act 1995* preventing any evidence he gave from being used against him in a prosecution for offences other than perjury. He also allowed the prosecution to cross-examine Sako as an unfavourable witness pursuant to s38 of the Evidence Act. The trial judge admitted as evidence of the truth of their contents Sako's prior inconsistent statements to police during his first full interview.

A majority of the High Court, comprising Gleeson CJ, McHugh, Kirby and Hayne JJ. held that the prior inconsistent statements in the interview were properly admitted. Although the prior inconsistent statements were relevant to Sako's credibility they could also rationally affect (in at least some respects directly, and in others indirectly) the assessment of the probability of the existence of several of the facts in issue in the trial. Consequently they were relevant to issues apart from Sako's credibility. As the statements were relevant not *only* to Sako's credibility the credibility rule in s102 of the Evidence Act did not exclude the statements. As the evidence was relevant to Sako's credibility and to some of the facts in issue, it was relevant for a non-hearsay purpose. It therefore fell within the exception to the hearsay rule provided by s60 of the Evidence Act and was admissible as evidence of the truth of the contents of the statements.

In her dissenting judgment Gaudron J held that because the trial judge did not consider that Sako's prior inconsistent statements were potentially unreliable, his Honour erred in the exercise of his power to grant leave to the prosecution under s38 of the Evidence Act to cross-examine Sako. Further, because the grant of leave necessarily resulted in the admission of potentially unreliable evidence that could not effectively be tested, leave should not have been granted.

Smith v The Queen – (2001) 181 ALR 354

The appellant was tried for bank robbery in New South Wales. Bank security photographs allegedly showing the appellant were tendered. The appellant denied being in the photographs. Two police officers each gave evidence about previous dealings with the appellant and recognising him in the photographs.

The majority, comprising Gleeson CJ, Gaudron, Gummow and Hayne JJ defined the fact in issue to be 'Is the person standing trial the person who is depicted at the right-hand side of some of the photographs tendered in evidence?'

The majority held that the police conclusion that the appellant was in the photographs was based on information similar to the material available to the jury – i.e. the photographs and the appearance of the appellant. Therefore, the police conclusion did not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact. The jury had probably spent more time in the appellant's presence by the end of the trial than the police had prior to it. For these reasons the police identification evidence could not rationally affect the assessment by the jury of the question in issue and did not satisfy the relevance test in s55 of the *Evidence Act 1995*.

In cases where the facts in issue extend beyond the narrow question of whether the accused is the person depicted in a photograph the majority said identification evidence might be relevant. One example is whether an accused owned a jacket of the kind that the offender depicted in security photographs of a robbery was shown to be wearing. Another is where it is suggested that the appearance of an accused, at trial, differs in some significant way from the accused's appearance at the time of the offence. In the latter case, evidence from someone who knew how the accused looked at the time of the offence, that the photograph depicted the accused as he or she appeared at *that* time, would be relevant. But in these cases the opinion rule in s76 of the Evidence Act and the general discretions under s135 and s137 might restrict admissibility.

Kirby J held that the police evidence was relevant but inadmissible as a lay opinion upon a subject about which the members of the jury were required to form their own opinion.

Brownlee v The Queen (2001) 180 ALR 301

The applicant was tried on indictment in the District Court of New South Wales for the Commonwealth offence of conspiracy to defraud the Commonwealth contrary to s86A of the *Crimes Act 1914* (Cth). In the trial s68 of the *Judiciary Act 1903* (Cth), subject to s80 of the Constitution, applied to pick up the relevant provisions of the *Jury Act 1977* (NSW).

Section 80 of the Constitution provides, *inter alia*, that 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury…'.

Although the applicant's trial was conducted before a judge and jury, in accordance with the Jury Act, the applicant argued that his trial was not 'by jury' within the meaning of s80 of the Constitution for two reasons. The first was that two of the original twelve jurors were discharged during the course of the trial in accordance with s22(a)(i) of the Jury Act and the (unanimous) verdict was of the remaining ten jurors only. The second was that in accordance with s54(b) of the Act the members of the jury were permitted to separate after they retired to consider their verdict.

The Court, comprising Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, applied contemporary standards for the conduct of trial by jury to the interpretation of s80 of the Constitution and held that neither of the challenged provisions of the Jury Act was contrary to s80. Each judgment distinguishes the challenged provisions from those in some States which allow for majority verdicts. The Court affirmed its earlier decision in *Cheatle v R* (1993) 177 CLR 541 that such provisions are contrary to s80 and any jury verdict for a Commonwealth offence in any State or Territory court must be unanimous.

In their joint decision, Gaudron, Gummow and Hayne JJ said that a real question remained as to whether it is consistent with s80 of the Constitution to continue a trial on indictment for an offence against a law of the Commonwealth where a jury of 12 has been reduced below 10, as provided in s22(a)(iii) of the Jury Act.

The Bar in mediation and ADR

By Sylvia Emmett

The positioning of alternative dispute resolution (ADR) within the commercial community, statutory and regulatory use, the advent of conflict management systems and the introduction of New South Wales Barristers' Rule 17A raise some critically relevant issues for the Bar in relation to its involvement in the evolution of ADR. Sylvia Emmett provides an overview of areas of recent significant development in the uses of mediation and ADR, particularly some of the consequences of the introduction of Barristers' Rule 17A. She also examines some of the issues arising from these developments insofar as they affect the Bar.

Recent developments in mediation and ADR beyond the Bar

There now exists a myriad of Commonwealth and State enactments dealing with mediation. In several instances, this legislation compels mediation or other dispute resolution processes prior to the enforcement of rights, (for example, *Farm Debt Mediation Act 1994* (NSW), *Retail Leases Act 1994* (NSW), *Native Title Act 1993* (Cth). In addition, the Federal Court and the Supreme Court have power to order parties to mediation without the consent of the parties. The District Court and the Local Court have powers of referral only with consent of the parties. Mediation has long since been used in the Family Court, Land and Environment Court and Local Court where there are nearly always emotional, financial or historical issues beyond the purely legal issues. Similarly, conciliation has long been used in industrial tribunals.

Below are some of the more relevant recent developments in the ADR area. 'ADR' has become the general term for processes by which disputes are resolved outside the court system.

The new frontier for ADR is in conflict *avoidance* and conflict *management*, rather than just conflict *resolution*. However, it is the conflict or *dispute resolution* aspect of ADR that has particular relevance for the Bar and which intersects with and confronts the Bar's traditional role as that of advocate only.

Section 110K *Supreme Court Act 1970* (NSW)

From the NSW Bar's point of view, probably the most relevant recent amendment is s110K *Supreme Court Act 1970* (NSW), which came into force on 1 August 2000, empowering the Court to order parties to mediation or neutral evaluation without their consent.

There are concerns worthy of consideration about a process that is untransparent, largely unregulated and seemingly operating without universally accepted, endorsed or enforceable standards of conduct. These concerns are particularly valid from a court's point of view in circumstances where it can make orders compelling parties to participate in a process that may not be the parties' process of choice and may be a further hurdle to access to the courts.

On one level, this lack of regulation and transparency is a serious problem with mediation as it currently stands – there ought to be concerns about compulsory processes without satisfactory supervision.

On another level, the flexibility and confidentiality are the very reasons for the popularity of the process where the commercial world is much more concerned with cost effective, pragmatic dispute resolution management.

An origin of these concerns and tensions may lie in s27 of the *Commercial Arbitration Act 1984* (NSW), whereby an arbitrator may, with the consent of the parties, also act as 'mediator', although if so acting must observe the rules of natural justice and not engage in private conferencing.

I would suggest it is unfortunate to describe such a process as 'mediation' where it prevents such a fundamental step in a mediation process as private conferencing. It is the absence of any determinative or advisory role on the part of a mediator that enables use of such strategies. Once a mediator trespasses into either the determinative or advisory role, the risk exists of perceived or actual compromising of the very neutrality that is central to the parties' confidence in the use of mediation.

Of course, parties may agree to hybrid or varied processes. However, the integrity of the process selected is highly dependent on the parties being able to make properly informed choices, perhaps necessarily on advice from appropriately trained and skilled advisers. This is not a simple task where there exists such a plethora of processes and definitions that are still not yet consistently accepted by ADR practitioners themselves.

Commercial contracts

Many commercial contracts now contain conditions making mediation a pre-requisite to commencing litigation. This form of conflict management is prevalent, for example, in the regulation of infrastructure utilities (such as electricity, telecommunications and rail) in accordance with Part IIIA of the *Trade Practices Act 1974*. In disputes concerned with access to monopolistic utilities, the ACCC approves regimes for resolution that involve an integrated form of negotiation, mediation, expert determination and arbitration, often in the early stages without lawyers.

These regimes are directed to avoiding potential litigation and the involvement of lawyers and as such are readily embraced by the relevant industry users. Generally, the courts will uphold their terms provided the clauses are sufficiently certain. (see: *Morrow v Chinadotcom* [2001] NSWCA 82; but see also *Elizabeth Bay Development Pty Ltd v Boral Building Services* (1995) 36 NSWLR 709; *Hooper Bailie Associated Limited v Natcon Group Pty Limited* (1992) 28 NSWLR 194.)

There is a move within organisational industries to use 'mediation' as, almost, a dispute resolution management process that identifies how the issues of the dispute, once distilled, are most effectively managed and resolved. For example, it may be that some issues in a dispute are best resolved by consensual methods whereas other issues may need either expert determination (binding or non binding), arbitration, court determination or a combination of the above. The value of this type of mediation as a tool in the crystallization of different parts of a dispute and the mechanics for their future resolution is now emerging as an effective conflict management process.

Regulatory bodies

Regulatory and semi-regulatory bodies are increasingly using compulsory mediation or binding arbitration or both rather than the courts. To mention two prominent examples: the World Intellectual Property Organisation (well known as WIPO) manages disputes arising from the regulation and registration of internet domain names by way of binding arbitrations that are often conducted on the papers only and thereby are significantly

more cost effective; the National Registration Authority manages disputes in Australia between chemical owners and potential lessees of the use of the chemicals in compounds by way of mediation and or binding arbitrations. Also, s144 of the *Legal Profession Act 1987* (NSW) provides for disputes between clients and legal practitioners to be referred to mediation, although participation is voluntary.

Electronic ADR

There is even exploration into the manner in which mediations, expert determinations and arbitrations can be conducted electronically – some dispute resolution systems involve mathematical formulae setting out ways in which, for example, business to business disputes will be resolved. Again, the system is designed to omit the use of lawyers and litigation.

Barristers' Rule 17A

Rule 17A states:

> A barrister must inform the client or the instructing solicitor about the alternatives to fully-contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of these alternatives as to permit the client to make decisions about the client's best interest in relation to the litigation.

In light of the introduction of Rule 17A in January 2000, barristers need to address the requirements of the Rule and their ability to comply.

One can readily envisage a scenario where a disgruntled client who has lost a case becomes aware of Rule 17A and alleges that the barrister's failure to comply resulted in the client being unaware or not understanding the alternatives available and that, as a result of this failure to inform, the client has lost the opportunity to resolve the case on more favourable terms and should therefore be compensated. Even without identifiable damage, the barrister may still be vulnerable to a professional conduct complaint.

A number of questions arise for the barristers regarding compliance with this provision:

1 What are all the *alternative processes* available to a client to fully-contested adjudication?

2 What are the *elements* of each of these processes?

3 What are the *possible outcomes* for a client in respect of each of these processes?

4 What is involved in *preparation* for and what is the time and cost of each of these processes?

5 What will *fully-contested adjudication* involve for the client, including outcomes?

6 How does a barrister assess which of the processes is reasonably available to a given client?

7 What constitutes *reasonable grounds for a belief* by a barrister that a client has such an understanding of the alternative processes?

8 What is the meaning of *'the client's best interests in relation to the litigation'*?

9 What is the *level of understanding required by the client* to excuse the barrister from discussing alternative processes?

10 Are there any other *circumstances which excuse discussion* of the alternatives (e.g. urgency of interlocutory steps)?

11 Is *discussion with the instructing solicitor sufficient* to satisfy a barrister of a client's understanding of the alternatives?

The first question – what sort of alternatives for compliance are available – is one to which the Bar must give particular thought given that Rule 17A specifically imposes a requirement on a barrister to inform about 'alternatives'. This may not be as readily answerable as one might think. Even the courts do not speak of the same alternatives in their ADR referral sections. For example, the Supreme Court (s110K *Supreme Court Act 1970*) and the District Court (s164A *District Court Act 1973*) speak of mediation or neutral evaluation, whilst the Federal Court (s53A *Federal Court of Australia Act 1976*) speaks of mediation or arbitration. Below are three of the more relevant of many categorisations, which further highlight the difficulties in determining which 'alternatives':

i National Alternative Dispute Resolution Advisory Council (NADRAC) states that processes involving third party intervention fall into three broad categories (see NADRAC Definitions March 97, and unchanged by NADRAC Report 2001):

- Determinative (adjudication, arbitration, expert determination, references)
- Advisory (early neutral evaluation, case appraisal, conciliation)
- Facilitative (mediation, facilitation, conciliation)

(There is a real debate in the ADR industry as to the overlap, if any, between mediation and conciliation and the extent to which any advisory role by the neutral is appropriate in mediation. The difficulty is enhanced by the plethora of definitions both within Australia and internationally. There is currently a subcommittee of the United Nations examining the UNCITRAL Rules in respect of this issue.)

ii In the Barristers Resolution Service the following alternative processes are identified:

- Arbitration
- Expert determination/references
- Early neutral evaluation or appraisal
- Mediation
- Conciliation

iii The Law Reform Commission purports to map these processes on a continuum from the least to the most adjudicative:

- Negotiation
- Mediation
- Neutral evaluation
- Conciliation
- Expert advice and assessment
- Arbitration

However, whatever the appropriate alternatives and definitions, there has been a growing demand for an integrated approach to the various processes.

I would suggest that a barrister's obligation is to turn one's mind to the intention of Rule 17A and its pragmatic compliance. The questions raised above simply illustrate the need for careful consideration of the duty imposed.

Barristers in mediation

It is important for the Bar to consider the role it will take in these sorts of consensual dispute resolution processes. The important point to stress is that alternative means of dispute resolution are not just a vast set of ill-defined processes. ADR has come to be perceived as an industry in itself closely interwoven with litigation.

It is obviously important that compromises reached through mediation be achieved against a background of an informed understanding of a party's rights and the remedies available through the courts,

together with an assessment of the likely outcomes from a court. Solicitors are effectively carrying out this role more and more often without recourse to the Bar.

In a mediation it can be very useful to have the benefit of the skill of an advocate. However, where that skill is perceived as the *only* constructive role for a barrister, then it is often not seen as adding sufficient value. The barrister's role should be seen more in terms of *advising* the client in facilitating a settlement with which t*he client* can live rather than a settlement with which *the barrister* can live. Mediation is not there to enforce a party's legal rights, but to manufacture a mutually tolerable resolution. Consensual resolution will usually have a greater prospect of acceptance and endurance than adjudicated outcomes, because it fosters communication among parties and creative consideration beyond rights-based parameters for dealing with conflict.

There is a perception among solicitors and dispute resolution practitioners that barristers tend to see the dispute in terms of court outcomes only and often ignore the wider issues which can lie at the heart of a conflict. Failure by legal advisers to address these issues is a common impediment to settlement.

'If barristers are to remain advocates only, rather than dispute resolution advisers (and all that those three words import), they need to appreciate the effect that that will have on the Bar's traditional work.'

Mediation provides parties with an opportunity to identify and explore these relevant personal factors in a confidential forum where voluntary participation is founded in good faith. Whilst the notion of '*good faith*' has difficulties for lawyers in terms of certainty, it is a notion that is well understood and embraced by parties participating in a mediation process and is a fundamental cornerstone to the success of that process – it is also one of the distinguishing features between mediation and structured settlement negotiations. It is a *tool* to facilitate constructive discussions and is not intended for use as a weapon between parties. Similarly *confidentiality* of discussions is a tool which should facilitate full and frank disclosure and discussion of issues thereby offering parties the best opportunity for teasing out resolution options for consideration.

The absence of a desire of a party to participate in that spirit (despite the statutory obligation to participate in good faith imposed by s110L of the *Supreme Court Act 1970* (NSW)) may be a relevant factor for a court to consider before it makes a mandatory order to mediate.

If barristers are to remain advocates only, rather than dispute resolution advisers (and all that those three words import), they need to appreciate the effect that that will have on the Bar's traditional work and its perceived ability to participate in mediation, ADR and dispute management.

Finally, all this highlights the need for an understanding of these various ADR processes, their proper definitions and uses coupled with a universally accepted standard of conduct and accreditation.

One of the practical difficulties with a universal standard has been the administrative framework it would require and the enforceability of any sanctions or licenses to be applied. Within professional bodies, such as the Bar Association, many of these concerns can be accommodated. Similarly, appointment to various panels can go some way to identifying, adopting and enforcing a standard of skill, experience and conduct. However, the field of dispute resolution practice is far wider than that being conducted by professionals and panels.

Considerations for the future

It is apparent from the above that there is barely an aspect of civil based interaction of rights within a broad legal framework that remains untouched by consideration, at least, of alternative means of dispute resolution.

To the extent barristers play a role in the ways in which that interaction occurs, and in light of the barrister's duty under Rule 17A, barristers must equip themselves with the knowledge and skill to participate validly in the ADR evolution.

Editor's note: Any members with comments on the workability of the current Barristers' Rule 17A are invited to address them to the Association (Philip Selth) or the Editor.

Royal commissions and inquiries

By Peter Garling S.C.

Introduction

In 1982 L A Hallett, the author of the well-known text[1], excited interest when he said:

> Royal commissions and boards of inquiry (and like bodies) are well known and established organs of Government. Nevertheless, it is probably accurate to state there is, in general, little known about them. In particular, little is known of their legal status in Government and the rules (or lack of them) which regulate them.

It may be surprising to members of the Bar that a commission of inquiry[2] is an organ of Government, but reflection on the nature of a commission, the method of establishment and the purpose would suggest that Hallett's statement is undoubtedly correct.

Commissions of inquiry are not functions carried out in the exercise of the judicial power of the Commonwealth, but may nevertheless involve the commissioner acting judicially to find facts and apply the relevant law[3]. Commissions are not carried out as a function of any judicial office but may be carried out by a judge. They are part of the executive functions of government and are subject to the effective control of the Executive. That control is exercised by, *inter alia*, requiring the commissioner to deliver a report by a fixed date, providing defined terms of reference which can be altered by executive action and also by providing the funding for a commission.

In addition to royal commissions, which are usually established for a single purpose, there has been an expansion, certainly in New South Wales, in recent times of other forms of inquiry. These may range from what are effectively standing commissions of inquiry, such as the Independent Commission Against Corruption, the State Crime Commission and the Police Integrity Commission, to single purpose special commissions of inquiry such as the McInerney Inquiry into the Glenbrook Rail Accident.

Commissions of inquiry have been an established feature of Government in Australia. The first federal royal commission appears to have been conducted in 1908 by Justice Hood of the Supreme Court of Victoria, who was charged to conduct the Royal Commission into Insurance. One of the earliest royal commissions was one conducted by the chief justice of the High Court of Australia, Griffith CJ in 1918. It was an inquiry into the war. It finished within one week.

It is substantially outside the scope of this article to discuss any particular standing commission of inquiry. Rather, the purpose of this article is to provide the readers with some assistance when they receive a brief to appear at a commission of inquiry.

Establishment

Essentially, there are two bases by which a commission of inquiry can be established. The first of these is by the exercise of the Crown's prerogative to issue Letters Patent for a commission of inquiry. Sir Owen Dixon discusses the historical basis for this source of power to issue Letters Patent in his judgment in *McGuinness v The Attorney General of Victoria*[4]. This basis is also recognised in New South Wales in the *Royal Commissions Act 1923*, which in part regulates procedures before a royal commission, but which does not provide a statutory basis for the issues of Letters Patent.

'There is often a tendency by commissioners to be very protective of the integrity of their inquiries.'

The second basis for the establishment of a commission of inquiry is by the issue of Letters Patent, which are authorised by statute. One example can be found in s1A of the *Royal Commissions Act 1902* (Cth), which provides a statutory source of power for the issue of Letters Patent by the governor-general, providing that they 'relate to or [are] connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'.

Standing commissions of inquiry will have particular Acts of Parliament, which establish them and control the conduct of them.

Typically, although not universally, these Acts provide for mechanisms for the summonsing of witnesses, the compulsory production of documents, the method of taking evidence from witnesses, the obligation of witnesses to answer questions, privileges against self-incrimination and powers of contempt.

Nature and purpose

The principal purpose of a commission of inquiry is to gather information for the Government. That process of information gathering may be for the purpose of a review of, or the formulation of, government policy, but is more usually directed towards a the investigation of a particular incident and establishing all of the factual circumstances surrounding that incident. Occasionally, and perhaps more frequently in recent times, the terms of reference may call for recommendations on policy questions as a result of the factual findings of a particular incident[5].

The very nature of a commission of inquiry means that it performs an investigatory role and involves an inquisitorial style of proceeding, rather than an adversarial style. This has a number of consequences, including:

- the fact that not all investigations are made through the process of public hearings;
- the commissioner may chose to investigate certain matters and not to investigate others; and
- the commissioner has control over the manner and style of hearings or other information gathering processes.

A number of commissions of inquiry have used methods of information gathering in public other than traditional hearings. Seminars and meetings of a range of affected bodies and individuals, which allow a flexible debate, particularly on policy formulation questions, are now regularly being used to assist a commissioner with the inquiry.

It will therefore be necessary for a barrister when briefed to appear at a commission to read the terms of reference and determine the particular purpose of the commission, so as to provide a base for consideration of the role or interest of the client.

Appearance before a commission of inquiry

An individual has no absolute right of appearance before a commission of inquiry, nor any absolute right to participate throughout the whole of the inquiry. All appearances at a commission of inquiry are by leave of the commissioner, which can be granted or withdrawn at any stage of the inquiry.

In NSW, s7 of the Royal Commissions Act provides a further limitation on an appearance: it provides that a person must be 'substantially and directly interested in any subject-matter of the inquiry, or that the person's conduct in relation to any such matter has been challenged to the person's detriment' before being granted the right to appear. This statutory test appears to reflect the practice of those commissions which do not have any statutory provisions dealing with appearances. It has long been the practice for a commissioner to require a person seeking leave to appear to establish that the person has a particular interest in the inquiry which requires leave to appear. It is not sufficient for the person to be interested in the outcome in the same way as the broader public may be.

Once granted leave to appear, a person's entitlement to participate may be terminated at any time. As well, the ability to cross-examine a witness will depend upon approval by the commissioner. Traditionally, all witnesses are called by counsel assisting the inquiry. Counsel assisting ought to elicit all of the relevant evidence. But other participants may wish to elicit additional evidence, or else to challenge the evidence of the witness. The commissioner is entitled to control this process, and commonly does.

Counsel appearing at a commission of inquiry need to be sensitive to the fact that leave to appear does not give them an open-ended role in the conduct of the inquiry.

Procedural fairness

A commission of inquiry has obligations of procedural fairness, the content of which may vary from inquiry to inquiry, and which will depend upon the nature and subject matter of the inquiry, as well as the way in which an inquiry has proceeded[6].

In *Mahon v Air New Zealand* [1984] 1 AC 808, the Privy Council, when dealing with a royal commission, held that the obligations of natural justice were:

> The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon

> evidence that has some probative value. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.[7]

It is now commonplace for commissions of inquiry to circulate, either in advance of the conclusion of evidence or else in advance of final submissions, a list of potential findings critical of a person or body which might be made, and to give to the persons represented before it an opportunity to consider those potential findings and deal with them.

If no indication is given that such a course is going to be followed, it is appropriate for counsel appearing for a party to raise with the commission the question of what practice it proposes to follow in the circumstances.

Powers of compulsion

Most commissions of inquiry will have the requisite powers to compel the attendance of witnesses, the giving of evidence and the production of documents. These powers derive from a variety of statutes which affect the conduct of commissions of inquiry.

It is essential for counsel briefed to satisfy themselves as to the nature and extent of those powers. Some statutes remove the privilege against self-incrimination[8], but this is usually accompanied by a statutory prohibition against the use of the evidence and material in proceedings against the person concerned. Again there may be limitations to this prohibition and counsel ought be careful to be satisfied what the prohibition is and how, if at all, it is limited.

Questions of contempt also vary from commission to commission. There is often a tendency by commissioners to be very protective of the integrity of their inquiries. This can lead to an over-reaction on the part of a commissioner to adverse publicity about the inquiry or evidence which a witness has given. When confronted by such an occasion, it is incumbent upon counsel to know what are the particular powers of contempt which the commission has, and to what extent the commissioner (as opposed to a court) can deal with any such circumstance.

That said, in general terms, it will be a contempt, or a specified statutory offence, for a witness to decline to attend and give evidence, produce documents or otherwise fail to comply with properly made orders of any commissioner.

Judicial review

Opportunities for judicial review of the findings of a commission of inquiry are few. *Mahon's case* is a well known but rare example, and even that case was limited to a review of a small part of the royal commissioner's findings.

However, there may be a greater opportunity to seek judicial review involving other matters going to the heart of a commission of inquiry. Although not dealing with a commission of inquiry, the type of challenge mounted to the appointment of Mathews J to conduct a ministerial inquiry in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[9] is one course which may ground judicial review. *R v Winneke; ex parte Gallagher*[10] is an example of the use of the prerogative writ in attempt to subject a royal commission to judicial review with respect to the ordinary functioning and conduct of a commission.

What is clear is that there is a reluctance on the part of courts to interfere with the functioning and conduct of commissions of inquiry, and it would be unwise for counsel appearing at any commission to rely upon the availability of judicial review as if it were akin to an appeal as of right.

Some statutes contain privative clauses with respect to proceedings against commissions and commissioners. The provisions of s36 of the *Special Commissions of Inquiry Act 1983* (NSW) is a good example of this.

Protection and immunities

In New South Wales, commissioners are provided by statute with the same protection and immunities as are given to a judge of the Supreme Court[11]. In the Commonwealth sphere, a royal commissioner has the same protection and immunity as a judge of the High Court of Australia[12].

However, the position may be different for witnesses and practitioners who may not enjoy the same protection as in a court. The Commonwealth legislation provides for this, but not all State legislation does. Counsel will need to carefully check the position for each different inquiry.

Conclusion

Since a commission of inquiry is not a judicial proceeding akin to party and party litigation, it is critical that counsel briefed to appear at such an inquiry give careful consideration to at least the matters mentioned briefly in this article in order to ensure that they best serve their client's interests.

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1 L A Hallett, *Royal Commissions and Boards of Inquiry* (Law Book Company, 1982), p. ix.

2 It is convenient to use the term commission of inquiry as a generic one to encompass all forms of inquiries. I will refer to several of the different types of inquiries separately as appropriate.

3 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

4 (1940) 63 CLR 73 at 93-102.

5 The terms of reference for the current HIH Royal Commission are a good example of this trend. The can conveniently be found at www.hihroyalcom.gov.au.

6 See *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118; *Maksimovich v Walsh & anor* (1985) 4 NSWLR 318 at 327, 337.

7 at 820F - H.

8 See s6A of the *Royal Commissions Act 1902*.

9 (1996) 189 CLR 1.

10 (1982) 152 CLR 211.

11 See s6 of the *Royal Commission Act 1923* (NSW) and s11 of the *Special Commissions of Inquiry Act 1983* (NSW).

12 See s7 of the Royal Commissions Act.

Ruth McColl S.C: Reflecting on her term in office

An interview with Ruth McColl S.C. at the conclusion of her presidency.

Sofroniou: Thank you very much for agreeing to be interviewed, Ruth. This month you've concluded your two-year term as president of the Bar Association and chaired your final Bar Council meeting. What are your thoughts as you reflect on that?

McColl S.C.: The final Bar Council meeting was a very long and trying meeting because it was a meeting at which we gave final consideration to some of the notifications about bankruptcy made in accordance with the recent amendments to the *Legal Profession Act 1987*. Most presidents glide out of office - I think I feel somewhat as though I left office with mortars exploding around me.

'...I feel somewhat as though I left office with mortars exploding around me.'

Sofroniou: Did you have the chance in the midst of all of that to actually reflect that it was your last meeting? Was there any sense of ceremony?

McColl S.C.: We were working so hard that there was no sense of ceremony but at the end of the meeting the councillors said some nice things which were very pleasing.

Sofroniou: Will you miss them?

McColl S.C.: And I told them I would miss them.

Sofroniou: Can you now remember your feelings on being appointed?

McColl S.C.: Frankly it was so long ago now that it is very difficult to remember my feelings on the exact day. I recall that I felt tremendously happy and very honoured and I had a great sense of the responsibility that went with the position.

Sofroniou: Did you have any prior expectations of the office?

McColl S.C.: Only those that were reflected in my last answer. I expected the role to involve a great deal of commitment in terms of time and that has certainly been borne out. I envisaged that it would involve a lot of responsibility and that too has been the case.

Sofroniou: What were the highlights of your term?

McColl S.C.: There were a number of highlights. There was the Bar Strategy meeting which was some time in the planning but which finally took place in May 2001. The entire Bar Council, together with Heads of Committees and members of the Regional Bars met and considered in great detail the future of the Bar in New South Wales. I reported on that in various editions of *Bar Brief*. One of the outcomes of that meeting was a proposal that led to the introduction of compulsory continuing legal education for all members of the Bar. It's a proposal which by and large appears to have received majority approval, with the exception of the very few members who have written to me opposing the idea. Over all there has been very little criticism of the idea and instead a great deal of pleasing acceptance of it.

Sofroniou: Other highlights?

McColl S.C.: I think the indigenous legal strategy that we launched through the Equal Opportunity Committee, chaired by Michael Slattery Q.C., has really been a tremendous achievement for the Bar. Also, of course, the Olympic Pro Bono Scheme. Those matters really added in varying ways to the Bar and, in particular, its contribution to the community.

Sofroniou: Could we turn now to the challenges you experienced during your term as president?

McColl S.C.: Well the most obvious one was the issue which blew up this year allegations about the way certain members of the Bar appeared to have used bankruptcy procedures as a means of avoiding their obligations to the Commissioner of Taxation and indirectly to the community.

Sofroniou: A huge challenge.

McColl S.C.: I believe that was the biggest challenge that I have faced, and, indeed, that the Bar has faced, for many years. I can't think of anything within living memory that has brought the Bar into such disrepute. It was an incredible challenge to work out how to deal with that in a way which made it very clear to the community at large that if the conduct alleged had indeed occurred,

then, not only did we not condone it, but, indeed, we deplored it and would do everything we could to ensure that the confidence of the community was restored in the Bar and in the legal profession generally.

Sofroniou: Do you think that the Bar has clearly sent that message to the community?

McColl S.C.: I think we have done that to a certain extent so far, but the task isn't over yet. I also think we needed to make it clear that it is only the notification amendments to the Legal Profession Act and regulations that have made it possible for us to actually know what had happened. Previously we had been unaware of the conduct alleged against particular barristers because we could not obtain that information from the Commissioner of Taxation (notwithstanding our requests, I might add) and it was impossible for us to sit in every court in New South Wales, the Federal Court or the Local Court in case something emerged about a member of the Bar we might regard as requiring investigation.

Sofroniou: Other challenges?

McColl S.C.: Another obvious one was the issue involving WorkCover and

the various aspects of legal reform, which have had the effect of limiting damages to plaintiffs. That has obviously had a potential effect on our members and we have tried to deal with that as effectively as possible.

Sofroniou: What specific coping strategies did you employ during the last two years in order to meet the worst of those challenges? Was there anything that was of particular help?

McColl S.C.: I suppose just the strategies I use to cope with life generally. These are mainly the support of close friends, running and maintaining a sense of humour during the worst of times.

Sofroniou: Could you tell us how would you characterise the role performed by the Bar Council?

McColl S.C.: The Bar Council is a representative political unit insofar as it represents the whole of its electorate, even though in practice not all members of the electorate necessarily vote. We get almost a 50 per cent turnout, which is pretty good without compulsory voting. The Bar Council reflects the diversity of the Bar. Its members bring their individual views to bear in dealing with all of the issues that come before the Bar Council for its consideration. The Bar Council members also bring to the Bar Council their experience derived from the particular committees that they sit on. Almost every member of the Bar Council is on one or other of the professional conduct committees, for example. It is very important for Bar Council to receive the benefit of that experience and to have that range of views expressed when dealing, for example, with the Barristers' Rules and their proper application. Obviously the Bar Council plays a very important role and one that is essential to the continuity of the Bar.

'...I believe that it is important for the public to understand where the Bar is coming from.'

Sofroniou: Has the role fluctuated or altered at all in your view?

McColl S.C.: I don't really think so. I have been a member of the Bar Council now for about 20 years and essentially the role has remained the same. It is a democratic institution that debates the issues, whether about law reform, particular issues affecting the Bar generally, or particular issues affecting members of the Bar as individuals. That has always been the role of the Bar Council and it has always carried out that role diligently, in my experience.

Sofroniou: Considering now the length of your term as president. Is two years too long or not long enough? Also, has it effectively become a full time job?

McColl S.C.: It is not a full time job. I couldn't have done it without running a practice at the same time, otherwise I would have been virtually without any income at all! It is not too long, although my view has fluctuated on this point. I used to think that two years was too long in terms of the succession plans of those who come behind, but I now really do think that it takes almost a year for the Bar Association president to be recognised, particularly in the public arena and then to consolidate that recognition over the next year. It has been particularly in this second year that that level of recognition has borne fruit in terms of being sure that we obtain decent media coverage of the matters we want to put forward, for example with respect to the issues about bankrupt barristers and tax and WorkCover. We received pretty good coverage, both this year and last year, with respect to issues of particular interest to the press, such as mandatory sentencing. I think it has really helped that there has been that level of recognition.

Sofroniou: So if the second year serves to consolidate a president's term, would you want a third?

McColl S.C.: No, I don't think so. Three years is excessive. I think that two is just about right.

Sofroniou: Since you refer to press coverage, do you think the media accurately reflect the Bar and its position on issues and its concerns?

McColl S.C.: It depends upon the issue you are dealing with. With mandatory sentencing I thought the media was very positive and supportive. I think that was an issue that they had themselves finally awoken to as being of grave concern, so we obtained a lot of very good publicity about that. Obviously with regard to the issue of bankrupt barristers and tax, that was not reported as favourably and I wouldn't have expected otherwise. But at least even there the media did publish the Bar Association's attitude and responses to the issue. Then there are a variety of other issues in respect of which one can

say fairly generally that our views have been very much at odds with those of the media. An example of that is the law and order issue. Nevertheless they do still tend to publish what we say. In the most recent controversy about gang rape sentences, the media published our view about the necessity of maintaining the separation of powers. I do think that certain elements in the media appreciate the significance of what we regard as issues which are fundamental to the rule of law and will often publish the Bar's views with respect to such matters.

Sofroniou: Having said that, is there anything that the Bar could or should still do to further improve the lines of communication with the media?

McColl S.C.: I think that it is always important to make sure that the media are aware that the lines of communication are open. I have spent a lot of time in the last two years trying to ensure that the Bar communicated its views on important matters through the media, whether through press releases, letters to the editor, columns in various newspapers and through radio interviews and television appearances. This is because I believe that it is important for

the public to understand where the Bar is coming from. I think that the best way for them to see that is either to hear, read or see directly what the Bar is saying.

Sofroniou: On a personal note, did you grow up in Sydney?

McColl S.C.: Yes.

Sofroniou: Are you an only child or do you have brothers or sisters?

McColl S.C.: I am the second daughter, I have an older sister.

Sofroniou: And who or what influenced or inspired you to study law and in particular to become a barrister?

McColl S.C.: In terms of studying law, it was a teacher at Willoughby Girls High who planted the idea in my mind and it was a decision I made in a relatively impromptu way during Orientation Week at Sydney University. I decided that doing only an Arts degree wasn't very vocationally positive, so I changed my course to Arts/Law. I majored in History. As to coming to the Bar, it was a function of having been a solicitor for a few years and having instructed counsel in a variety of courts. I decided that it would be a better application of all that hard work I had done at university if I went to the Bar and actually argued about the relevant points of law, rather than briefing other people to do it.

'I think that the current position of Australia's Indigenous community is a national shame...'

Sofroniou: Have you maintained your interest in history?

McColl S.C.: In the last two years it hasn't really been easy to maintain any interest other than Bar issues, but yes, I am still interested in history. I really love reading and I just haven't had enough time in the last couple of years, except for reading about Bar issues.

Sofroniou: Did you enjoy university?

McColl S.C.: I am sure I did. It is a long time ago.

Sofroniou: Would you care to comment upon the relatively small number of female barristers?

McColl S.C.: I am reasonably comfortable in saying that the numbers are increasing. While, over all, women comprise only 13 per cent or so of the NSW Bar, if you look at the 'under-fives', women constitute about 25 per cent. There is a much stronger representation in that newer level, and that encourages me in the belief that women are increasingly coming to the Bar. One of the reasons that there is a relatively small number at a more senior level is because a number of women barristers have been plucked out of the Bar to become judges. I think the proportion will increase. I would like to see it increase. I would have preferred, like most people, for the percentage of female barristers to increased more rapidly, rather than just creeping up from ten to the current overall figure of 13 per cent in the last decade or so. I don't believe it is a function of anything inherent in the Bar, though. I think it is just a function of people getting in there and doing it.

Sofroniou: What would you list as the most important qualities possessed by a good barrister?

McColl S.C.: A capacity for extraordinary hard work, patience, being a good communicator, obviously being intelligent and as logical as possible.

Sofroniou: 'Patience' is an interesting inclusion. Where does that quality come in?

McColl S.C.: Patience in dealing with a wide variety of people, some of whom are intolerant of the whole notion that they need to be in a court situation and that it is the way to resolve their particular dispute. Patience also with the way your opponent is presenting the argument, which you may believe is nothing but a time-wasting exercise.

Sofroniou: When you do get the time, what are your particular interests outside of work?

McColl S.C.: Seeing friends, theatre, ballet, running and swimming. Oh, also reading - I had almost forgotten about that because I haven't done it for so long. But I promise myself that I will.

Sofroniou: Could you nominate your best virtue and your worst habit?

McColl S.C.: (Laughs) Well I think that my best virtue and my worst habit are probably the same: a capacity for hard work and constant implementation thereof.

Sofroniou: Do you think that is a bad habit?

McColl S.C.: It can take over your life!

Sofroniou: Are you naturally well organised? Do you have any secrets of good organisation that you care to share?

McColl S.C.: I think that the answer to the first question is probably no, but is anybody? One secret of good organisation

is to apply a lot of discipline in starting one task and finishing it before you move on to the next one. Another is to make sure that you distribute your time rationally between tasks rather than going overboard on one in particular.

Sofroniou: What are your future goals now that your term as president is complete?

McColl S.C.: Just to continue the pursuit of being a barrister to the best of my ability and doing the best for my clients that I can.

Sofroniou: You are enjoying the job?

McColl S.C.: Absolutely!

Sofroniou: What advice would you give to those just starting life at the Bar or who may be thinking of taking the plunge?

McColl S.C.: Remember not to allow hard work to displace quality of life. In other words maintain some balance and perspective on being a barrister.

Sofroniou: What about those 'middletons' for whom the years can seem to blur together or even to stand still altogether?

McColl S.C.: Well I would

encourage 'middletons' as you describe them to realise that in fact the years aren't standing still; that there is always much opportunity to improve and that they should make such improvement their goal.

Sofroniou: Looking ahead, is there any particular reform or change in the role of president or the Bar Council that you would like to see?

McColl S.C.: It is hard to identify any particular reform. I actually think if I was to look to any change it wouldn't be in their roles but it would be in terms of encouraging members of the Bar to take advantage of the opportunities which are there to communicate directly with the president or the Bar Council about issues they feel are important, rather than bottling up their concerns. In other words, it would be great to see improved communications. That was something I encouraged from the start and I was disappointed that there was comparatively little feedback during the two years.

Sofroniou: You have from time to time spoken or written about your interest in Indigenous matters. Could you tell us a little about that?

McColl S.C.: I am interested in matters affecting Indigenous communities and youth. That has been a long term interest of mine. One of the first things I did in my first year at University was to become involved in Indigenous issues as they were then on the political agenda. I think that the current position of Australia's Indigenous community is a national shame and I believe that we must try to do as much as we can to redress it. In terms of the Bar we have tried to do that through our Indigenous Legal Strategy. In terms of a national approach to matters affecting Australia's Indigenous communities, I chair the Law Council's Indigenous Legal Committee. That committee is formulating the Indigenous issues that the Law Council will address. In the first instance we are again taking a practical approach in encouraging members of Indigenous communities to pursue legal studies and encouraging them through the early years of practice. On a principled approach I think we will be looking very shortly at the issue of traditional law and how, if at all, that can be reconciled with the European legal system with a view to ensuring better outcomes for Indigenous communities.

Sofroniou: Similar to the way in which the common law of property has recognised traditional notions of connection to land?

McColl S.C.: More in the context of criminal law. Recently I attended the Garma Festival in Arnhem Land and that was the main topic; namely, how traditional law could work with European Law. The aim is for members of the Indigenous community not to feel such outsiders in a system which is basically leading to incarceration of Indigenous people in foreign circumstances, frequently leading, as we know, to tragic results.

Sofroniou: In which capacity did you attend that Festival?

McColl S.C.: I went in my capacity as President of the Australian Bar Association.

Sofroniou: Which is the role which continues -

McColl S.C.: Until February.

Sofroniou: What matters do you deal with in that role? In particular do you see any scope for the formulation for a national legal profession?

McColl S.C.: The idea of a national profession is something members of the legal profession in each of the States and Territories have been working towards for some years, not just through organisations like the Australian Bar Association but obviously also through the Law Council and initiatives such as the Travelling Practising Certificate and mutual recognition. The Australian Bar Association, while a relatively low-key organisation, nevertheless is incredibly important in providing a forum for communication between the Bars about developments in each State. We often find that the relevant issues are the same in each of the States. To the extent that we strive to have model Rules for the Bar, for example, it is vital for each State or Territory Bar to contribute its views regarding the relevant issues. That is a very important aspect of the work of the Australian Bar Association, as of course are the Australian Bar Association Conferences.

Sofroniou: Have you therefore found that the challenges you faced as President of the New South Wales Bar Association have been mirrored in your role as ABA President, or are there separate concerns?

McColl S.C.: Some of the issues are similar. Some of the issues concerning the Australian Competition and

Consumer Commission, for example, are very similar; not particularly because of the Bar so much as the ACCC's own approach. The issue about bankrupt barristers and tax was one which didn't really affect the other Bars as much as ours, but it was nevertheless encouraging to find that interstate Bars all adopted a notification regime very similar to the one that was introduced in the New South Wales Legal Profession Act, again to ensure that the public could be confident that such issues would be adequately addressed should they manifest themselves in any of the other States. I think that was a very important action and it has highlighted the importance of having an organisation like the Australian Bar Association, which enables such a speedy response through joint action.

Sofroniou: What organisation will you be chairing after February 2002?

McColl S.C.: I think at the end of February I will truly be a feather duster.

Sofroniou: Well *Bar News* thanks you for your time today and for your immense contribution to the NSW Bar.

Sofroniou: Thank you.

Does Chapter III of the Constitution protect substantive as well as procedural rights?

by The Hon Justice M.H. McHugh AC High Court of Australia.

Delivered at the New South Wales Bar Association, 17 October 2001.*

Sir Maurice Hearne Byers was one of the greatest advocates that the Australian Bar has produced. He was admitted to the New South Wales Bar in 1944 and took silk in 1960. He was Solicitor-General of Australia from 1973 to 1983. He was President of this Bar in 1966 and 1967.

Sir Maurice excelled in all fields of advocacy. But his great power of analysis, all round knowledge of the law and conversational style of advocacy combined to make him most effective when arguing points of law in an appellate court. He was an extraordinarily persuasive and lucid advocate. His arguments had a hypnotic effect on his opponents as well as on judges, frequently forcing or inducing his opponents to argue cases within the legal framework that Sir Maurice had impressed on the case. He was my opponent in the first High Court appeal I argued[1]. The subtlety and plausibility of his arguments induced me, as an inexperienced junior of just four years standing, to spend 90 per cent of my time combating his arguments instead of concentrating on my primary argument – which the Court ultimately accepted. It taught me the valuable lesson that, as an advocate, you cannot let your opponent dictate the structure of the argument.

Whatever field of law he was arguing, Maurice Byers mastered it. Those who think of him as primarily a constitutional lawyer should be reminded that, as a junior of five years standing, he had a remarkable win in the High Court in a criminal case. In *Greene v The King*[2], he persuaded a majority of the Court that it was *not* an offence against the law of false pretences to falsely pretend to the buyer of goods that the accused intended and was in a position to deliver them within a specified period. The majority held that a representation of the existence of a present intention to perform a promise was not a representation of an existing fact. Understandably, the legislature quickly reversed the decision.

But it is as one of the greatest constitutional lawyers in the history of Australia that Sir Maurice will always be remembered. In 1985, when the federal government announced the formation of the Australian Constitutional Commission, he was the natural choice as its chairman. As solicitor-general, Sir Maurice appeared in 44 constitutional cases, winning 37 of them. Among his wins were the *Tasmanian Dams Case*[3] and the *Sea and Submerged Lands Case*[4]. But his success as a constitutional advocate did not cease upon his retirement as solicitor-general. At the private Bar, he successfully argued the *ACTV Case*[5] which established that, by necessary implication, the Constitution protects freedom of communication concerning political and government matters. In his last constitutional case, he got a majority of the Court to hold that Chapter III of the Constitution prohibits a State legislature from investing its courts with any function or jurisdiction that might impair public confidence in those courts while exercising federal jurisdiction. That was in *Kable v Director of Public Prosecutions (NSW)*[6].

It seems fitting, therefore, that the subject of this Address should concern Chapter III of the Constitution and the vexed question as to the extent that it protects substantive rights. I should, however, lodge a caveat of the kind that any serving judge should lodge when giving a public lecture about law[7]. The views that I express are the product of my own reading and reflection. For the most part, they have not had the advantage of counsel's argument that, so often, induces a judge to depart from any provisional view that he or she may hold about the law.

Chapter III: 'The Judicature'

Chapter III of the Constitution contains 10 sections, ss71-80. Among other things, those sections create the federal judiciary, delineate the appellate and original jurisdiction of the federal judiciary, and provide for trial by jury in indictable matters. Of these ten sections, the most fundamental is s71. It declares that the judicial power of the Commonwealth is vested in the High Court 'and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'. The Court has often said that it is practicably impossible to give an exhaustive definition of judicial power[8]. But a 'widely-accepted statement' is that of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[9] where he said that judicial power means:

> the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.

On its face, Chapter III is merely a blue-print for the judicial arm of government. However, interpretation of Chapter III has revealed a number of procedural and substantive due process rights within its provisions[10]. At an early stage of federation, the High Court declared that s71 exhaustively defines the bodies that can exercise the judicial power of the Commonwealth. They must be courts that meet the requirements of ss71 and 72 of the Constitution. By 1918, it had been established that federal judicial power could not be exercised by the comptroller-general of customs[11], the Inter-State Commission[12] or a court or tribunal created by Federal Parliament whose members were not appointed in accordance with s72 of the Constitution[13]. That view of Chapter III has been maintained. And as Quick and Garran point out, 'the legislature may *overrule* a decision, though it may not *reverse* it'[14].

Procedural rights

Few would now doubt that Chapter III protects some procedural rights. The distinction between procedural and

* The inaugural Sir Maurice Byers Lecture was delivered by Sir Gerard Brennan on 30 November 2000 and published in *Bar News* Summer 2000/2001

substantive rights is not always easy to draw. In discussing procedural rights, I may occasionally be referring to what others regard as substantive rights. Speaking generally, a procedural right is a right of access to a method of enforcing substantive rights and duties[15]. A number of such procedural rights are evident in Chapter III. Thus, s73 of the Constitution provides for a right of appeal against the orders of the supreme courts and courts exercising federal jurisdiction. And as Deane and Gaudron JJ have said[16], the effect of ss75(iii) and 75(v) of the Constitution is to:

> ensure that there is available, to a relevantly affected citizen, a Chapter III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.

Another procedural right in Chapter III is the right to a jury where a person is tried on indictment[17].

However, apart from the s75(v) right to obtain prerogative relief against Commonwealth officers, these procedural rights may be legislatively restricted without contravening Chapter III. Thus, the Parliament may require serious offences to be tried summarily, thereby avoiding jury trials. Since 1984, most appeals to the Court require a grant of special leave[18], and there is no absolute right of appeal to the High Court.

'It is only in recent years that it has become accepted that due process rights are guaranteed by the Constitution.'

Gradual acceptance that Chapter III protects due process rights

But there are some procedural rights in Chapter III that cannot be abolished or restricted. In *Re Tracey; Ex parte Ryan*[19], Deane J said, correctly in my opinion, that s71 is 'the Constitution's only general guarantee of due process'. In *Leeth v The Commonwealth*[20], Mason CJ, Dawson J and myself also said:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.

The procedural rights that are arguably beyond the power of the Parliament to change may be described as those rights which courts have traditionally regarded as fundamental to the effective functioning of judicial power. It is after all a 'short step'[21] from the constitutional requirement that judicial power can only be vested in the courts identified in s71 to the conclusion that Chapter III guarantees the procedural rights necessary for the exercise of that power.

It is only in recent years that it has become accepted that due process rights are guaranteed by the Constitution. In the *Australian Communist Party Case*[22], Latham CJ[23], Webb[24] and Fullagar JJ[25] emphatically rejected an argument that legislation dissolving the Communist Party and permitting the governor-general to declare certain persons disqualified from holding office in trade unions usurped the judicial power of the Commonwealth. Fullagar J[26] said that Chapter III only had a very limited role in protecting individual rights. If His Honour's views were accepted, it would seem that the Parliament could make any law invading the judicial function with impunity.

Instead, the weight of judicial opinion, in the last fifteen years, supports the judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*[27]. Their Honours said that Commonwealth legislative power does not extend 'to the making of a law which requires or authorises 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'[28].

Thus, Gaudron J in *Re Nolan; Ex parte Young*[29], emphasised that the protection that Chapter III gives to the judicial process includes:

> open and public inquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.

But what of such procedural matters as discovery and interrogatories, the obtaining of particulars and the issuing of subpoenas? What of matters that straddle the borders of substance and procedure such as the right to a fair trial, the presumption of innocence, the right of an accused to refuse to give evidence, the onus and standard of proof in civil and criminal cases and the use of deeming provisions and presumptions of fact? Can the Parliament abolish or change these rights and matters? Would legislation purporting to do so be an invalid attempt by Parliament to dictate and control the manner of exercising the judicial power of the Commonwealth? Given statements made in cases decided in the last 15 years, the power of Parliament to affect these procedural and quasi-substantive matters in significant ways is open to serious doubt.

But what is meant by exercising 'judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'[30]? In *Polyukhovich v The Commonwealth*[31], *Leeth v The Commonwealth*[32] and *Nationwide News Pty Ltd v Wills*[33], Deane and Toohey JJ provided some answers to this question. They insisted that Chapter III does more than determine what bodies shall exercise the judicial power of the Commonwealth. Their Honours said that Chapter III dictated and controlled the manner of its exercise. The judicial power of the Commonwealth must be exercised in accordance with the 'traditional judicial process'[34]. In *R v Quinn; Ex parte Consolidated Food Corporation*[35], Jacobs J also saw judicial power as being concerned with the 'basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom'. In *Polyukhovich*[36], Deane J said that Chapter III was based 'on the assumption of traditional judicial procedures, remedies and methodology' and that the Constitution intended that the judicial power of the Commonwealth 'would be exercised by those courts acting as courts with all that notion essentially requires'.

If these statements are right, the power of Parliament to interfere with traditional procedural rights is narrower than once was assumed to be the case. I think it is likely that the view of Deane J will ultimately gain wide acceptance. Judicial power is vested in courts exercising federal jurisdiction to promote the supremacy of the law over arbitrary power[37]. Any law that might weaken the supremacy of the law in the administration of justice is suspect. For such a law to be valid, it must at least be justified as a reasonably proportionate means of implementing some other legitimate object within the constitutional powers of the Parliament. Professor Zines must be right when he says that: 'At least one test for determining the limits on legislative power

arising from Chapter III is surely whether the statutory provision impairs the due administration of justice.'[38]

As it happens, certain procedural and substantive rights can now be taken as constitutionally protected and judicially recognised.

Implied right to legal representation

One important example of a due process right recognised as protected by Chapter III is the right to legal representation in certain situations. In *Dietrich v The Queen*[39], our court reaffirmed that a court has power to stay proceedings in a criminal case where an unfair trial might otherwise result. That power extends to a case where an indigent accused is charged with a serious offence and, through no personal fault, is unable to obtain legal representation. It cannot be doubted that Chapter III protects the right to stay proceedings where the accused is unable to get legal representation to meet a serious criminal charge. That is because the right to a fair trial is entrenched in that Chapter, as Deane and Gaudron JJ, in separate judgments, pointed out in *Dietrich*[40].

Once it is accepted that the Constitution guarantees the right of a fair trial, it must follow that Chapter III also protects litigants from legislative and other acts that might compromise the fairness of any civil or criminal trial in federal jurisdiction. In that regard, it is important to bear in mind that fairness 'transcends the content of more particularised legal rules and principles'[41]. It 'provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal [and civil] law'[42].

'Our Court has already recognised that Chapter III protects some substantive rights.'

The constitutional right to a fair trial in federal jurisdiction must also mean that there are constitutionally entrenched rights to an unbiased hearing, to obtain a stay of proceedings of a criminal charge where there has been unfair delay in prosecuting the charge[43] and to obtain a permanent or temporary stay of proceedings where there has been prejudicial publicity[44] or a contempt of court that could affect the jury's verdict. No doubt there are many more constitutional rights that flow from the constitutional right to a fair trial. As Mason CJ and I pointed out in *Dietrich*[45], '[t]here has been no judicial attempt to list exhaustively the attributes of a fair trial'. We pointed out, however, that 'various international instruments and express declarations of rights ... have attempted to define, albeit broadly, some of the attributes of a fair trial'[46]. The rights recognised in those instruments and declarations may well become, if they are not now, guaranteed by Chapter III's grant of judicial power.

Given the modern view of Chapter III, it is difficult to see how the decision of the High Court in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[47] can stand. There, a majority of the Court, with Dixon and Evatt JJ dissenting, held that it was not inconsistent with the judicial power of the Commonwealth for the Federal Court in Bankruptcy, if it had reason to believe a bankrupt was guilty of an offence against the Act, to charge the person with the offence and hear the charge summarily. The notion that a court could be both prosecutor and judge seems repugnant to the most basic ideas of judicial power. The facts in *Lowenstein* were far removed from the power of a judge to punish a person for contempt in the face of the court, a power that is necessary to protect the integrity of the court's business.

More controversial – whether substantive rights are protected by Chapter III

The foregoing discussion shows that the right to procedural due process is now guaranteed by Chapter III of the Constitution. Are more substantive rights, often enshrined in the constitutions of other countries, similarly entrenched? Professor Winterton has pointed out[48] that such rights could include criminal process rights, such as freedom from unreasonable search and seizure[49], freedom from detention by police or official questioning and the privilege against self-incrimination. They might even include other civil and political rights, such as freedom of communication[50] and the right to equal treatment by the law[51].

In the *Builders Labourers Case*[52], Murphy J asserted that 'many of the great principles of human rights stated in the English constitutional instruments (the *Magna Carta*, the *Declaration of Rights* and the *Bill of Rights* 1688) such as those which require observance of due process, and disfavour cruel and unusual punishment' are embedded in the Constitution.

Our Court has already recognised that Chapter III protects some substantive rights. In its constitutional context, the term 'judicial power' has been interpreted as implying a separation of judicial power from legislative and executive power and as guaranteeing the absolute independence of the judiciary[53]. Chapter III has also been interpreted as creating a public right to have the judicial power of the Commonwealth exercised by judges and courts that do not perform tasks for the executive government that might impair public confidence in the impartiality of those judges and courts[54]. It also provides for protection of substantive rights by ensuring through s75(v) of the Constitution that officers of the Commonwealth are performing their tasks according to law[55]. Section 75(v) prevents the Parliament from declaring that the conduct of a Commonwealth officer is not examinable in the High Court. One of the great questions that remains to be decided is whether s75(v) also prevents the Parliament from declaring that the conduct of a Commonwealth officer in a relevant field is not justiciable in the High Court even though it is contrary to law.

The judgment of Deane and Toohey JJ in *Leeth v The Commonwealth*[56] provides the major premise for the conclusion that Chapter III protects substantive due process rights generally. Their Honours said:

> [T]he doctrine of legal equality is, to a significant extent, implicit in the Constitution's separation of judicial power ... [I]n Chapter III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit ... the essential requirements of the curial process, including the obligation to act judicially. At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.

I will consider the arguments for and against three particular substantive rights that have been addressed by the High Court as being potentially enshrined by Chapter III.

1. Protection from 'usurpation of judicial power' and 'legislative judgment'

Arguably, Chapter III guarantees the right of an individual to a judicial process that is free of a legislative 'usurpation of judicial power' or 'legislative judgment' about the facts and issues in the case. In *Liyanage v The Queen*[57], the Privy Council held

invalid legislation that had been passed specifically in relation to a group of dissidents who had been arrested following an attempted coup against the Ceylon government. This special legislation redefined the relevant offences and penalties applicable to the group, modified the laws of evidence, provided for trial by three judges sitting without a jury and retrospectively validated their arrest without warrant and their detention before trial. In a celebrated decision, the Privy Council held the law was invalid as a usurpation of judicial power that violated the separation of powers in the Ceylon Constitution.

The Privy Council said[58]:

> Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings.

There is little doubt that this decision would be followed in Australia. Our Court has long recognised that no Australian legislature can improperly interfere with the federal judicial process[59]. In *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[60], the Court declared invalid a sub-section of the *Trade Practices Act 1974* (Cth) that deemed a union guilty of tortious conduct. Sub-section 45D(5) provided that, where two or more officers of a union engaged in concerted conduct, the union itself was deemed to engage in that conduct, unless it could show 'that it took all reasonable steps' to prevent the officers doing so. By a five to two majority, this provision was held to be invalid.

Murphy J said[61]:

> Unlike a presumption, the purpose and effect of a deeming provision is to prevent any attempt, by either party, to prove the truth. Legislative provision for suppression of the truth in judicial proceedings is inconsistent with the exercise of judicial power and unconstitutional.

However, in *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation*[62], Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ distinguished Actors Equity on the basis that the impugned provision in that case did not fall within the commerce power pursuant to which it was enacted. *Ludeke* suggests that Parliament can enact deeming provisions provided that they are within the head of power pursuant to which they are enacted. But given the statements in later cases concerning the extent of judicial power, the matter cannot be taken as finally settled.

At present, High Court case law also upholds the power of Parliament to change the onus of proof[63] in a criminal case or to declare that a state of facts is presumed to exist[64]. In *The Commonwealth v Melbourne Harbour Trust Commissioners*[65], Knox CJ, Gavan Duffy and Starke JJ said that a law does not usurp judicial power simply because it regulates 'the method or burden of proving facts'. But the cases that hold that the Parliament can do so were decided before the modern view of Chapter III had gained currency. Whether they would now be regarded as correctly decided must be an open question.

As Dr Fiona Wheeler has pointed out[66], the report of the Constitutional Commission over which Sir Maurice presided makes clear that the presumption of innocence is an important element in ensuring that an accused is not tried unfairly. She argues that:

> [I]t should be accepted that where Parliament has placed upon the defendant the persuasive burden of proof in relation to an element of a federal offence, this is (prima facie) to ask a court exercising federal jurisdiction to conduct an unfair criminal trial because of the risk that … a defendant will be convicted despite the existence of a reasonable doubt as to her or his guilt.

If the presumption of innocence is a necessary concomitant of a fair trial, as human rights instruments indicate, it must be debateable whether the Parliament can try a person for a serious criminal offence and put any onus of proof on that person. Similarly, it must be debateable whether the Parliament can provide for a lower standard of proof in a criminal trial than proof beyond reasonable doubt.

However, the privilege against self-incrimination, although seen as a fundamental common law principle, has not so far been seen as beyond federal legislative power to impair or abolish[67]. In *Sorby v Commonwealth*[68] Gibbs CJ said:

> The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action.

Nevertheless, the traditional view of the judicial process may invalidate any attempt by the Parliament to compel an accused person to give evidence or, in the course of giving evidence, to answer questions that might incriminate him or her. Nor does it seem consistent with the traditional view of the judicial process

that the Parliament could require a person to incriminate herself or himself in a non-judicial environment and then use the answers so obtained to convict the accused.

Bills of attainder and retroactive laws

More recently, the question of Parliament interfering with the judicial process has been brought into the spotlight through the High Court considering bills of attainder and retroactive laws. Acts of Attainder and Acts of Pains and Penalties are laws that punish a person without a judicial determination of guilt. Such laws were common in the 16th, 17th and 18th centuries.

In *Polyukhovich v The Commonwealth*[69], six judges agreed that the Australian Constitution prevented the Federal Parliament from enacting a bill of attainder because it was inconsistent with the separation of judicial power provided for in Chapter III of the Constitution. It amounted to a declaration of guilt by the Parliament and was, therefore, an improper exercise by Parliament of judicial power. It would leave to a court only the duty of determining whether the person charged was a person (or

a member of the class) specified in the Act. If Parliament could pass such legislation, it could enact a legal rule and simultaneously declare that a particular person or group had broken it.

Given these statements on bills of attainder, the decision in *R v Richards; Ex Parte Fitzpatrick and Browne*[70] is difficult to defend. By resolution of the House of Representatives, Fitzpatrick and Browne were declared 'guilty of a serious breach of privilege' and for the 'offence' were committed to gaol. The offence consisted in publishing articles that the Committee of Privileges found were 'intended to influence and intimidate a member … in his conduct in this House'. Our Court upheld the imprisonment on the basis that s49 of the Constitution gave each House the privileges of the House of Commons. In an oral judgment, the Court simply said that the separation of powers doctrine was not a sufficient reason for giving s49 a restrictive meaning[71]. But surely reconciling ss49 and 71 required greater analysis than the Court gave to the problem. The resolution was an attainder, adjudging two men to be guilty of an offence and committing them to prison. It was an exercise of judicial power. No attempt was made to justify how or why the general language of s49 should be given ascendancy over s71 of the Constitution. Moreover, since *ACTV*[72] and *Lange*[73], there is reason to think that the unrestricted right of Parliament to punish persons for criticisms of members of Parliament is inconsistent with the freedom of communication protected by the Constitution.

More controversial is the view that a retroactive criminal law is a breach of the separation of powers and necessarily a usurpation of judicial power. In *Polyukhovich*[74], the retroactive law in question was the *War Crimes Act 1945* (Cth) which provided that a person was guilty of an indictable offence if that person committed, in Europe, between 1 September 1939 and 8 May 1945, a 'war crime'. A majority of the court held that the Act was not inconsistent with the separation of powers.

Mason CJ, Dawson J and myself pointed out that the Act penalised persons according to a generally applicable rule, rather than, as in the case of a bill of attainder, specifying persons or groups by name or identifiable characteristics[75]. Further, we found that the Act did not make any determination of fact. Instead, the requirement of proof of conduct and the necessary state of mind which constitutes murder was 'too particular' in its nature to amount in these circumstances to a 'disguised description of group membership'[76]. Mason CJ said that[77]:

'There is nothing in the statements which I have quoted to suggest that an exercise of judicial power necessarily involves the application to the facts of a legal principle or standard formulated in advance of the events to which it is sought to be applied.'

Toohey J also held that the Act did not constitute a bill of attainder and did not amount to a legislative judgment as to guilt. However, he did deal with the general international abhorrence of retroactive criminal law, seemingly on the basis that it was relevant to Chapter III. He said retroactive laws would not

necessarily offend Chapter III, but he would not 'share dicta which may be thought to suggest that an ex post facto law can never offend Chapter III'[78]. He found it unnecessary to pursue that issue because the Act was not 'offensively retroactive' in relation to the plaintiff. Murder was universally condemned and constituted a grave moral transgression[79].

Deane and Gaudron JJ, on the other hand, held that the Act was incompatible with Chapter III of the Constitution, saying that a retroactive criminal law was a usurpation by Parliament of judicial power and a legislative judgment of guilt[80]. For Deane and Gaudron JJ, there was no relevant difference between a law that declared that persons who had certain characteristics were guilty of an offence and a law that provided that persons who had committed certain acts were guilty of an offence[81].

Deane and Gaudron JJ's views regarding the validity of retroactive criminal laws are controversial because, unlike the United States Constitution[82], there is no mention of how retroactive laws should be dealt with in the Australian Constitution.

To sum up, in *Polyukhovich* there was a clear majority holding that a bill of attainder per se will be inconsistent with the reservation of judicial power in Chapter III. On the other hand, an implied constitutional guarantee against retroactive criminal laws, as supported by Deane and Gaudron JJ, has not yet won majority support. The early High Court decision of *R v Kidman*[83] – which held that the Commonwealth did have power to enact a retroactive criminal law – would seem to remain good law.

'More controversial is the view that a retroactive criminal law is a breach of the separation of powers and necessarily a usurpation of judicial power.'

Kable v Director of Public Prosecutions (NSW)

The issue of legislative judgment and usurpation of judicial power also arose in *Kable v Director of Public Prosecutions (NSW)*[84]. There, the *Community Protection Act* 1994 (NSW) empowered the Supreme Court of New South Wales to make preventive detention orders. However, s3 limited the making of detention orders to the case of a man named Gregory Kable. The Act was passed because Kable, while in gaol for the manslaughter of his wife, had written letters allegedly threatening the safety of his children and his deceased wife's sister.

Sir Maurice, who appeared for Kable in the High Court, argued that the Act was invalid because it singled out an individual person for detention in the absence of any conviction. He argued that this amounted to a 'legislative judgment' or a 'legislative usurpation of judicial power' within the meaning of *Liyanage v The Queen*[85].

But the Constitution Act 1902 (NSW) embodies no 'separation of powers'[86]. Accordingly, in the absence of any 'separation of powers' at the State level, an attack on the *Community Protection Act* based on the concept of 'legislative judgment' without more had to fail. However, a majority of the Court invoked the 'incompatibility doctrine'. We held that the function conferred on the Supreme Court by the *Community Protection Act* was 'incompatible' with the exercise of federal jurisdiction invested in the Supreme Court and would undermine public confidence in that court.

Citing authority[87], I said that it is implicit in Chapter III that a State cannot legislate in a way that has the effect of violating 'the principles that underlie Chapter III'[88]. I went on to say that[89]:

> At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired. The Act therefore infringed Chapter III of the Constitution and was and is invalid.

Once it was established that aspects of the doctrine of separation of powers, such as protection from usurpation of judicial power, were relevant, the invalidity of the Act was readily apparent.

2. Freedom from detention

A second substantive right arguably implicit in Chapter III is the right of the citizen to freedom from detention except pursuant to judgment by a court. In *Chu Kheng Lim v Minister for Immigration*[90] Brennan, Deane and Dawson JJ in a joint judgment recognised this right. Their Honours suggested[91] that there existed 'a constitutional immunity from being imprisoned ... except pursuant to an order by a court' – since, apart from certain 'exceptional cases'[92]:

> the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

The exceptions noted by the majority included an accused's custody pending trial, the detention of those who are mentally ill or have an infectious disease, and imprisonment by a military tribunal or for contempt of Parliament[93]. And *Lim* itself decided that the aliens power extended to authorising the detention of an alien for the purpose of deportation or expulsion.

If there is a Chapter III right of freedom from detention, then Commonwealth legislation purporting to authorise detention outside the excepted categories may be invalid as an attempted exercise of the judicial power of the Commonwealth. Arguably, federal legislation authorising the detention of a criminal suspect for interrogation, for example, may be invalid.

Gaudron J's judgment in *Lim* was more cautionary. Her Honour said that she was 'not presently persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Chapter III'[94]. My judgment was also cautionary. I said[95] that a law that authorised the detention of an alien for the purpose of deportation or processing an entry permit might be invalid if it went beyond what was reasonably necessary to effect that purpose. That is to say, detention without a curial order will not usurp judicial power if it is reasonably and appropriately adapted to serving some other legitimate object within the Parliament's powers.

Nevertheless, despite these cautionary statements, Lim is a significant decision. It provides a foundation for the conclusion that, except in limited circumstances, the detention of citizens against their will may be constitutionally permissible only when determined by a court and only when the determination conforms to the traditional procedures and safeguards of the judicial process.

Kruger v The Commonwealth

If the involuntary detention rule exists, *Kruger v The Commonwealth*[96] shows that the exceptions to it are not closed. The issue in *Kruger* was whether the *Aboriginals Ordinance 1918* (NT) was valid insofar as it authorised the forced removal of Aboriginal children from their families and communities without a court order. Toohey, Gaudron and Gummow JJ rejected the plaintiffs' argument on the ground that the ostensible concern of the ordinance with Aboriginal welfare precluded any finding that the confinement of Aboriginals was 'punitive'. Gummow J[97] said that:

> The powers of the Chief Protector to take persons into custody and care under the 1918 Ordinance were, whilst that law was in force, and are now, reasonably capable of being seen as necessary for a legitimate non-punitive purpose (namely the welfare and protection of those persons) rather than the attainment of any punitive objective.

Of more general application, Gummow J also noted that '[t]he categories of non-punitive, involuntary detention are not closed'[98]. Indeed, having regard to the breadth of exceptions acknowledged in *Lim* and in *Kable*, Gaudron J[99] now doubted whether any constitutional requirement that involuntary detention be subject to judicial 'due process' was maintainable at all.

Nevertheless, despite the finding that the ordinance in *Kruger* did not infringe Chapter III, and despite the reservation of Gaudron J, it is still arguable that a limited right against detention without judicial due process exists. Further case law will be needed to define how limited this right is.

3. Equality argument

From the separation of judicial power in Chapter III, some judges have inferred a third substantive right in that Chapter. It is the guarantee of the equal application of federal law. If the Constitution requires a court to administer equal justice, then, so the argument runs, the court can only do so if the substantive rules created by the legislature require the 'like treatment of persons in like circumstances' and an appropriately 'different treatment of persons in different circumstances'[100].

Leeth v The Commonwealth[101] is the seminal case. The issue was whether a section of the Commonwealth Prisoners Act 1967 (Cth) was valid. It provided that, where a person was to be sentenced to imprisonment for a federal offence and the local law of the State or Territory required prison sentences to specify a minimum non-parole period, the federal offender was to be sentenced according to that local law. As a result, federal offenders in different States and Territories could receive different minimum non-parole periods. The section was said to be unconstitutional because it breached an alleged implied prohibition against the 'unequal treatment of equals'[102] or because it contravened s71 of the Constitution which 'contemplate[d] that in substantive matters the law to be applied will be the same throughout Australia'[103].

Only Gaudron J based her decision on the ground that the Act was in breach of s71. She declared that equal justice was fundamental to the judicial process[104]. The Act directed courts to treat convicted persons in different ways according to the place of trial, and thus required them to exercise power otherwise than in accordance with 'the judicial process'. Her Honour said[105]:

> All are equal before the law. And the concept of equal justice - a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such - is fundamental to the judicial process ... [The legislation here confers] a power ... that treats people unequally. As such its exercise is inconsistent with the judicial process.

In comparison, Deane and Toohey JJ evince what Professor Zines[106] calls a more 'general equality' argument. Their Honours said[107]:

> [T]he doctrine of legal equality is, to a significant extent, implicit in the Constitution's separation of judicial power ... [It] is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.

The joint majority judgment of Mason CJ, Dawson J and myself rejected both the general equality argument and that based on Chapter III. In relation to the equality ground, we said[108]:

> 'There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.'

In relation to the s71 argument, we said[109] that the Act was not an attempt to cause the court to act contrary to the judicial process. We said:

> [To] speak of judicial power in this context is to speak of the function of a court rather than the law which a court is to apply in the exercise of its function.

Like the other members of the majority, Brennan J found that the legislation was not inconsistent with s71 of the Constitution, although his reasoning was closely tied to the circumstances of the case and did not amount to a rejection of the views of the dissenting justices.

A majority of the court in *Leeth* was therefore of the view that the principle of the separation of powers does not limit the Parliament's power to make substantive rules of law that, in the view of the court, treat people in an unequal or discriminatory manner.

Kruger v The Commonwealth

In *Kruger v The Commonwealth*[110], the *Aboriginals Ordinance 1918* (NT) was also challenged on equality grounds. Gaudron J reaffirmed[111] her own analysis in *Leeth* and repudiated the broader 'equality' doctrine envisaged by Deane and Toohey JJ in that case. Dawson J[112], with whom I agreed, and Gummow J[113] also rejected the approach of Deane and Toohey JJ in *Leeth*. Similarly, Brennan CJ held that there was no generalised requirement of 'substantive equality' which could assist the Aboriginal plaintiffs in *Kruger*[114]. Only Toohey J defended[115] the position that he and Deane J had taken in *Leeth*.

Conclusion

The cumulative effect of the judgments of Dawson, Gaudron

and Gummow JJ and myself in *Kruger* appears to mean that the 'doctrine of legal equality' suggested by Deane and Toohey JJ in *Leeth* has been decisively rejected. This supports Professor Winterton's view that the 'judicial power of the Commonwealth' should not generally be held to include substantive rights[116]. It is notable that the United States Constitution, upon which our separation of judicial power was modelled[117], does not view the right of legal equality as an essential feature of 'judicial power'. Rather, the United States Constitution contained no guarantee of equality until the adoption in 1868 of the Fourteenth Amendment, guaranteeing 'the equal protection of the laws'. Moreover, the framers of the Australian Constitution considered a provision modelled on the Fourteenth Amendment (at least in relation to the States), and specifically rejected it at the Melbourne Constitutional Convention in 1898[118].

On the other hand, the more limited Chapter III doctrine proposed by Gaudron J, and at least partially endorsed in *Kruger* by Dawson J and myself, appears to be still open. On that basis, despite the plaintiffs' failure in *Kruger*, the combined effect of the judgments in that case with those in *Leeth* and *Polyukhovich* suggest that implications protective of personal liberty will be drawn from the conception of Chapter III as an 'insulated, self-contained universe of Commonwealth judicial power'[119]. *Kable* is perhaps the most dramatic example of this with its protection against usurpation of judicial power and legislative judgment.

'*Kable* is perhaps the most dramatic example of this with its protection against usurpation of judicial power and legislative judgment.'

Gaudron J's comments that legislation requiring courts to apply the law to 'facts invented by Parliament' would impose 'a travesty of the judicial process' and thereby contravene s 71 of the Constitution[120] also show that federal courts cannot and should not be unconcerned as to the substantive content of the law they apply. Professor Winterton is a critic of substantive due process. But he agrees[121] that it 'would be contrary to accepted notions of judicial power'[122] to require a court 'to enforce laws inconsistent with civilised standards of humanity and justice'. He gives as an example 'Commonwealth legislation imposing barbarous sentences'.

Inevitably, this issue will raise questions about the tension that exists from the effect of the negative implications, arising from the separation of judicial power from legislative power, on laws that are otherwise literally within a head of constitutional power. This is a debate that has been waged since federation and will inevitably continue in the future.

The constitutional law of Australia will be the poorer for not having the wisdom and views of Sir Maurice Hearne Byers on the questions that are and will be involved in this debate.

1 *Scala v Mammolitti* (1965) 114 CLR 153.
2 (1949) 79 CLR 353.
3 *The Commonwealth v Tasmania* (1983) 158 CLR 1.
4 *New South Wales v The Commonwealth* (1975) 135 CLR 337.
5 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
6 (1996) 189 CLR 51.
7 cf the remarks of Sir John Laws, 'Judicial remedies and the Constitution' (1994) 57 *Modern Law Review* 213 at 213.
8 *Cominos v Cominos* (1972) 127 CLR 588 at 606; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 67; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257; *Nicholas v The Queen* (1998) 193 CLR 173 at 233 [148].
9 (1909) 8 CLR 330 at 357.
10 Lumb and Moens, *The Constitution of the Commonwealth of Australia*, 6th ed (2001) at 7.
11 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
12 *New South Wales v The Commonwealth* (1915) 20 CLR 54.
13 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.
14 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 722 (emphasis in the original).
15 Nygh and Butt (eds), *Butterworths Australian Legal Dictionary* (1997) at 1129.
16 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205.
17 Section 80.
18 Lumb and Moens, *The Constitution of the Commonwealth of Australia*, 6th ed (2001) at 254.
19 (1989) 166 CLR 518 at 580.
20 (1992) 174 CLR 455 at 470.
21 Zines, 'A judicially created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 at 168.
22 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
23 (1951) 83 CLR 1 at 172-173.
24 (1951) 83 CLR 1 at 234-235.
25 (1951) 83 CLR 1 at 268-269.
26 (1951) 83 CLR 1 at 268-269.
27 (1992) 176 CLR 1 at 27.
28 cf Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.
29 (1991) 172 CLR 460 at 496. Similarly, I have said that '[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power': *Grollo v Palmer* (1995) 184 CLR 348 at 379.
30 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.
31 (1991) 172 CLR 501 at 607.
32 (1992) 174 CLR 455 at 486-487.
33 (1992) 177 CLR 1 at 70.
34 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70.
35 (1977) 138 CLR 1 at 11.
36 (1991) 172 CLR 501 at 607.
37 cf Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 322.
38 Zines, *The High Court and the Constitution*, 4th ed (1997) at 204.
39 (1992) 177 CLR 292.
40 (1992) 177 CLR 292 at 326, 362.
41 *Dietrich v The Queen* (1992) 177 CLR 292 at 326.
42 *Dietrich v The Queen* (1992) 177 CLR 292 at 326.
43 *Jago v District Court* (NSW) (1989) 168 CLR 23.
44 *R v Glennon* (1992) 173 CLR 592.
45 (1992) 177 CLR 292 at 300.
46 (1992) 177 CLR 292 at 300.
47 (1938) 59 CLR 556.
48 Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 200-201.
49 cf United States Constitution, Fourth Amendment.
50 cf United States Constitution, First Amendment; see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
51 cf United States Constitution, Fourteenth Amendment.
52 *Victoria v Australian Building Construction Employees' and Builders*

Labourers' Federation (1982) 152 CLR 25 at 109. His Honour's position varies quite dramatically from that expressed by Latham CJ in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. At 168, Latham CJ poured cold water on the suggestion that notions of due process should be imported into the words 'judicial power':

The case was argued by some counsel as if the Commonwealth Constitution contained provisions corresponding to those contained in certain other constitutions. In the Constitution of the United States of America there are provisions preventing the enactment of laws impairing the obligation of contracts or depriving persons of life, liberty or property without due process of law. In the Canadian Constitution 'property and civil rights within the province' is a subject as to which the provincial legislatures are declared to have exclusive power ... None of these provisions appear in the Constitution of the Commonwealth, and in my opinion there is no basis whatever for the attempt to create such provisions by arguments based upon the judicial power and s 92 of the Constitution and the natural dislike of suppressive laws.

53 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540.

54 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

55 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; see also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 684-685. See also Kennett, 'Individual rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581.

56 (1992) 174 CLR 455 at 486-487. See also *Re Nolan*; Ex parte Young (1991) 172 CLR 460 at 497 per Gaudron J.

57 [1967] 1 AC 259.

58 [1967] 1 AC 259 at 290.

59 *Huddart Parker v Moorehead* (1909) 8 CLR 330; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 346; *Hammond v The Commonwealth* (1982) 152 CLR 188; *Sorby v The Commonwealth* (1983) 152 CLR 281; *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

60 (1982) 150 CLR 169.

61 (1982) 150 CLR 169 at 214-215. See also His Honour's judgment in *R v Bowen; Ex parte Amalgamated Metal Workers & Shipwrights Union* (1980) 144 CLR 462 at 480.

62 (1985) 159 CLR 636 at 651-652.

63 *Williamson v Ah On* (1926) 39 CLR 95; *Milicevic v Campbell* (1975) 132 CLR 307.

64 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487.

65 (1922) 31 CLR 1 at 12.

66 'The doctrine of separation of powers and constitutionally entrenched due process in Australia', (1997) 23 *Monash Law Review* 248 at 272.

67 In H*ammond v The Commonwealth* (1982) 152 CLR 188 at 203, Brennan J expressly left open the question whether the Commonwealth Parliament could deprive a person, charged with a Commonwealth offence, of immunity from self-incrimination. However, the High Court has now recognised such power: *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298-299, 308, 314; see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

68 (1983) 152 CLR 281 at 298.

69 (1991) 172 CLR 501.

70 (1955) 92 CLR 157.

71 (1995) 92 CLR 157 at 165-166.

72 (1992) 177 CLR 106.

73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

74 (1991) 172 CLR 501.

75 (1991) 172 CLR 501 at 535-536, 647-649, 721-722.

76 (1991) 172 CLR 501 at 686 per Toohey J.

77 (1991) 172 CLR 501 at 533.

78 (1991) 172 CLR 501 at 690.

79 (1991) 172 CLR 501 at 690.

80 (1991) 172 CLR 501 at 612-613, 704-705.

81 See Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 at 171.

82 See United States Constitution, Art 1, s9, cl3, 'No Bill of Attainder or ex post facto law shall be passed'.

83 (1915) 20 CLR 425. In that case the defendants were charged with 'conspiracy to defraud the Commonwealth'. This offence had been added to the *Crimes Act 1914* (Cth) by amendment in 1915, but the amending Act required that it 'be deemed to have been in force' from 29 October 1914. Most of the judgments specifically held that the Commonwealth did have power to enact a retroactive criminal law.

84 (1996) 189 CLR 51.

85 [1967] 1 AC 259. See Byers Q.C. for the appellant (1996) 189 CLR 51 at 53-54.

86 Clyne v East (1967) 68 SR (NSW) 385; *Building Construction Employees' and Builders Labourers' Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

87 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 314-315.

88 (1996) 189 CLR 51 at 115; see also at 107 per Gaudron J.

89 (1996) 189 CLR 51 at 124. But see the dissenting judgment of Dawson J at 86, where His Honour said that 'the concept of incompatibility is derived from the separation of powers and does not have a life of its own independent of that doctrine ... New South Wales has not adopted that doctrine so that there can be no incompatibility between the exercise of judicial power and the exercise of executive or legislative power by a court of that State.'

90 (1992) 176 CLR 1.

91 (1992) 176 CLR 1 at 28-29.

92 (1992) 176 CLR 1 at 27.

93 (1992) 176 CLR 1 at 28.

94 (1992) 176 CLR 1 at 55.

95 (1992) 176 CLR 1 at 65-66.

96 (1997) 190 CLR 1.

97 (1997) 190 CLR 1 at 162; see also at 85 per TooheyJ.

98 (1997) 190 CLR 1 at 162.

99 (1997) 190 CLR 1 at 110.

100 See Zines, *The High Court and the Constitution*, 4th ed (1997) at 205.

101 (1992) 174 CLR 455.

102 (1992) 174 CLR 455 at 457 per Jackson Q.C..

103 (1992) 174 CLR 455 at 458 per Jackson Q.C..

104 (1992) 174 CLR 455 at 502.

105 (1992) 174 CLR 455 at 502-503.

106 See Zines, *The High Court and the Constitution*, 4th ed (1997) at 205.

107 (1992) 174 CLR 455 at 486-487.

108 (1992) 174 CLR 455 at 467.

109 (1992) 174 CLR 455 at 469.

110 (1997) 190 CLR 1.

111 (1997) 190 CLR 1 at 113-114.

112 (1997) 190 CLR 1 at 63.

113 (1997) 190 CLR 1 at 153.

114 (1997) 190 CLR 1 at 44-45.

115 (1997) 190 CLR 1 at 96-97.

116 See Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 207.

117 See Dixon, *Jesting Pilate* (1965) at 52.

118 See Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future directions in Australian Constitutional Law (1994) 185 at 205.*

119 Blackshield and Williams, *Australian constitutional law and theory*, 2nd ed (1998) at 1164.

120 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704; see also the comments of Murphy J in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 214.

121 Winterton, 'The separation of judicial power as an implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 207.

122 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 689 per Toohey J.

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Legal retail therapy:
Is forum shopping a necessary evil?

By The Hon. Justice R S French, Federal Court of Australia.
Delivered at the Australian Legal Convention, 11-14 October 2001, Canberra.

Forum shopping - origins and definition

The metaphor 'forum shopping' comes with a denunciatory overlay which does not convey with any clarity what is being denounced. A like imprecision is found in the more arcane, but equally denunciatory, concept of 'colourability' which is an attribute attaching to claims for relief which nominally but illegitimately invoke federal jurisdiction in order that they may proceed in a federal court.

In contemporary discussion of forum shopping it is useful to have regard to the history of that term. It originated in the United States, initially descriptive of the practice of invoking diversity jurisdiction in order to utilise federal courts which, although required to apply relevant State statutes, could create and develop a federal common law. The practice was dealt a blow by the landmark decision of the United States Supreme Court in *Erie Railroad Company v Tompkins.*[1] That decision required federal courts in diversity cases to apply the substantive laws of the State in which they sat. It was later extended by the requirement that federal courts apply the choice of law rule of the forum.[2] The term 'forum shopping' appears to have been coined in an article about the Erie decision in the *Southern California Law Review*[3]. An early reported judicial use of the term appears in a judgment of the United States Supreme Court concerned with the effect of a federal statute upon a plaintiff's ability to sue an employer in the court of any State of that plaintiff's choosing. Upholding that effect of the *Federal Employer's Liability Act*, Jackson J nevertheless said: 'The judiciary has never favoured this sort of shopping for a forum.' [4]

'The metaphor 'forum shopping' comes with a denunciatory overlay which does not convey with any clarity what is being denounced.'

The precise collocation 'forum shopping' appears first to have been judicially coined by the Ninth Circuit of the United States Court of Appeals in 1951, borrowing from its usage in the *Southern Californian Law Journal*.[5] In that case the parents of an eight year-old child, killed when hit by a gasoline truck, sued the oil company and its driver in the State District Court of Idaho under a State wrongful death statute. The verdict of $40,000 which they obtained was set aside by the Judge as excessive and a new trial ordered. They discontinued against the company and started fresh proceedings in the United States District Court for the District of Idaho invoking its diversity jurisdiction. This time they received a verdict of $35,407.50, reduced in the Federal Court of Appeal to $20,000. Although their tactic had no explicit impact on the outcome of the appeal, it was described by the chief judge as 'a clear case of what is aptly called 'forum shopping''.

The United States has some fifty State judicial hierarchies and federal courts of general and specialist jurisdiction. It is not surprising that forum shopping in that country has been described as 'a national legal pastime'.[6]

The term 'forum shopping' crossed the Atlantic to the United Kingdom where it was used for the first time in the House of Lords in 1971. The case was a running down action arising out of a road accident in Malta. Both parties were residents of England. The action was brought in England. Speaking of the advantage of the rule in *Phillips v Eyre* [7] Lord Pearson remarked that it enabled an English court '…to give judgment according to its own ideas of justice'. Moreover if one Englishman were wrongfully to injure another in a primitive country or unsettled territory where there was no law of torts, the English courts could give redress. His Lordship conceded, however, that with the rapid spread of civilisation the rule had much less importance. We may observe, perhaps with some relief, that the spread of 'civilisation' between the States of Australia since federation means that the recent abolition by the High Court of the rule in *Phillips v Eyre* is unlikely to disadvantage the residents of any State wherever they may be sued within Australia.[8] Lord Pearson identified the principal disadvantage of the rule in *Phillips v Eyre* in terms which have been regarded as the first judicial definition of forum shopping. The rule, he said:

> might lead to what has been described in American cases as 'forum- shopping', i.e. a plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would not be available to him in his natural forum. [9]

This definition of forum shopping is pejorative and embodies question-begging references to natural and alien forums. It is not reflective of a uniform attitude in the English courts. Lord Denning, in 1973, judicially invited any friendly foreigner to seek the aid of the English courts if he desired to do so:

> You may call this 'forum shopping'…but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[10]

Lord Simon of Glaisdale, in the following year, on appeal in the same case acknowledged that 'forum shopping' is a dirty word but characterised it as '…only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.'[11]

The criticism of forum shopping has not always applied with the same vigour in the United States against interstate forum shopping as it has been against State/federal forum shopping. Where a libel action against *Hustler Magazine* was brought in a State with an unusually long statute of limitations, Justice Rehnquist (as he then was) called the selection strategy: 'no different from the litigation strategy of countless plaintiffs who seek a forum with favourable substantive or procedural rules or sympathetic local populations.' [12]

It has been argued in the American context, that the courts of that country have offered little justification for the differential treatment of State/federal and interstate forum shopping. It has been suggested that the Supreme Court's aversion to State/federal forum shopping

rests upon a myth of State/federal court parity which contends that the two court systems as co-equals will produce similar substantive outcomes with regard to federal rights. It is suggested that in that country, however, on some issues the results differ systematically. So it is said that the federal courts are the only judicial forums in the American system capable of enforcing counter-majoritorian checks in a sustained, effective manner. The dominant policy against State/federal forum shopping ignores the fact that differences in court systems exist and that something is at stake in the choice between them.[13]

Reference to the debate in the United States is not intended to suggest immediate analogies between their court system and the Australia system. There are significant differences. The point to draw from the debates in both the English and the United Kingdom jurisdictions, however, is that it is important to be clear about what it is we discuss when we discuss 'forum shopping', to begin, so far as possible, with a value-free definition and then to examine its implications for public policy for better or for worse.

The seventh edition of *Black's Law Dictionary* offers a definition which is not overtly condemnatory: 'The practice of choosing the most favourable jurisdiction or court in which a claim may be heard.'

This is compared with 'judge shopping' which involves filing several law suits asserting the same claims in a court or district with multiple judges in the hope of having one of the law suits assigned to a favourable judge and discontinuing the others.

Butterworths Australian Legal Dictionary also defines the practice of 'forum shopping' in neutral terms: 'Selection by a plaintiff of the court of justice best suited to the plaintiff's needs by reason of commercial, legal or personal advantage.'

Both definitions are essentially the same. Forum shopping is ultimately about choice: choice of forum by litigants.

Forum shopping in the United States may be seen as an enthusiastic application of Rosco Pound's theories of legal realism. By way of example, a recent study by two Cornell Law School professors of corporate bankruptcy filings, concluded that large companies that decide to file for bankruptcy 'shop for judges the way most persons shop for groceries: they look for the best deal.' The study charted filings by the 273 largest public companies which filed for bankruptcy between 1980 and 1997. The study showed a rapid increase in the rate of forum shopping. In the early 1980s about twenty per cent of the cases were filed in a district other than where the company's headquarters were located. Since 1994, more than half the filings took place in other districts. New York City was the most popular destination in the 1980s. In 1988 it clamped down on judge shopping. The companies moved to Delaware. In 1996, 86 per cent of the largest public companies filing bankruptcy did so in Delaware even though none had headquarters there. When the Chief United States District Judge in Delaware withdrew the large bankruptcy cases from the bankruptcy judges in February 1997, the rate of out-of-state shopping in Delaware fell sharply.

Professor LoPucki observed:

> This study shows that big businesses don't just take the judge or the court that the system offers them…big businesses act strategically to come before the court or judge where they will get the best outcome. This pattern can't be explained by convenience; these companies are deliberately filing away from their own headquarters. [14]

Opportunities for choice of forum in Australia

Where there is a controversy amenable to judicial determination in Australia, the following choices of forum may arise:

1. Between an Australian court and the court of another country.
2. Between the High Court and a federal or State court.
3. Between the Federal Court and a State court.
4. Between a court of a State and a court of another State or Territory.
5. Between the courts of a State or Territory.
6. Between the Federal Court and the Federal Magistracy.
7. Between a federal or State court and an administrative tribunal established under federal or State law.
8. Between courts and tribunals on the one hand, and arbitration or alternative dispute resolution processes on the other.

The focus of this paper is on choices that arise between federal and State courts. However the discussion must be viewed in the context of the full range of options that may be open to a prospective litigant. Those choices may include resort to an offshore court seen as offering forensic advantages not available in this country. By way of example, from my own experience, in the late 1970s an environmental organisation in Australia took action against Alcoa in the US District Court in Philadelphia in respect of Alcoa's bauxite mining processes in the south-west of Western Australia. The action, however, was struck out, the judge referring to the Australian litigators in florid classical metaphor as akin to the inhabitants of Troy seeking protection from the heavenly palladium. On that basis the judge seems to have viewed himself as representing the Goddess Pallas. In a more recent example, in 1995, CSR brought an action in the US District Court in New Jersey against the Cigna Insurance Group seeking a judgment that insurance policies relevant to its liability for asbestos related claims were in effect for the critical years and covered pending and future claims. CSR contended that a purported release was invalid because it resulted from coercive conduct violating US anti-trust laws which were seen as essential to its claim and only able to be heard in the United States. The insurers, however, brought an anti-suit injunction against the manufacturer in the Supreme Court of New South Wales, which injunction was granted provisionally bringing the American action to a complete stop. The High Court subsequently discharged that injunction.[15]

Reference to the High Court is included in the choice of forum opportunities because, in recent times, the original jurisdiction of that Court to issue constitutional writs under s75(v) of the Constitution has been increasingly used to challenge decisions under the *Migration Act 1958* (Cth). This development has occurred due to the limitation of grounds of review in the Federal Court to those set out in s476 of the Act which exclude, *inter alia*, review on grounds of breach of the rules of natural justice, Wednesbury unreasonableness, failure to have regard to relevant factors and taking into account irrelevant factors. The High Court has been unable to remit applications to the Federal Court except in respect of grounds falling within s476. Those restrictions may

be seen as evidencing a perception of the Federal Court analogous to that of federal courts in the US as 'enforcing counter majoritorian checks' which in this setting may be viewed as any interference with the Executive.

The invocation of the original jurisdiction of the High Court to deal with decisions under the Migration Act, as it stood until recently, was a plain example of forum shopping but hardly to be condemned having regard to the wider grounds of review available in that jurisdiction. Criticism should be reserved for those who devised and enacted a regime calculated to lead to the gross distortion of the allocation of judicial resources that has occurred as a result. Some criticism may also be made of those who have lacked the imagination to consider using the State courts as alternative destinations for migration review cases having regard to their federal jurisdiction under s39 of the *Judiciary Act 1903* (Cth) and s4(1) of the *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth).[16]

'The invocation of the original jurisdiction of the High Court to deal with decisions under the Migration Act, as it stood until recently, was a plain example of forum shopping but hardly to be condemned...'

The choice that arises between federal and State courts will be considered more closely below. Now that statutory cross-vesting of State jurisdiction into federal courts has been struck down, this class of choice essentially derives from the concurrent federal jurisdiction able to be exercised in both systems. Federal jurisdiction incorporates an accrued jurisdiction which can include claims arising under the common law or under State statute which, if they are part of the controversy before a Federal Court, may be determined by that court.

The choices between State courts arise from common law choice of forum rules recently affected by the decision of the High Court in *John Pfeiffer Pty Ltd v Rogerson.* [17] By that decision the common law of Australia now requires that the *lex loci delicti* be the governing law with respect to torts committed in Australia but which have an interstate element. The rule applies to courts exercising both federal and non-federal jurisdiction. Its stated rationale is two-fold. One, it gives effect to the predominant territorial concern of the statutes of State and Territory legislatures as required by s118 of the Constitution. Two, it prevents forum shopping having regard to the reasonable expectation of the parties and provides certainty as to the law relating to liability. In the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, it was put thus at 647:

> If the *lex loci delicti* is applied, subject to the possible difficulty of locating the tort, liability is fixed and certain; if the *lex fori* is applied, the existence, extent and enforceability of liability varies according to the number of forums to which the plaintiff may resort and according to the differences between the laws of those forums and, in cases in federal jurisdiction, according to where the court sits.

In that case the *lex loci delicti* was New South Wales where the plaintiff suffered a workplace injury. He sued the employer in the Australian Capital Territory as that was where he was employed. The damages recovery was capped in New South Wales but not in the ACT. Callinan J described the case as 'a clear example of forum shopping'.[18] Subject to procedural advantages between one court system and another the case will leave parties with less incentive to chose, at least between States and/or Territory courts according to the law of the particular jurisdiction.

Other avenues for choice between State courts are provided by the cross vesting legislation. Section 4(3) of each State cross-vesting Act confers original and appellate jurisdiction with respect to State matters in the Supreme courts of the other States or Territories. Choices of court are subject to control by the provisions of the Act providing for transfer from the Supreme Court of one State to the Supreme Court of another State.[19] Choice is also enlivened by the provisions of the *Service and Execution of Process Act 1992* (Cth) which provides for initiating process issued in one State to be served in another State.

Choices between the courts of a particular State or Territory hierarchy or between the Federal Court and the Federal Magistracy are governed by relevant statutes and will no doubt be driven for the most part by considerations of cost and expedition.

Choices between curial and administrative tribunals are of importance and in the case of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* the Court has a discretion to refuse to grant an application where adequate provision is made under which an applicant can seek a review by the Court or another court or by another tribunal, authority or person of the decision which is impugned.[20]

The final class of choice which is mentioned is between courts and tribunals on the one hand and arbitral or other alternative dispute resolution processes. Curial and other adjudicative dispositions are merely the tip of the iceberg in the resolution of potentially justiciable disputes. The vast bulk of matters which could be or are commenced as proceedings in courts in Australia are resolved through processes of negotiation or mediation and the growth of the alternative dispute resolution industry and involvement in it by members of the legal profession is striking testament to the vitality of those alternative modes of resolution. They have the immense advantages of economy, expedition and privacy and, of course, the ability to find a resolution that will enable important personal or commercial relationships to continue without the lasting or undue damage that adversarial litigation can produce.

The constitutional basis for choices between federal and State courts

Choices may arise for litigants between federal and State courts ultimately because the Commonwealth Constitution provides for federal jurisdiction to be exercised by both federal and State courts. By s71 of the Constitution, the judicial power of the Commonwealth vests in the High Court of Australia, such other federal courts as the Parliament creates and such other courts as it invests with federal jurisdiction. Although the Constitution itself, unlike that of the United States, confers no express power to create federal courts, its implied power to do so flows from the phrase 'such other federal courts as the parliament creates' which appears in s71. As was said in the *Boilermakers*' case, express power was '…thought unnecessary by the framers of the

Australian Constitution who adopted so definitely the general pattern of Art III [of the US Constitution] but in their variations and departures from its detailed provisions evidenced a discriminating appreciation of American experience'.[21] The 'autochthonous expedient' of investing federal jurisdiction in State courts was not adopted in the United States because of the perceived parochialism and lack of independence of some State courts. Alexander Hamilton observed that it would be impossible to foresee 'how far the prevalency of a local spirit [might] be found to disqualify the local tribunals for the jurisdiction of national causes'. The constitution of some State courts would render them 'improper channels of the judicial authority of the union'. In particular those where judges held office at pleasure or from year to year would be 'too little independent to be relied upon for an inflexible execution of the national laws'.[22] On the other hand the Supreme courts of the States of Australia were seen by the framers of the Constitution as being of uniformly high standard 'in marked contrast with that which obtained in the United States shortly after its establishment'. [23]

'...the Supreme courts of the States of Australia were seen by the framers of the Constitution as being of uniformly high standard...'

It might have been observed that the independence of State courts in Australia was, under State Constitutions and their colonial predecessors, subject to legislative erosion. Subject to specific exceptions in New South Wales and Victoria, the State Constitutions do not entrench the independence of the courts or protect the tenure or remuneration of State judges.[24] But the fact of federation, s106 of the Constitution and the provision of legislative power to invest State courts with federal jurisdiction has itself provided them with a status and protection under the Constitution which they do not derive from the Constitutions of the States. For they are now 'part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power'.[25] They cannot now be invested with jurisdiction incompatible with their integrity, independence and impartiality as courts in which federal jurisdiction may be invested under Chapter III. That principle takes one readily to the proposition that State parliaments cannot erode the independence of the State supreme courts in ways that would make them improper channels of the judicial power of the Commonwealth. So they must be 'independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government'.[26]

A brief history of federal jurisdiction

There was a view early in the history of federation propounded by Henry Bourne Higgins among others, that the establishment of the High Court could be delayed and the supervision of the Constitution left to the State Supreme courts which were, bound by the Constitution by virtue of covering cl 5. In 1903 however, the parliament passed the Judiciary Act, providing for a High Court comprising a chief justice and two other justices. State courts were invested with federal jurisdiction under s39 of the Judiciary Act and as Harrison Moore observed the power so to invest then was exercised 'almost to its fullest extent'. The scheme of the section was:

> To embrace the whole of the matters of federal jurisdiction which it is not intended to give to the High Court exclusively, and to declare first, that the State courts shall according to their nature and degree have jurisdiction in all of them, whether they are matters of which the court would have jurisdiction under the State law or not; secondly, that no jurisdiction shall be exercised by the State courts in any of such matters, except as federal jurisdiction. [27]

For the greater part of the history of the Commonwealth, federal jurisdiction has been exercised by State courts. The early development of a federal judicature created by the Commonwealth Parliament was confined to specialist courts. The first was the Commonwealth Court of Conciliation and Arbitration, established in 1904, which was succeeded by the Commonwealth Industrial Court in 1956 after the *Boilermakers*' case, the relevant non-judicial functions being hived off to the Conciliation and Arbitration Commission. The Commonwealth Industrial Court was renamed the Australian Industrial Court in 1973. A Federal Court of Bankruptcy was created in 1930 and ultimately abolished on 30 September 1995 following the retirement in June 1995 of Justice Sweeney, who was the last judge of the Federal Court of Bankruptcy.

The 1970s saw the creation of two major new federal courts. The first was the Family Court of Australia, established under the *Family Law Act 1975*.[28] In 1963 the Thirteenth Annual Legal Convention of the Law Council of Australia was informed by the then solicitor-general, Sir Kenneth Bailey, that the attorney-general, Sir Garfield Barwick Q.C., had been authorised by Cabinet to 'design a new federal court with a view to consideration by Cabinet for approval for legislative action'. The purpose of the new court was to ease the burden on the High Court. The solicitor-general was responding at that Convention to a paper presented by MH Byers Q.C. and BP Toose Q.C..[29] The Byers and Toose proposal suggested a more substantial change for a wider purpose. It rested on certain assumptions which were contentious. The first of these was that the original understanding of the federal bargain contemplated the eventual creation of a complete structure of federal courts. The second was that there was no longer among members of the public the strong State sentiment which had existed at the time of federation and which supported the use of State courts for the exercise of federal jurisdiction.[30]

There was of course debate about the creation of the Court with FTP Burt Q.C. (as he then was) predicting that the 'two channel system' would breed 'complexity - and black motor cars', that it would seriously reduce the status of State Supreme courts and would accentuate an imbalance in the Australian judicial system under which too much inferior work was being done by superior courts. Gough Whitlam Q.C., then Deputy Leader of the Opposition, argued that as a matter of principle federal judges should interpret and apply federal laws. Garfield Barwick acknowledged that the investiture of State courts with federal jurisdiction was a potentially permanent and desirable feature of the Australian judicial system. The jurisdiction of the Federal Court would be limited to 'special' matters of which bankruptcy and industrial law were obvious examples. Beyond those examples, no coherent policy for selection of Federal Court jurisdiction was

disclosed.[31]

After many vicissitudes, which it is not necessary to review here, the Court was established in 1976. The Federal Court of Australia Bill was introduced into the Parliament by the then attorney-general, RJ Ellicott Q.C.. Previous more wide ranging proposals were criticised on the basis that they would have removed from State courts the bulk of the federal jurisdiction which they exercised and greatly weakened the status of those courts and the quality of the work dealt with by them.[32] The rationale for a Federal Court at that time was to put the existing federal court system on a more rational basis and to relieve the High Court of some of the workload it bore in matters of federal and territory law. According to the second reading speech the government believed that only where there were 'special policy or perhaps historical reasons for doing so should original federal jurisdiction be vested in a federal court'. Industrial law, bankruptcy, trade practices and judicial review of administrative decisions answered those criteria. The court would act as an appellate court from State courts exercising federal jurisdiction in matters of special federal concern.

'The Court's history indicates an evolution from a specialist body dealing with a narrow band of federal statutes, to one which is approaching a court of general jurisdiction.'

The development of Federal Court jurisdiction

The initial original jurisdiction of the Court covered bankruptcy, industrial law, trade practices, appeals from the Administrative Appeals Tribunal and compensation for Commonwealth government employees. By s39B of the Judiciary Act, enacted in 1983, it was given jurisdiction over the grant of prerogative and injunctive relief against officers of the Commonwealth in the same terms that such jurisdiction was conferred on the High Court by s 75(v) of the Constitution.

It is to be noted that although described as aspects of its specialist jurisdiction, the administrative law and trade practices jurisdictions of the Court in fact were extremely broad. The ADJR Act provided very powerful tools for the review of Commonwealth executive action unaffected by the technicalities of prerogative remedies which were still, in 1976, the main mechanisms of judicial review in the State jurisdictions. The administrative law jurisdiction generally gave the Court a foundation for developing a stature and authority not ordinarily achievable by small specialist courts. The *Trade Practices Act 1974* (Cth) also moved the Court away from the conception of a specialist tribunal concerned with a narrow band of federal statutes. Through Part V of the Act and in particular the prohibition against misleading or deceptive conduct by corporations the Court became involved in mainstream commercial litigation.[33]

The accrued jurisdiction of which more mention will be made below, picked up non-federal claims which were part of the same controversy in which the federal claim was embedded. The adoption by the High Court of a 'practical judgment' test for the scope of that jurisdiction meant that related non-federal claims in the Federal Court were not often defeated for want of jurisdiction.[34] The trade practices jurisdiction was initially exclusive, a fact which gave rise to possible difficulties between federal and State courts particularly in relation to the exercise of the accrued jurisdiction in common law claims or claims arising under State laws. This was later overcome by legislation and earlier by a determination by the High Court that the accrued jurisdiction was non-exclusive and discretionary.[35] The Court's exclusive jurisdiction under the anti-trust provisions of Part IV of the Trade Practices Act gave it a central role in the development of competition law in Australia. The volume of cases in that jurisdiction is much smaller than the volume of cases under Part V of the Act. However their significance and the special interface they offer between law and economics has attracted considerable professional and academic interest.

Eleven years after its establishment, the Federal Court acquired exclusive jurisdiction in taxation matters and original jurisdiction under intellectual and industrial property laws. Appellate jurisdiction in these areas is exclusive. In January 1989 it was invested with civil admiralty jurisdiction to be exercised concurrently with State and Territory Supreme courts.[36] In 1991, its jurisdiction was further extended to cover civil proceedings arising under the Corporations Law, although this was dependent in part upon what was later found to be the invalid vesting of jurisdiction under State laws. In January 1994, the Court acquired a new and demanding jurisdiction under the *Native Title Act 1993* (Cth).

The enactment of s39B(1A) of the Judiciary Act in April 1997 conferred on the Court jurisdiction in any matter in which the Commonwealth is seeking an injunction or declaration; arising under the Constitution or involving its interpretation; and arising under any laws made by the Parliament. The Court does not have jurisdiction to hear and determine offences against federal laws although it may hear and determine prosecutions for pecuniary penalties under the provisions of the Trade Practices Act. By 1998 the sources of the Court's jurisdiction were to be found in 125 federal statutes.

The growth of Federal Court jurisdiction is said to have adversely affected the status of State Supreme courts. In its 1987 Report the Constitutional Commissions Advisory Committee on the Australian Judicial System reported a corresponding decline in the role of the courts of the States on each occasion when the Commonwealth vests jurisdiction in a federal court. If the areas of jurisdiction of the federal courts continued to expand the courts of the States would become more and more restricted in the scope of their jurisdiction. It was the view of the Committee that the trend was in favour of expanding the jurisdiction of federal courts and although the pace of that change might alter or be reversed from time to time, the probability was that over all it would continue if nothing further were done. While that may have been a perception at the time, in my opinion it is not correct today. This is a matter discussed further below.

The Court's history indicates an evolution from a specialist body dealing with a narrow band of federal statutes, to one which is approaching a court of general jurisdiction. Professor James Crawford predicted in 1993 that if a provision such as s39B(1A) of the Judiciary Act were to be enacted, that change would complete the conversion of the Court into what he called 'a superior court of general jurisdiction in Australia'.[37]

It is notable that some interest groups have seen the Court as now insufficiently

specialised for specific areas of its jurisdiction. Submissions have been made from time to time for the establishment of a specialist intellectual property court or a specialist division of the Federal Court for that purpose. Other proposals have been put for a specialist division to deal with economic issues under competition law or a specialist human rights court or division and a specialist native title court or division. It is also perhaps an index of the jurisdictional development of the Court that it now operates specialist panels in some aspects of its jurisdiction.

The development of the Court described here in outline has not been without its ebbs and flows. The decision of the High Court in *Re Wakim* resulted in the loss of Corporations Law jurisdiction, cross-vested in the Federal Court under State law and the transfer under short-term remedial legislation of pending matters to the Supreme courts of the States.[38] Although the Court has now been revested with jurisdiction under the new referred power of the Commonwealth, it will be sometime before it returns to the volume of corporations work it had prior to the High Court decision. This will vary from State to State.

'There seems to have been little evidence of judicial empire building based on the cross-vesting legislation.'

The present position

Speaking anecdotally and without the benefit of statistical evidence, it is fair to say that the Court's initial dominance of Part V litigation under the Trade Practices Act has diminished. In the twenty six years since that Act has been in place a whole new generation of practitioners has arrived which is comfortable with its provisions and regards s52 as a tool of mainstream litigation. So it is invoked routinely in State courts together with the equivalent provisions of the various fair trading Acts which take Part V into areas beyond the reach of the Commonwealth constitutional power. It was perhaps in the two areas of Part V and Corporations Law that the Federal Court's role was perceived as potentially damaging to the State courts. It is noticeable however that while the wholesale cross-vesting in the Federal Court of jurisdiction under State laws was in effect, it did not appear to alter significantly the balance of work between jurisdictions. There seems to have been little evidence of judicial empire building based on the cross-vesting legislation. Even before cross-vesting legislation was enacted in 1987 the doctrinal basis of the accrued jurisdiction was reasonably settled and did not give rise to a significant volume of jurisdictional debate.

The term 'accrued jurisdiction' sometimes used to describe alleged Federal Court empire- building is a metaphor applied in the analysis of the content of federal jurisdiction. It does not describe any constitutionally inferior species of federal jurisdiction. It comes directly from the Constitution and the terms in which the Constitution provides for investing federal jurisdiction in State courts and defining the jurisdiction of federal courts. The authority of the Parliament under the Constitution extends to defining the jurisdiction of any federal court, other than the High Court or investing jurisdiction in State courts with respect to 'matters' of the kind mentioned in ss75 and 76 of the Constitution. Those include matters arising under any laws made by the Parliament. The concept of 'matter' covers the entire controversy which the parties bring to the Court for determination. If the controversy includes questions which are non-federal because they arise under common law or State statutes, they are nonetheless part of federal jurisdiction. Although there was authority in the 1980s to the effect that the accrued jurisdiction was discretionary that must be read in the light of subsequent authority asserting the obligation on the courts of the country to exercise the jurisdiction which is conferred on them.[39] The existence of that duty does not preclude the existence of exceptions based on the availability of a more appropriate alternative court.[40] The discretionary character was questioned by Gummow and Hayne JJ in *Re Wakim* where their Honours said:

> It may be that the better view is that the references to 'discretion' are not intended to convey more than that difficult questions of fact and degree will arise in such issues - questions about which reasonable minds may well differ.[41]

The Federal Court recently reasserted that the circumstances in which it would decline federal jurisdiction properly invoked were exceptional notwithstanding that the federal question which brought the controversy to the Court had been resolved adversely to the applicant by a decision on the pleadings. There was left a claim for damages in negligence which, notwithstanding the striking out of the federal question, retained its character as a subject of federal jurisdiction.[42]

That case was brought as a representative proceeding under Part IVA of the *Federal Court of Australia Act 1976*. The High Court having granted special leave to appeal against the jurisdictional decision and having granted special leave to appeal against the decision of the Full Court in *Femcare v Bright* relating to the constitutional validity of Part IVA, the trial judge decided to transfer the matter to the Supreme Court of Victoria. He did so under Commonwealth cross-vesting legislation so that any doubt as to the jurisdiction of the court in which the action proceeded could be avoided.

Federal/State choices and a single Australian judicature

There is no doubt that there are important areas of federal jurisdiction in which litigants can chose to proceed in a State Court or in the Federal Court or, indeed, the Federal Magistrates Court. But the choice, if thought inappropriate, can be controlled having regard to considerations of comity between the courts. Parallel proceedings in State and federal courts arising out of the same subject matter can be stayed so that the litigants have their dispute determined, so far as possible, in one court. Federal courts can transfer proceedings to State courts under the provisions of s5 of the Jurisdiction of Courts (Cross-Vesting) Act or, in the case of trade practices litigation, s86A of the Trade Practices Act. [43]

The exercise of a choice to proceed in the Federal Court or in a State court exercising federal jurisdiction is, according to the definition discussed earlier, 'forum shopping'. The existence and exercise of that choice is contemplated by the Constitution and sanctioned by laws made under it which confer concurrent federal jurisdiction. It is also entirely consistent with a vision of the Australian system of State and federal courts as a single judicial system under the Commonwealth Constitution serving a single Australian common law and statute laws for the Commonwealth, the States and the Territories made by their respective parliaments. As Deane J said:

> The creation of national jurisdiction involving the application of the new national law, with its Commonwealth and State components, by non-State courts and the provision for the conferral of federal jurisdiction upon State courts provided the mechanism for the administration of the new national law as a single unit. The conferral of general and final appellate jurisdiction upon [the High Court] imposed an ultimate unity upon the various court systems entrusted with the administration of justice under the new national law. The provisions of s 109 of the Constitution ensured coherence between Commonwealth and State laws operating within the national system by invalidating inconsistent State laws to the extent of the inconsistency. [44]

The reference to the administration of the new national law as 'a single unit' is borrowed from Sir Owen Dixon's statement to a United States audience that Australia has a national system of law which is properly to be regarded as 'a unit' or 'a single legal system'.[45] More recently Kirby J has, in similar vein, on the topic of interstate choice of law rules, referred to the operation of institutions within a federal nation which reinforce principles of comity and feelings of common identity and national unity. He said:

> In Australia, such institutions include the integrated courts system, the unified common law, the growth of federal legislation and the predominantly territorial concern of the statutes of the several States and Territories. [46]

'Choices are made under a constitutional system which contemplates the possibility of choice and legitimate choice is healthy.'

The exercise of choice of court must be viewed within this large national framework. The factors affecting such choice will be various and will properly and healthily include considerations of expertise, cost and efficiency. Trends in such choices may cause the courts themselves to reflect upon their rules and processes. Human nature will undoubtedly inject into such reflection a competitive desire to maintain a standing as an institution of the highest quality. Provided that competitive instinct is kept within reasonable bounds and does not lead to long term distortion of priorities, it will serve the interests of the whole community.

There will undoubtedly from time to time be occasions in which litigants perceive State or federal courts as potentially easier for particular classes of litigation or even sympathetic to particular classes of litigant. A safely distant example is the Delaware District Court in bankruptcy matters. Provided there is adequate communication between jurisdictions and vigilance to address any perceptions of imbalance that may occur, these should be at worst short term problems which will not affect the long term integrity of the Australian judicial system. There is little evidence in the Australian system of choices of jurisdiction based upon the kinds of considerations which would be regarded as illegitimate. I say that having regard to recent debate about the perceived respective approaches of the Federal Court and the State Supreme Court in Victoria to industrial matters. Against the background of the historical context in which the term 'forum shopping' arose and in particular its American origins and practice, there is in my opinion little, if any basis, within Australian jurisdictions for concern about federal/State forum shopping. Choices are made under a constitutional system which contemplates the possibility of choice and legitimate choice is healthy.

It is fair to say also that generally speaking there is, at least among the judges of the Supreme courts and the Federal Court, a sense of common membership of an Australian judicature. The judges attend a conference in January each year at which their experiences and perceptions are shared and acquaintances and friendships renewed. The chief justices meet together regularly as members of the Council of Chief Justices to consider matters of common concern to the judiciary. There is an increasing number of examples of cases in which a judge of a State supreme court will sit as a member of another State supreme court to deal with a particular case for a particular period. In the recent appeal to the New South Wales Court of Appeal in which Justice Heydon of that Court was a respondent, Chief Justice Malcolm of the Supreme Court of Western Australia sat with Justice McPherson of the Queensland Court of Appeal and Justice Ormiston of the Victorian Court of Appeal to constitute a special bench of the New South Wales Court of Appeal. Justice Ipp of Western Australia was recently seconded to the New South Wales Court of Appeal for twelve months and judges of that Court visited Western Australia to sit in the appellate jurisdiction of the Supreme Court there. The New South Wales Court of Appeal has recruited a number of retired judges of the Federal Court to act for periods as judges of that Court.

These developments will hopefully continue and strengthen the sense of common membership of a national judiciary. Justice Santow of the Supreme Court of New South Wales and Mark Leeming, a New South Wales barrister, a few years ago proposed a system under which, in certain classes of case, particularly where consistency in the law was desirable, composite appellate benches drawing on the Supreme courts of the States and Territories and the Federal Court might be constituted. The point of the suggestion was to endeavour to reduce or avoid precedential conflict between State courts and the Federal Court particularly in areas like Corporations Law. This was on the basis that the High Court's increasing workload limits its capacity for appellate intervention in resolving such conflicts and refining the law. It was proposed as a minimalist solution to the overloading of appellate capacity aimed at enhancing the appellate system.[47] While nothing much further has been heard of that proposal some of its objectives may be achieved by the increased use of mixed interstate benches for determining issues of precedential importance, albeit the interstate bench might be formally constituted as a sitting of the appeal court of one or other of the relevant States. There is a constitutional difficulty in constituting State court members as members of the Federal Court without conditions of appointment mandated by Chapter III of the Constitution. However, members of the Federal Court could be commissioned as State judges for the purposes of such sittings. This process could be facilitated by a protocol among the courts about the circumstances in which it would be seen as appropriate to constitute a composite bench. Indeed, in cases of important national significance and, subject to statutory restrictions imposed in the jurisdiction of choice, a bench composed of judges from each of the State and

Territory jurisdictions together with a judge of the Federal Court could be constituted as a special sitting of, for example, the New South Wales or Victorian Court of Appeal. There was a suggestion in the Santow - Leeming article that this would be done by nomination of relevant cases by the High Court. It could also be done by a straight exercise of what could be called cooperative judicial federalism.

There is of course, from time to time, talk of institutional unification of the Australian judicature whether at the level of intermediate appellate jurisdiction or at both appellate and trial levels. These debates will ebb and flow and change may come. No institution or institutional arrangement has a right to immortality. The present time however is one in which governments and parliaments are inclined to a degree of hostility to the independent role of courts and a desire to incorporate them as a kind of extension of bureaucracy. There are occasionally dramatic gaffes from ministers or officials which indicate a failure to understand the essentials of the separation of powers. More insidious are pressures from executives and legislatures to homogenise the courts administratively so that they acquire the texture and appearance of executive bureaucracies. It may be thought that a good defence against that trend is a plurality of small, competent, and collegiate courts which place a high value on the independence of individual judges and the unique nature of the judicial function. Such a plurality as presently exists within Australia is an expression of a single national judicial system best suited to meet, in a cooperative way, the contemporary challenges of serving the community and delivering justice according to law. The fact that choices may exist as an incident of that plurality seems a small price to pay, if it be a price at all.

1 304 US 64 (1938)

2 *Klaxon Co v Stentor Electric Manufacturing Co* 313 US 487 (1941)

3 Horowitz, '*Erie RR Co v Tompkins* - A test to determine those rules of State law to which its doctrine applies', 23 So. Calif. L.Rev 204 at 215

4 *Miles v Illinois Central Railroad Co* 315 US 698 (1942) at 706

5 *Covey Gas & Oil Co v Checketts* 187 F.2d 561 (1951) at 563

6 Wright, 'The federal courts and the nature and quality of State law', 13 Wayne L. Rev 317, 333 (1967) cited in 'Forum shopping reconsidered' (1990) 103 Harv L. Rev 1677 and 1679

7 (1870) LR 6 QB 1

8 *John PfeifferPty Ltd v Rogerson* (2000) 172 ALR 625

9 *Chaplin v Boys* [1971] AC 356 at 401

10 *The Atlantic Star* [1973] 1 QB 364 at 382

11 *The Atlantic Star* [1974] AC 436 at 471

12 *Keeton v Hustler Magazine Inc* 465 US 770 (1984)

13 *Forum Shopping Reconsidered* (1990) 103 Harv L Rev 1677 at 1683

14 *Harvard Law School News* www.law.harvard.edu/news/lopuckibankruptcy .html. See Eisenberg and LoPucki 'Shopping for judges: An empirical analysis of venue choice in large Chapter 11 reorganisations', 84 Cornell L Rev (1999). See also Rasmussen and Thomas, 'Timing matters: Promoting forum shopping by insolvent corporations', 94 NW U L Rev 1357 (2000); David A Skeet Jnr, 'Bankruptcy judges and bankruptcy venue: Some thoughts on Delaware', 1 Del L Rev 1 (1998); David A Skeet Jnr, 'What's so bad about Delaware?', 54 Vand L Rev 309 (2001); LoPucki and Kalin, 'The failure of public company bankruptcies in Delaware and New York: Empirical evidence of a 'race to the bottom', 54 Vand L Rev 231 (2001)

15 *CSR America Inc v Cigna Insurance Australia Ltd* (1997) 189 CLR 345

16 See the extensive, albeit *obiter*, discussion by Lee J in *Ayub v Minister for Immigration and Multicultural Affairs* (2000) 181 ALR 522 at 527-530

17 (2000) 172 ALR 625

18 172 ALR at 673

19 *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s5(2)

20 *Administrative Decisions (Judicial Review) Act 1977* s10(2)(b)

21 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268

22 Hamilton A, Jay J and Madison J (1787) *The Federalist*, Reprint EM Earle (ed), Modern Library New York 1937 No 81 p 528

23 Sawer G, *Australian federalism in the courts*, Melbourne University Press (1967) pp.20-21, Barwick, 'The state of the Australian judicature' (1977) 51 ALJ 480 at 482

24 *McCawley v The King* [1920] AC 691 at 713; *Constitution Act 1902* (NSW) s 7B; *Constitution Act 1975* (Vic) s 18

25 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 114-115 (McHugh J), see also 102 (Gaudron J) and 143 (Gummow J)

26 Ibid, 116 (McHugh J)

27 Harrison Moore, W (1910) *The Constitution of the Commonwealth of Australia* 2nd edition reprint Legal Books, Sydney 1997 p 217

28 Under an option available under the *Family Law Act 1975*, Western Australia established a State Court, the Family Court of Western Australia. Federal jurisdiction was invested in it under the provisions of the Commonwealth Act. Each of the judges of that Court also holds a commission on the Family Court of Australia.

29 Byers MH and Toose BP (1963), 'The necessity for a new federal court: A survey of the federal court system in Australia' 36 ALJ 308

30 These assumptions have been contested - see *Commonwealth Parliamentary Debates* House of Representatives, 24 July 1974 598 (RJ Ellicott Q.C.). See also Rogers, Andrew (1980), 'Federal/State courts: The need to restructure to avoid jurisdictional conflicts' 54 ALJ 285. The rebuttals however go too far in suggesting that the Convention delegates saw the creation of federal courts as unnecessary except in the last resort - *Stack v Coast Securities* (No 9) Pty Ltd..

31 Barwick (1964) op cit at p 2

32 Commonwealth Parliamentary Debates, H of R 21 October 1976 p 2110

33 French RS, 'A lawyer's guide to misleading or deceptive conduct', (1989) 63 ALJ 250; Pingilley W, 'Section 52 of the Trade Practices Act - A plaintiff's new Exocet' (1987) 15 ABLR 247

34 *Fencott v Muller* (1983) 152 CLR 570

35 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261

36 *Admiralty Act 1988* (Cth)

37 Crawford, James (1993) *Australian Courts of Law* 3rd Edition, Oxford University Press, Melbourne p 168

38 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

39 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559

40 Lindell G, 'The justiciability of political questions: Recent developments' in Lee and Winterton (eds) *Australian constitutional perspectives* (1992) pp 218-223

41 Re Wakim at 588; And see generally *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 600-603

42 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564

43 See *Bell Group Ltd v Westpac Banking Corporation* (2000) 104 FCR 305

44 *Breavington v Godleman* (1988) 169 CLR 41 at 124

45 Dixon O, '*Sources of Legal Authority*', Jesting Pilate (1965) pp 198-202

46 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 at 657

47 Santow GFK and Leeming M, 'Refining Australia's appellate system and enhancing its significance in our region', (1995) 69 ALJ 348

A practical way to early resolution of the head of state issue

*by Richard E McGarvie**

Richard McGarvie previews the conference to be hosted by the Corowa Shire Council on 1 and 2 December 2001, as the end piece of the federation year. The conference aims to perform the same function as the Corowa Conference of 1893, which recommended the process that was followed to resolve the issue of whether Australia should federate. +

Our strong and stable federal democracy is a priceless community asset which belongs to the people. So does the responsibility for keeping it strong and ensuring that whenever it is adapted to fit changing circumstances, this is done in a way that preserves or improves it.

'The issue is whether we have reached the stage of history where we should cast off the legacy of colonial times, which gave us a head of state in a foreign country...'

Is early resolution necessary?

A Newspoll in September 1999 showed 95 per cent agreeing that the head of state should be an Australian, 88 per cent strongly agreeing. In the referendum two months later only 45 per cent voted for the package offered and no State gave majority support. This indicates that over 40 per cent of voters were not satisfied they were offered an acceptable package and voted 'no' despite their desire for an Australian head of state. A later study shows 89 per cent agreeing an Australian should be head of state, 70 per cent agreeing strongly.

That shows a latent instability in our constitutional system. Constant wrangling over basic features of the constitution has a destabilising effect in a federal democracy. That has been the experience of the long-running series of constitutional disputes in Canada since the late 1970s. It would not be responsible for the Australian people to leave the body politic unhealthy, with a constitutional running sore where about 90 per cent do not identify with a central feature close to national sentiment.

What is the issue?

The issue is whether we have reached the stage of history where we should cast off the legacy of colonial times, which gave us a head of state in a foreign country on the other side of the world, and finally attain entire constitutional autonomy.

Since 1788 we have moved so far in that direction that only a slim residue of constitutional dependence on Britain remains. For years the operative or de facto heads of state, the governors-general, governors and administrators of the Northern Territory, have performed virtually all the head of state responsibilities for the Australian federation. They operate as advised by their Australian ministers and are entirely free of any control by the Queen. Our only remaining constitutional dependence is that whoever is monarch of the United Kingdom is monarch of Australia and the formal head of state of the Commonwealth and each State and Territory. The only constitutional function the Queen now performs is the fairly mechanical and infrequent one of complying with the binding convention to appoint or dismiss the governor-general, State governors or administrator of the Northern Territory as advised by the prime minister or State premier.

The issue which faces us is whether we have reached the stage where the whole federation should separate from the Monarchy.

While that would be a relatively small change, it is a difficult one. The quality of our federal democracy has endured mainly because the law of its constitutions and the operating constitutional system developed on that, between them leave power holders no real option but to exercise their powers consistently with the continuation of democracy and its safeguards. They have that effect because they combine to provide incentives and disincentives and to bind power holders to act in that way. Particularly important are the constitutional conventions which are made binding on power holders by the way the constitutional system actually works and the non-legal penalties it imposes for their breach.

The main difficulty in moving to complete constitutional autonomy is to ensure that a model which replaces the Monarchy would not reduce the incentives and disincentives provided by the operation of the constitutional system and would not lead it to work in a way that would weaken or destroy the binding power of those conventions. Avoiding these unintended consequences depends very little on a knowledge of law but on a knowledge of humans and their behaviour within organisations, particularly when influenced by the impulsive attractions of obtaining or retaining power.

What is needed for effective resolution?

The experience of resolving the issue of whether Australia should become a federation, and of the 1999 referendum, show what will and what will not resolve the head of state issue. It must be resolved in a constitutional way which makes full use of the resources of people, parliaments and governments in working out the proposal ultimately put to referendum.

The issue will be resolved only by a referendum vote upon a proposal that can genuinely be presented so as to catch the public imagination and vision, and where people can vote free of partisan political impulse and secure in the knowledge that whichever way the vote goes our democracy and federation will be safe for future generations.

In practice the issue will be resolved only in two events. If a referendum passes. Or if a sound and acceptable proposal for change is strongly put and voters reject it because of a genuine preference against making the change at the present stage. Both those events depend on there being a sound and acceptable proposal.

The effective resolution of the issue is retarded by loose thinking. Regarding or describing the issue in the vague terms of whether Australia becomes a republic is an instance of this.

+ 'A practical way to early resolution of the head of state issue' by Richard E McGarvie, published in (2001) 117 *Victorian Bar News*, p. 38

* Richard McGarvie was formerly a Supreme Court judge and govenor of Victoria, 1992-1997.

The word 'republic' distracts attention from the realities and rouses conflicting responses based on emotion. Use of the word has led many to concentrate on copying the constitutional structures of very different overseas republics rather than on how best to maintain the strengths of the federal democracy that has been evolved to suit Australia's history, tradition and culture. In some, the word evokes utopian ecstasy which convinces them that if we become a republic our trade will automatically increase and all our problems become easier to solve. In others it has the opposite effect. Within living memory we have seen republics which produce good democracy, such as the United States and Ireland. But we have also seen the republics that produced the tyrannies of Hitler, Stalin, Mao Zedong, Idi Amin, Pinochet and Robert Mugabe. This predisposes people, particularly those who or whose families came to this country to escape the tyrannies of such republics, to regard all republics with repugnance. It is better to use tight and objective words which do not distort clear thinking and which convey what is actually proposed. Since the 1999 referendum the issue is increasingly being described as the 'head of state issue' and it is recognised that the real question is whether the Australian federation finally separates from the Monarchy and attains the constitutional self-sufficiency of a nation state.

'The word 'republic' distracts attention from the realities and rouses conflicting responses based on emotion.'

Didn't the 1999 referendum resolve the issue?

The package rejected at the 1999 referendum lacked a number of the attributes which are essential if a referendum vote is to resolve the issue. I refer only to some of them.

The package was not developed in the constitutional way, in which the resources of people, parliaments and governments are fully utilised in working out the proposal put to referendum. In reality, the people, parliaments and governments had very little involvement in putting the package together. Instead we sought to resolve the issue in a privatised way. The main influence on the form it took was a private organisation, the Australian Republican Movement. The main critic of the package was another private organisation, Australians for Constitutional Monarchy.

The process by which the package was determined was not one which led people to vote free of partisan political impulse. The process was designed and operated so as to suit the purposes of the government of the day. John Button has observed that Paul Keating woke up republican sentiment in 1993 and understood its symbolic power. 'He held it in his hand like the 'Welcome Stranger' gold nugget. Then he dropped it in the murky waters of acrimonious partisan politics.' What he did was to brand the model as the one endorsed and promoted by his party. To brand it that way and use it in extracting political advantage from his party's opponents was to brand it a referendum reject. To negate the political advantage over the Coalition that Keating and his party were deriving, John Howard undertook to hold a convention and put to referendum a model with clear support, and the 1999 referendum was the result.

Resolution of the issue became to a large extent politically partisan. This showed in the Newspoll of voting intention taken a week before the referendum. It indicated 53 per cent of ALP voters voting 'yes' but 63 per cent of coalition voters voting 'no'.

Although it was put together as we approached the centenary of federation, paradoxically the designers and promoters of the referendum package hardly looked at, and never seriously considered, a resolution of the issue for the whole federation. The referendum was confined to the Commonwealth unit of the federation. People could not vote secure in the knowledge that whichever way the vote went our federation would have been safe for future generations. The destabilising effect if the referendum had succeeded with one or two States strongly dissenting would have been considerable. The majority in the dissenting States would have been forced into a system of government for the Commonwealth in which they lacked confidence. Although theoretically possible for them to remain monarchies, circumstance and ridicule would have forced the dissenting States to become republics at State level. This would have produced a destabilising factor in the federation, unequalled since Western Australia voted in 1933 almost two to one to secede from the federation.

The referendum package could not be presented so as to catch the imagination and vision of Australians. A referendum to separate the whole federation from the Monarchy could be presented as completing the long sweep of evolution from being totally dependent on Britain in 1788 to becoming finally totally self-sufficient. That was not open to the advocates of change in 1999. If the referendum had succeeded, most of the federation – all of the States – would still have been monarchies. The advocates had to content themselves with extolling the virtues of novel fittings and fixtures in the package.

What is the aim of the Corowa Peoples Conference 2001?

The conference, to be hosted by the Corowa Shire Council on 1-2 December 2001 as the end piece of the federation year, aims to perform the same function as the Corowa Conference of 1893. It recommended the process that was followed to restart the stalled move to resolve the issue whether Australia should federate and to progress it to resolution.

This year's conference will confine itself to recommending a process for early resolution of the head of state issue. It will not consider whether the Australian federation should separate from the Monarchy nor the merits of models to replace the Monarchy in that event. It will consider a process that will empower the people to decide those questions in an informed, fair and effective way.

It will have the advantages of the lessons that come from the experiences of federation and the 1999 referendum.

Why is it a peoples conference?

It is designed to enable the conference members to make recommendations in exercise of their responsibility to ensure that if Australia separates from the Monarchy, it is done in a way which preserves or improves the strength of our federal democracy. The influence of the people is essential if the stalled move to resolve the head of state issue is to be restarted.

The reality at present is that the main political parties share a strong interest in retarding resolution of the issue. They all had their fingers badly burnt in the referendum and

naturally do not wish to repeat the experience. Apart from enduring the strains of permitted disagreement between party members, the Prime Minister, who favoured a 'no' vote, carried only 65 per cent of the Liberal Party's most recent electoral constituency that way. The Nationals opposed the package but a number of senior members broke rank and supported it, and the party carried only 80 per cent of its constituency to a no vote. Labor supported a 'yes' vote but carried only 57 per cent of its most recent electoral constituency that way.

The Coalition is treating the issue as having disappeared with the referendum. Labor's approach is first a plebiscite on whether we desire an Australian head of state, then another plebiscite on the preferred model and ultimately a referendum on whether to change the constitution. That seems only the start, as it does not appear to encompass resolving the issue for the States. If that process eventually resolved the issue, it would take many years.

Fortunately many within all parties see that the national interest demands an early resolution of the issue.

About half the Corowa Conference will be self-selecting. They will be members of the public who respond to advertised invitations to register. Up to a quarter are automatically invited because they have constitutional experience from holding office related to government. They include current and former prime ministers, premiers and leaders of the opposition; former operative heads of state; current Australian presidents of the main political parties, leaders of parliamentary parties, independent members of parliament, presiding officers of the parliaments and councillors holding office in the main local government organisation in Australia. The other members will be people of all views who have experience or knowledge relevant to recommending a process for consideration of a constitutional change. They include people holding the various positions held on the head of state issue and those with experience in business, unions or other organisations.

'Fortunately many within all parties see that the national interest demands an early resolution of the issue.'

Can the conference work in a non-partisan way?

For a conference to recommend the best process for resolving the head of state issue, Australians expect the membership to include people of all viewpoints and that each will vote according to what they individually think best for our community and future generations. Every Australian, whatever their political preference and whatever their position on the head of state issue, shares an identical interest in identifying and following the best process. It is not an occasion for partisan voting on the dictates of a party, group or faction.

The response from all community sectors has been magnificent. A crucial lead was given by the early agreement of Australian presidents of political parties, Shane Stone (Liberal), Greg Sword (Labor) and Michael Macklin (Democrats) to attend the conference. Showing similar leadership, Greg Barns, Australian Republican Movement Chairman and David Flint, National Convenor of Australians for Constitutional Monarchy, are attending. So is business leader, Stella Axarlis. Former governors, Gordon Samuels (NSW), former chief justice, Sir Gerard Brennan and former High Court justice, Sir Daryl Dawson, will be there. Seldom, if ever, has a conference been convened which combines in a national task members of the public and community leaders of all viewpoints. Seldom has there been such a prospect of non-partisan approach to the recommendation of process.

How did the conference originate?

John Lahey asked me to launch his book, *Faces of Federation: An Illustrated History*. On reading it I saw how much the experience of federation confirmed the practicality of the process advanced by a working group at the 1998 Constitutional Convention and in my book, *Democracy*, to resolve the head of state issue for the whole federation. I said so in my launch speech. Sir Zelman Cowen read the speech and in his notable lecture to the St James Ethics Centre in Melbourne on 31 October 2000 urged Australia to follow that process, which he saw as combining 'political realism with expert advice'. Jack Hammond Q.C. read the speech and the lecture and came up with the idea of Corowa again taking the initiative. He put it to the Mayor, Cr Gary Poidevin, who responded 'Sure it can be done'. Jack Hammond and I presented a paper and spoke at Corowa. Two days later, on 19 December 2000, the Corowa Shire Council decided to host the conference. Sir Zelman Cowen is its Patron and will give the opening address.

What process will the conference consider?

The conference will consider a number of processes, set out in some detail on its web site.

One process prepared by Jack Hammond Q.C. and me for consideration proposes that the conference appoint a high level and non-partisan drafting committee to prepare legislation to establish all-party committees within each of the parliaments. First, the State and Territory committees would each investigate, listen to their community and report on two questions:

1 Which head of state model would best preserve or improve our democracy if it replaced the Monarchy?

2 Which method of deciding the head of state issue would place least strain upon our federation?

Then the all-party committee in the Federal Parliament, with a representative from each State and Territory committee, would give a report on those questions and append to it the State and Territory reports. That report would go to the proposed coordinating authority, the Council of Australian Governments (COAG) and be widely publicised on the Internet and elsewhere.

All-party parliamentary committees have a good record in Australia for their reports on questions where the political parties have no conflicts of interest. Much of our best legislation comes from them. The proposed process would start with investigation and reports by committees within the parliament closest to the people of a State or Territory. This will come immediately to people's attention and begin to provide the information they need to make their decisions. The capacity of the process to provide the people with information and expert advice from a variety of sources is one of its great strengths.

It is proposed that on the second question, the parliamentary committees consider the following method of deciding the issue without strain on the federation.

With the community informed by the work and reports of

the parliamentary committees and media discussion of it, there would be a plebiscite in which the people would express their preference between the models supported by either the majority or a minority in the report of the federal parliamentary committee. The people of each unit of the federation, the Commonwealth and each State and Territory would choose the model they would prefer for their unit if it separated from the Monarchy. Each Australian voter would mark a ballot paper showing their preference of model for the Commonwealth and another showing their preference for their State or Territory. There is no constitutional necessity for each unit to have the same type of model though that is the most likely outcome. The traditions, culture and operating systems of government within each unit are essentially the same as within each other unit and it is difficult to see why a model considered best for one unit would not also be considered best for the others. The plebiscite could be held with the federal election to be held not later than 2004.

Finally, all Australian electors would vote in the one referendum on the one question of whether the whole federation – all its units – separate from the Monarchy. That method would enable the change to be made with political and constitutional legitimacy and without strain on the federation.

'...there would be a plebiscite in which the people would express their preference between the models...'

No State would separate from the Monarchy and substitute a self-sufficient model for it, unless the majority of the State's voters had voted for that. While a Territory could change, without a majority of its voters voting for that in the referendum, it would change to the model preferred by its voters in the plebiscite. All powers of constitutional change would be relied on, particularly the new powers created by the Australia Acts in 1986. If supported by the overall majority of voters and a majority in every State, and if every State parliament requested it under the Australia Acts, the whole federation would separate from the Monarchy at the same time, with each unit converting to the model it chose in the plebiscite. Otherwise there would be no change. Either way the issue would be resolved, at least for this stage of history. The referendum could be held in about 2005.

The potential of Australia Act powers for resolving the issue for the whole federation was perceived at an early stage by South Australian Solicitor-General, Brad Selway Q.C.. That appears from the South Australian Constitutional Advisory Council report, South Australia and Proposals for an Australian Republic, (Peter Howell, Chairman), Adelaide, 1996. My book, Democracy, pp.255-63, outlines constitutional mechanisms relying on those new powers.

Every successful referendum after 1910 has been carried with the support of an overall majority of voters and a majority in every State. The proposed process does not require a level of support for constitutional change that is significantly higher than that usually attained. If a majority of a State's voters vote for the change, in political reality, the State parliament would have no option but to make the necessary request.

Are there valid objections to the proposed process?

It is said that December 2001 is far too early to start making decisions on recommended process and much more time should be left for discussions before that is done. Whatever satisfactions come from sessions of endless talk that lead only to more talk and never to decisions or action, the need for Australians to move from theory and face up to taking practical steps, must outweigh the temptations of serial postponement. Discussions have gone on since 1993 and if the propounders of an alternative process cannot put it on the conference web site in as much detail as the one displayed since last May, and thus expose it to public scrutiny well before the conference, it must have little substance.

It is not only the deepening constitutional running sore mentioned earlier, that should impart a sense of some urgency. We now have an opportunity we have not had for years and which may not last for long. At present no political party is identifying itself with a particular model and promoting it. The fact that they are licking their referendum wounds is a great plus. This atypical situation gives the best chance ever of resolving the issue free of partisan political impulses. We should not squander it through inertia.

Then it is said that instead of the first step of the recommended process being inquiries and reports by parliamentary committees, the process should go first to a constitutional convention which is all or mainly elected. The precedent of the 1897-8 Constitutional Convention is relied on. That seems to overlook the realities. Although politicians were about as unpopular then as they are today, voters knew who best understands how the constitutional system actually works, and all but one member of the convention were parliamentarians. The convention was, in effect, a large committee of parliamentarians.

The elections for that convention were held about thirteen years before the modern party system asserted itself in Australia. Today, if members of parliament stood for election to a constitutional convention on the head of state issue, the parties would seek political product differentiation by sponsoring different models and processes. Political partisanship would mar the second attempt to resolve the issue. As the election for the 1998 Constitutional Convention showed, if parliamentarians were barred from standing, electors would tend to elect people they had heard of. Usually this would elect celebrities who have little understanding of the working of the constitutional system rather than those who had that understanding but lacked the public recognition of celebrities.

It is also said that instead of the process starting with parliamentary committees or an elected convention, the first step should be a plebiscite on whether we desire an Australian head of state.

That has two obvious weaknesses. First, however ready some 90 per cent of the people are to reveal to an opinion poll their desire for an Australian head of state, many of them would be reluctant to express themselves in that way in a public plebiscite. Constitutional caution would predispose against giving what many would regard as a blank cheque. They would regard a yes vote as politically committing Australia to dispense with the Monarchy and would desire that no such commitment be given until they were satisfied that the substituted system would be safe for the democracy and federation of future generations.

Second, even if the result of such a plebiscite showed a majority desire to separate from the Monarchy, we would have

placed ourselves in the position where our declaration of no confidence in a central feature of our constitution would be likely to resonate for years. It would continue to restate our position until we did the hard stuff necessary to resolve the issue through a referendum vote with the essential qualities mentioned earlier. We would be most unwise to place ourselves in that constitutional no-man's land for many vital years.

No doubt, in the pre-conference debate upon the conference web site and at the conference itself the cases for and against the recommended process starting with parliamentary committees, an elected convention or a plebiscite on whether we desire an Australian head of state will be put strongly. Other processes with other initial steps are likely to join the contest. The conference decision on that contest will be very important.

What effect could the conference have?

As with the first Corowa Conference, the effect of the recommendations of this year's Corowa Conference will depend on the persuasive authority they carry with people, parliaments and governments. The conference has the potential to initiate an orderly exercise of the people power which underlies our democracy. It could bring the weight of public opinion upon parliaments and governments to take the action necessary for early resolution of the head of state issue, despite the hesitancy of political parties to do so. If it does, it will not only have provided a significant end piece for the year of celebrating federation. Corowa will again have served its nation well.

Sources

The information relied on in this article is to be found in my papers on the www.corowaconference.com.au or www.chilli.net.au/~mcgarvie web sites or in my book, *Democracy: choosing Australia's republic*, Melbourne University Press, 1999. That book is also entirely on the www.mup.unimelb.edu/democracy/index.html web site.

Note: During the original publication of this article, it was reported that Opposition Leader Kim Beazley proposed a referendum in 2005 if elected: *The Age*, 21 July 2001, p. 3.

An innovative feature of the conference, likely to set the pattern for consideration of constitutional change in the electronic age, is that the debate on the process the conference should recommend is well under way.

It is open to every Australian, whether attending the conference or not. More than six months before the Conference, the Conference website (www.corowaconference.com.au) was opened six months before the conference.

It displays processes proposed for consideration by the conference and papers and comments on processes.

Structured settlements now available for injured plaintiffs

By Judie Stephens, Sylvania, NSW

My life changed dramatically on Saturday 27 November 1993. My daughter, Amanda, and son-in-law, Jay, tragically died in a motor vehicle accident leaving behind three tiny children - Matthew (five years), David (three years) and Jackson (three months). Jackson was catastrophically injured and lives with me. Until then, my life was fairly ordinary, I was relatively happy and never recognised that I would need to stretch myself beyond boundaries I never knew existed.

A few years after the accident, I started looking beyond the day-to-day care and wondering how people like Jackson, who would receive compensation, could manage their affairs for the rest of their life. I am fifty-seven and Jackson is eight. I recognise, as do many people who manage the affairs of those who are differently abled, what happens when I am gone. I looked at the alternatives that are available, both in New South Wales and other States, and wasn't impressed. I was in aware of Jon Blake and his Mum's terrible plight with the Protective Office. The papers abound with sad stories of mismanaged, lost or stolen compensation.

'If most of us were to receive all our disposable income at one point of time, there would be very few of us that could see it through to the end. Greed gravitates towards money.'

Giving this much consideration, I discovered structured settlements were available in the UK, Canada and USA. About three years ago, I was put in touch with Jane Ferguson who at that time was putting together national associations from legal, medical and insurance backgrounds to form the Structured Settlement Group. The first chairman was Dr Richard Tjiong of United Medical Protection. This happened and we took the law reform journey together.

'What is a structured settlement?' A structured settlement is only available by choice of the plaintiff. It is an indexed income stream for life in the form of an annuity that will pay for care, medical and rehabilitation expenses. There is no income tax payable on the interest of the annuity. This may be in conjunction with a lump sum and is available only at time of settlement. Structured settlements have been embraced in UK, Canada and USA.

It was time to talk with our Federal Government. We went to Canberra and lobbied for two and half years. Many visits were made to my friend, The Hon. Danna Vale MP, Assistant Treasurer Senator Rod Kemp and informal discussions were held with Treasurer Peter Costello and the Prime Minister's Department. We also met with Treasury and Health. It was a long haul. It was bipartisan and made social sense. Our current medical crisis assisted our lobby.

Wednesday, 26 September 2000: a great victory. The Assistant Treasurer said in his press release:

> The Assistant Treasurer, Senator Rod Kemp today announced that the Government will introduce legislative amendments designed to encourage the use of structured settlements for personal injury compensation.

Now plaintiffs have the opportunity to choose a structured settlement. People like Jackson, those who are catastrophically injured and those who may need to be protected from people who don't have the plaintiff's interest at heart. Let us stop and think. If most of us were to receive all our disposable income at one point of time, there would be very few of us that could see it through to the end. Greed gravitates towards money.

In 1997, The Hon. Bryan Vaughan MLC, Chairman of the Law and Justice Committee said,

> Throughout the course of the committee's inquiry, I have become increasingly convinced that the lives of those who are most seriously injured in motor vehicle accidents… can be significantly assisted by the increasing use of structured settlements.
>
> I am convinced that the time has come for Australia to follow the lead of other common law countries – United Kingdom, Canada and United States and introduced structured settlements for the very seriously injured accident victims.

It has been my passion that structured settlements should be available and now they are. It is very important to share this good news with people who make decisions, including members at the Bar.

This year in May, I spoke in London with Lord Phillips, Master of the Rolls. He was very interested in what is happening in Australia. His comment to me, 'we feel here in Britain that we would like to ask each plaintiff why they choose not to have a structured settlement'. This month in the UK, there is a working party to look at these and other issues pertaining to structured settlements.

Readers may like to look at our evolving www.daretodo.asn.au community website. Here we share our story of Jackson's rehabilitation and legal journey. We hope this will assist others. The legal feature promotes our law reform advocacy for structured settlements.

From a plaintiff's perspective, structured settlements makes great sense. The defendant insurer knows that the money is going in the right direction. The judge has the terrible task removed of putting a 'use-by' date on the plaintiff's life.

So now to consider: do you know someone who would benefit from a structured settlement? I do?

‘Servants of all, yet of none’

By Carol Webster

We have all seen the motto of the Association, ‘Servants of all, yet of none’, but who knows today how or why it was adopted? The history can be traced in the files of the Bar Association.

In 1957 Sir Garfield Barwick suggested that the Association obtain a formal grant of arms. It was proposed that a panel bearing the arms of the Bar Association be installed at the southern end of the entrance to Wentworth Chambers, near the stones bearing the Arms of the Inns of Court. Those stones were handed over on behalf of the four Inns of Court by The Right Hon. The Lord Morton of Henryton when the building was officially opened on 20 August 1957 by The Hon. J J Cahill, then premier and of New South Wales.

Lord Eldon had said of the barrister, ‘He lends his exertions to all, himself to none’.

A subcommittee of the Bar Council was formed to consider the question of a coat of arms and also whether any motto should be included, and if so, what that should be. There was correspondence back and forth with Sir John Heaton-Armstrong, the Clarenceux King of Arms of the College of Arms for some time afterwards, with sketches going backwards and forwards. It probably will not surprise that it took some time before final decisions were reached.

The idea ‘Servants of all and of none’ was suggested for a motto, but the next question was whether it ought rather be in Latin. Lord Eldon had said of the barrister, in *Ex parte Lloyd*, Montague Reports 69 at 72, ‘He lends his exertions to all, himself to none’.

Scholarly advice was sought as to the correct Latin, including from Professor A J Dunston, Dean of the Faculty of Arts at the University of Sydney. A correct Latin equivalent of the phrase, ‘Servants of all and of none’ caused some difficulties, because of the double meaning an English speaker readily recognises for ‘servant’, which would not have been at all apparent to an ancient Roman from the noun *servi*. *Cuiusque serui et nullius* conveys the modern meaning but is not good Latin for the meaning. Professor Dunston suggested *Cuiusque ministri, serui nullius*, or, using the Latin verb *seruio*, either *non serui seruimus or salua libertate seruimus.*

Finally, the idea of a motto in Latin was abandoned and there was a poll on the question of a motto in English, which considered the following possibilities:

(A) Servants of all and of none.
(B) In the service of all, but servants of none.
(C) Serving all, servants of none.
(D) Servants of all, yet of none.
(E) Servants of none, yet of all.
(F) Servants only of the law.

The poll result was tied between (A) and (D) and at a Bar Council meeting of 13 August 1959, (D) was favoured.

The correspondence continued, and finally one finds in the Bar Association file a clipping from the *Sunday Mirror* of 26 June 1960. The headline is ‘Servants of all - yet of none’ recording that three weeks ago the Association had received from London a Grant of Arms with the motto, ‘Servants of all yet of none’. The meaning of the motto was explained, ‘that barristers will take any briefs from anyone without prejudice, but will take orders on how to conduct cases from no one’.

The story of the motto and the grant of arms is told in Dr John Bennett’s *History of the New South Wales Bar* (The Law Book Company, Sydney, 1969) at pages 183-184.

The history of trial by jury in New South Wales

By Wendy Robinson Q.C. & Carol Webster

At the request of the History Committee, Ian Barker Q.C. has agreed to deliver a lecture late next year, on the topic ‘The History of Trial by Jury in New South Wales’. Wendy Robinson Q.C. is the Project Secretary, assisted by Carol Webster.

The History Committee encourages all barristers interested in the topic who have personal recollections or other specialised knowledge which may be appropriate for incorporation into the lecture, to make that information known as soon as possible. Equally, the Committee is keen to identify any barristers who would like to assist with the research and statistical exercises to be undertaken in preparation for the lecture.

Persons interested in providing information or otherwise assisting should contact either Wendy Robinson Q.C. ph: (02) 9285 8836 or Carol Webster, Assistant Secretary of the History Committee ph: (02) 9224 1550.

For further information generally, contact the Secretary of the History Committee, Chris Winslow, the Public Affairs Officer of the Association on ph: (02) 9229 1732, or Geoff Lindsay S.C., Chairman of the History Committee ph: (02) 9232 6003 or Carol Webster.

Bullfry and the Sapphic Oration

By Lee Aitken

Bullfry Q.C., last heard in *Bar News* (Spring 2000), ponders the question of women at the bar.

'Monstrous regiments of women' intoned Bullfry softly to himself into his large whisky and water. He undid his Bar jacket and re-read with growing concern the 'Op-Ed' page of the tabloid. There, as reported, one of the most distinguished jurists in the country, giving the annual Sapphic Oration, had lamented the absence of women in the highest echelons of the Bar. 'Why is it so?', the jurist had wondered.

To Bullfry's enfeebled mind, the reasons were self evident. First, the biological constraints of maternity necessarily meant that an aspiring female junior may be perforce out of active practice for an extended period. And practice at the Bar is pre-eminently personal. Even in times of war, the notion that a brief might be held on behalf of an advocate on active service had worked with only mild success. How much less likely was it that a young female barrister would be able to presume upon the largesse of her brethren and the courts - still less that of her sisters. (An earlier suggestion that a commission of some sort might be paid for a cross-referral by a nursing mother had not found favour). No one could be a part-time litigator, either at the Bar or in the largest law firms. (Indeed, Bullfry when giving the occasional guest lecture at the Law School always stressed to the female students in his audience the importance of asking at interview how many female litigation partners the firm had. The answer, after much wringing of hands, references to 'glass ceilings', and ill-concealed hypocrisy, was usually 'two or three - but we intend to make a lot more at some time in the future'). The idea that young mothers at the Bar should be able to arrange court appearances to suit their child-care arrangements would never find favour with either clients or the judiciary.

Now what woman, Bullfry wondered rhetorically, would aspire to such an existence at the age of fifty seven?

Furthermore, success only came at the end of a long, long road. 'Who you are is what you are in'. If you wished to be retained in the largest cases with the most complex issues a severe psychical price had to be paid. Like acquiring a knowledge of women themselves (something in which Bullfry was still manifestly deficient), 'real success' at the Bar was likely to come at a time when it was too late to be of any use to you.

Bullfry thought fondly of Blenkinsop, the leading advocate of his generation. Up and down the country Blenkinsop roamed, leaving in his wake distraught tribunals and large empty 'slabs' of Victoria Bitter. Ready at a moment's notice to peruse overnight the fifteen volumes delivered by courier before boarding the flight to Melbourne; only two minutes (in terms of preparation) in advance of any court; able to 'wing it' with the fatal fluency and sure grasp of principle which made him an exemplum in younger eyes.

But ultimately - for what? No doubt to be recognised as the consummate forensic performer of his age by his peers was a worthy reward. But only for a moment; and only with the aim of producing an artefact of some sort, likely quickly to be diluted by the short passing of time. 'Who wants to know that a man for twenty nine days investigated the building of a lunatic asylum when a contractor wanted ten thousand pounds more than a county council was willing to pay?' No-one in the whole wide world; certainly not the second Mrs Blenkinsop who was usually to be found refurbishing her tan at a Double Bay solarium.

And at the end, after all the tumult and the fighting, the two familiar and lacrimose questions - even for Blenkinsop - as those who were left scanned the 'Vale' notice - 'when's the funeral?' and 'who's getting his room?'

Blenkinsop was well into his fifties (the saurian head, the distal tremble of the fingers, the lived-in look); he had all that money could buy. What then drove him forward? Only his ego (which was large) and the happy contentment his ego enjoyed which comes from a throng of people clamouring for his expensive services on a daily basis.

Now what woman, Bullfry wondered rhetorically, would aspire to such an existence at the age of fifty seven? Who would forego the pleasures of living, for the uncertain delights of sitting, wet-towel on head, at eleven o'clock in the evening at the 'Sheraton-on-the-Canyon' while urgent instructions were received by facsimile from Pretoria about the next day's cross-examination of the creosote expert? Very, very few.

As well, Blenkinsop's success concealed a Darwinian process of selection. The dead were many. The Sapphic orator had failed to observe that out of the vast number of aspirants there were very few men who either coveted, or could achieve, a Blenkinsopian success. In each generation, a select few would by a constant process of winnowing achieve forensic glory so that they were demanded in every large matter in their particular area of expertise - appellate work, crime, massive liquidations and the like. By the wayside, forlorn and forgotten, lay the overwhelming number of aspirants who never enjoyed any eclat at all. (Speaking entirely for himself, Bullfry had at an early stage realised that he wanted that mental and emotional capacity to have any form of 'successful' practice. His ideal week involved modest case preparation on the Monday, a pleasant two day excursion before the duty judge, and the matter settling judiciously on Thursday morning - then followed an extended

Friday luncheon with boon companions).

Moreover, any female barrister who began to achieve notoriety in a select jurisdiction would, inevitably, be offered a more or less senior judicial post to attempt to attain the gender equality of appointments considered so important in the post-modern world. Indeed, it could be safely predicted that within a year or two of achieving a silk gown, a female barrister would be plucked from obscurity to take her place on some court; indeed, for the high-flying female silk it was almost a question of 'name your post' when the Attorney called. It followed that there was no prospect of any senior woman barrister achieving a liver-function test result like that of Blenkinsop. (Bullfry had hoped to accept a post as 'mentor' to a young female junior under the Bar's new-fangled 'Help a youngster' campaign but the second Mrs Bullfry had scotched that possibility at the breakfast table when it was timorously floated.)

It would surely be far better, mused Bullfry, if all these simple truths were recognised and the constant implicit criticism of the Bar and male barristers as some backwater of unreconstructed chauvinism was silenced forever.

Bullfry leant back on the chaise longue and picked up one of the French classics; his secretary, carefully selected by the second Mrs Bullfry for her singular looks, knocked and entered. 'Just time for another double before we finish up, Alice - and pour one for me as well'.

A gentle calm descended on Bullfry, the ataraxia of one whose business for the day has ended. He thought momentarily of Blenkinsop, even then winging his way north with a coterie of young thrusters from the mega firm, two benighted juniors, and a caravanserai containing more tender bundles than any man could ever wish, or hope, to deploy.

Bullfry's battered head fell forward; the tattered copy of Balzac slipped from his grasp - a suspirious snore escaped.

...his secretary carefully selected by the second Mrs. Bullfry for her singular looks, knocked and entered. *(Cartoon by Poulos Q.C.)*

2001 Senior Counsel

Senior Bar Counsel: Back row, left to right: Colin Charteris, John Nicholas, Keith Rewell, John Griffiths, Neil Williams, Robert Sutherland.
Middle row, left to right: John Ayling, Sharron Norton, RobertsonWright, Rowan Darke, Robert Weber, Jeremy Gormly, Martin (Anthony) Blackmore.
Front row, left to right: Paul Conlon, Howard Insall, Christopher Craigie, Bruce Hodgkinson, Robert Lethbridge, Vance Hughston.
Timothy Robertson was not present.

August 2001 Readers Course

August 2001 Readers course: Back row, left to right: Graeme Blank, Ross Carruthers, James Whyte, Christian Dimitriadis, James Hmelnitsky, Philippe Gray-Grzeszkiewicz, Dominic Williams, Christopher Wood, Mark Dennis, Joanne Gallaher.
Middle row, left to right: Radhakrishnan Nair, Christina King, Matthew Darke, Adrian Canceri, Cameron Thompson, John Azzi, Mary Falloon, Ivan Griscti, Roger Quinn, John Gibson, Thomas Hickie, Emma Wright.
Front row, left to right: Harriet Grahame, John de Greenlaw, Terese Messner, Margaret Allars, Therese Catanzariti, Anita Betts, Stephanie Fendekian, Felicity Rogers, Constantine Miralis, Heather Irish, Meredith Phelps.

INAUGURAL WORLD CONFERENCE OF BARRISTERS AND ADVOCATES

EDINBURGH 27 – 29 JUNE 2002

For the first time, the members of the independent referral bars will be invited to gather at a conference designed to examine and discuss current issues affecting barristers.

Matters such as competition policy, direct access, regulation of the profession, independence of the profession and specialisation will be on the agenda. Each of the participating bars will provide speakers and the conference will afford registrants a unique opportunity to consider and assess the role of the Bar and the challenges it and its members face.

The host Bar is The Faculty of Advocates. In existence for over half a millennium, the Faculty is the body which represents independent lawyers who have been admitted to practise as Advocates before the Courts of Scotland.

There are approximately 20,000 barristers in private practice at independent referral Bars around the world. To ensure that a place at the Conference will be available, prospective attendees will be invited to pay a deposit of approximately £40. A conference web-site is being established and details will be available on it within the next few months. A link will be available on the web site of your own Bar to take you to the Conference information.

In the meantime, preliminary information can be obtained from the Conference Secretariat.

It is being administered by the Australian Bar Association.

Telephone: 61 7 3236.2477

Facsimile: 61 7 3236.1180

Email: mail@austbar.asn.au

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Robert Francis Greenwood Q.C.

1941 - 2001

Bob Greenwood Q.C. is known to a wider world as the former head of the Australian Special Investigations Unit set up to investigate allegations of war crimes against persons in Australia.

He had, prior to taking up that challenging role, been a member of the National Crime Authority and Deputy Director of Public Prosecutions for the Commonwealth of Australia in the Australian Capital Territory.

Bob was a skilled criminal trial defence advocate who had achieved notable successes at trial and on appeal, including in the High Court. In his earlier career he had practiced particularly in the north of Queensland. He had taken up practise in New South Wales following his resignation from the Special Investigation Unit.

He died on Tuesday 23 October 2001, following a farewell function organised by his family and friends, which he was able to attend at Centennial Park on Sunday 21 October 2001, his 60th birthday.

He leaves his family, Janet, Anne, Bill, John, Sally, Michael and Harry with the fondest of memories of him.

At his memorial service at St. Andrew's Cathedral on Monday 29 October 2001, his children spoke of their affection for a father for whom they had the highest regard.

Justice Mary Gaudron of the High Court described him as a man dedicated to the law, unswerving in his belief that all are answerable to the law and entitled to the law's protection. He was a man, she said, who lived his beliefs. She described him as single-minded, fearless and sometimes slightly Fenian, generous, irreverent, irrepressible.

Mark Aarons, author, described the diligence and skill with which Bob had performed his function as head of the Special Investigation Unit obtaining the co-operation of the Soviet authorities in providing assistance including the provision of witnesses to the Australian prosecutions in consequence of the Unit's investigations.

Those that knew him admired the man and respected the lawyer. His friends who were many will miss him very deeply.

The Hon. Justice J R F Lehane

1941 - 2001
By The Hon. Justice R P Meagher

Justice John Robert Felix Lehane, who has died aged 59, will be an enormous loss to the legal profession. He was an immense success as a judge, both with his colleagues and with the Bar, and should have been appointed to the High Court of Australia.

Lehane was a lecturer in equity at the law school of the University of Sydney and published many articles and studies on various aspects of equity and commercial law, particularly in the area of banking, in which he had formidable expertise. He was, with R P Meagher and W M C Gummow, an author of Equity: Doctrines and Remedies, the leading Australian textbook in that field. Anyone who reads the chapters in that book dealing with equitable assignments, or receivers, will at once appreciate his unique combination of profound learning, precise thinking and verbal elegance.

Lehane was born in Sydney to Felix Lehane and his wife Jessie (nee Vickers), whose sister is Lady Windeyer, Sir Victor's widow.

He was educated at Sydney Grammar School and at the University of Sydney, from which he graduated BA with first class honours in Latin (1964), LLB with first class honours and the University Medal (1969) and LLM with first class honours (1980). As an undergraduate, he was a member of St Paul's College at the university.

Lehane served articles of clerkship from 1966 with the late A P Henchman, then a partner of Allen Allen & Hemsley, solicitors, of Sydney and was admitted as a solicitor of the Supreme Court of NSW in 1969.

He worked with the firm as an employed solicitor until 1971, in which year he became a member of the firm.

He remained a partner until his appointment to the Bench. From 1990 to 1993 he was the firm's managing partner and from 1994 until October 1995 its chairman of partners. On 3 October 1995 he was appointed as a judge of the Federal Court of Australia.

Lehane served on the council of St Paul's College since 1977 and had been its chairman since 1992. He was also a member of the council of Pymble Ladies College since 1990.

In 1971 Lehane married Dr Rosalind Day and they had two daughters and two sons. He was a devout Anglican. His recreational interests included tennis, theatre and music.

He was always courteous, quiet, calm and precise, with a mischievous sense of humour. He was very well read. He was generous. And he was modest, although he had nothing to be modest about. With good reason, he was enormously popular.

His death, after a year's battle with malignant cerebral tumours, will make us all feel deprived.

Paul Donohoe Q.C.

1944 - 2001
By Alan Sullivan Q.C.

Paul Donohoe Q.C. passed away on Friday 2 November 2001 completely unexpectedly. He was 57 years of age and at the height of his powers. His death shocked and shook his family, friends and colleagues especially, of course, his beloved wife Louise and his adored children, Phoebe, Justine, Jeremy, Simon and Andrew. There could be no more eloquent testimony to the great affection, respect and regard with which he was held by his family, friends and colleagues than the huge turn out for his funeral on an appropriately bleak Wednesday, 7 November 2001.

Almost 1,000 people packed St Mary's Cathedral for the beautiful and moving service. One senior barrister observed that there couldn't be much business going on in the Supreme Court or the Federal Court that morning because, it seemed, most of the judges of those courts were in attendance as were judges from the High Court of Australia and many other courts as well as a countless number of Paul's colleagues and friends from the Bar and from the solicitors' branch of our profession.

Paul was the youngest of the five children of Frank and Eileen Donohoe who lived in Martin Road, Centennial Park. Frank Donohoe was a well known and highly regarded Sydney solicitor. Paul attended Waverley College where he was a competent and diligent student. Although he played a bit of tennis, Paul's sporting passion was surfing. He retained a love of the surf for the whole of his life. One passion which Paul didn't retain for the whole of his life was his love of budgerigars. It may surprise some to know that in his adolescent years Paul was a breeder of budgerigars. The problem was that the family also had cats. They too liked the budgerigars but for reasons different to those of Paul. An abiding memory Paul's eldest brother, Frank, has of Paul as an adolescent is of him sitting at the back of the

house in a chair with a bottle of beer nearby and his air rifle beside him ready to take a pot shot at any cat which dared to approach the aviary.

After obtaining his Leaving Certificate, Paul attended the University of Sydney from which he graduated with degrees in arts and in law. Whilst at Sydney University he represented the Law School in the intervarsity debating competition and also commenced Articles at his father's firm, F P Donohoe & Son being articled, in fact, to his brother Frank. With a neat symmetry which would have pleased Paul the teacher-student relationship between he and Frank was reversed in 1983 when Frank came to the Bar. By then Paul was an established and busy junior and he did all he could to assist his brother establish himself at the Bar.

Paul was admitted as a solicitor in March 1968 and, almost immediately, became a partner in the family firm. Frank snr died in 1973 and Frank jnr left the firm in 1974. Thereafter, Paul in conjunction with Alan MacDonald carried on the family firm until it merged with Law & Milne.

During his time as a solicitor Paul developed a reputation as a connoisseur of fine wines and cigars. He even toyed with the idea of setting up a business to sell Cuban cigars in Australia and applied for an import licence to do so. Not surprisingly, in the political climate which prevailed in Australia in the late 1960's and early 1970's, he did not obtain that licence. Maybe it was that which caused him to flirt with politics. Paul became heavily involved with the Liberal Party of Australia and even stood for pre-selection to the Senate. Fortunately, he was unsuccessful.

However, the vast majority of Paul's time at this stage was divided between the raising of his young family with his first wife, Dianne and the maintenance of his practice. He was an excellent solicitor held in very high regard by all who dealt with him, especially the barristers he briefed. He became very friendly with a number of those barristers and that contact stimulated him to make the major career decision of his life.

Paul was admitted to the Bar on 11 February 1977. He was fortunate enough to read with Dick Conti then a junior counsel with an enormous commercial practice. He found his first home at the Bar in Ground Floor Wentworth Chambers. He made many close friends there including Justice Carolyn Simpson. He quickly developed a very busy, very diverse practice as a junior. One of Paul's many qualities as a barrister was his versatility. He could do any sort of commercial or equity case but, unlike many others, he was equally adept and comfortable running a personal injuries case or a medical negligence claim. He fervently believed that all judicial officers should be treated with respect at all times and that the role of the advocate was to persuade rather than to lecture. He had consistent and regular success whether appearing in an arbitration or in a local court or in the highest court in the land. He was a true all-rounder.

Paul's qualities as a barrister soon came to the attention of other floors.

In December 1979 he made the very difficult decision to leave his good friends on the Ground Floor and to join the Eleventh Floor Wentworth largely because, I suspect, two of his legal idols, McAlary Q.C. and Staff Q.C., as well as his former pupil master, Conti Q.C. were members of the Eleventh Floor. The Ground Floor's loss was the Eleventh Floor's enormous gain.

Paul joined the floor which has always prided itself on its camaraderie and which was the home of many highly skilled practitioners. Yet it would be fair to say that few, if any, members of the Eleventh Floor have enriched it and had as great an impact upon it as Paul did in the 22 years he was a member. Paul's wonderful array of personal skills - his charm, urbanity, sophistication, warmth, honesty, rock-hard integrity and his sense of fun and humour - quickly resulted in him becoming one of the most popular and respected members of the floor.

His zest for life, genuine interest in people and his disdain for pretentiousness or pomposity infected us all. He had a love of French champagne which he would very generously share with his Floor colleagues. But Paul introduced an inviolable rule for such occasions. You were free to talk about your work and how well you performed it on a particular day - but only if it was funny. If it wasn't (and Paul was the ultimate and very strict arbiter of that) you had to buy the next bottle of champagne. Needless to say, the rule had its desired effect. Very few ventured, on these occasions, to talk about work or, more particularly, how they had excelled at it. However, having diverted us from talking about ourselves and our work, Paul then found he had to introduce another rule. This was the 'no golf rule'. No one was permitted to use any word remotely associated with the game of golf lest Maconachie latch on to it as an opportunity to regale us all, in excruciating detail, about his latest exploits on the golf course.

Paul also initiated what has become an Eleventh Floor institution, namely the Friday lunch in the common room which members and ex-members of the Floor are encouraged to attend whenever possible. He had two motives for this initiative, each laudable. First, he wanted to ensure that close personal contact was maintained between the members and ex-members of the floor, especially after people had left the floor to go to the Bench. He believed that this contact was extremely important for all of us but most particularly for the younger members of the floor. His second aim was to assist in maintaining the economic viability of the dining room. Paul believed the common room and the dining room had very important roles to play in maintaining and enhancing the fraternal and collegiate spirit of the Bar which distinguishes our profession from many others. He loved the Bar and its institutions and recognised the critical part that mutual trust plays in the practice of our profession. He believed that that mutual trust was fostered and developed by the close personal contact between members of the profession and of the judiciary which occurred in the common room and dining room.

Paul Donohue, with clerk Paul Daley, when the bows for new silk were taken at the High Court in Canberra in 1991.

The lunches were also a weekly

reminder of Paul's sometimes mischievous sense of humour. Each Friday morning he would circulate an invitation to the lunch comprising the menu for the day and some witty or humorous cartoon or extract from a book. We will miss those invitations.

Paul's career at the Bar continued to flourish after joining the Eleventh Floor. To the surprise of none, he took silk in 1990.

Paul's appointment as silk caused him only one regret. It meant he could no longer do formally what he had done so spectacularly well as a junior, to act as a pupil master (to use the politically incorrect term) to various readers. I feel confident in saying that there has never been a better pupil master than Paul. He had a genuine interest in his readers, their well-being and their education as barristers. In the best traditions of the Bar, he was exceedingly generous with his time and with his knowledge with his readers and, indeed, with any other member of the Bar who sought his assistance. He gave his readers his unstinting support, advice and encouragement. He helped get them briefs. He was a natural teacher. He ingrained in all his readers the paramount importance of acting at all times, just as he did, with the highest ethical standards and the utmost integrity. Not surprisingly, all of his readers have done well at the Bar, to Paul's great satisfaction. In my last conversation with him, at the swearing in of Justice Joe Campbell, Paul proudly recounted to me that two of his readers, Rowan Darke and Neil Williams had taken silk this year. He was genuinely pleased to have been able to help them a little on their way.

As a silk Paul had great success and enjoyed a very strong following. He appeared in many important cases and quickly became widely regarded as one of Australia's pre-eminent senior counsel in long, complex and complicated construction and building litigation. But he continued to practise with skill, expertise and great success in an almost bewildering array of different types of case. He appeared with distinction in the High Court of Australia in *Chappel v Hart* (1998) 195 CLR 232, a medical negligence/causation case. He was successful in persuading the High Court to accept his submissions on industrial law issues in *Re Amalgamated Metalworkers Union of Australia; ex parte The Shell Company of Australia Limited* (1992) 174 CLR 345. A very special bonus for Paul, in this case, was that Louise was his junior. He also appeared before the High Court in an important case setting out the principles of law for the liability of a public authority in respect of the negligent supply of contaminated water in *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575. He was one of the senior counsel who successfully argued the landmark decision of the High Court on private international law in *Pfeiffer Pty Limited v Rogerson* (2000) 74 ALJR 1109.

Even a cursory examination of the law reports further reveals the success, diversity and width of Paul's practice. He argued personal injuries cases (e.g. *Dell v Dalton* (1991) 23 NSWLR 528), he successfully persuaded the Full Court of the Supreme Court of South Australia in respect of the application of the principles of fiduciary duty in *Gemstone Corporation of Australia Limited v Grasso* (1994) 13 ACSR 695. He appeared in the Federal Court in bankruptcy, administrative law and trade practices cases (see, e.g. *Seovic Civil Engineering Pty Limited v Groeneveld* (1999) 161 ALR 543; *Lord v Commissioner of The Australian Federal Police* (1997) 154 ALR 631 and *Wilkins v Dovuro Pty Limited* (1999) 169 ALR 276). In New South Wales, the reports evidence him contributing to the development of the law relating to gifts, conveyancing, contract/estoppel, building and construction law and in many other areas. He also played an important role in the notorious recent defamation case involving Mr John Marsden and Channel Seven. His involvement in that case stemmed from his innate sense of justice, his commitment to the legal system and his desire to help an old friend out in hard times.

It is fair to say that there are few, if any, practitioners at the modern Australian Bar who were as well equipped as Paul to appear as an advocate at any level in the legal system in virtually any type of case. His versatility perhaps stemmed from his strong conviction that barristers should have only one specialty, namely advocacy. In Paul's view, intelligence, judgment, courage, knowledge of the law and, perhaps most of all, the ability and commitment to meticulously prepare a case in all its aspects were the tools of trade which every barrister should possess and which should equip a barrister to practise in virtually any field of law before any court or tribunal.

In Paul's own case, at least, this was a correct assessment.

After Paul and Louise got married, they decided to live in Berry and 'commute' to Sydney and other places to work. As Paul, by this stage, had developed an Australia-wide practice this was not as impractical as it may sound at first blush. Notwithstanding the fact that both Paul and Louise were both city born and bred (or probably because of it) they loved their time in Berry and never complained of the inconvenience that the travel for work purposes involved.

More recently, Paul and Louise decided to move to Canberra where Louise had spent time as a child and where Paul had always had a significant practice. Paul, however, continued to maintain his chambers on the Eleventh Floor in Sydney and continued to do a lot of work in Sydney.

In what seemed no time at all, Paul became the undisputed leader of the Canberra Bar. His experience, ability, judgment, administrative and communication skills were quickly appreciated and recognised by the Canberra Bar. He was approached to stand as president of the ACT Bar Association and, succumbing to his sense of duty, he agreed. He was elected unopposed as President of the ACT Bar Association.

Paul's willingness to put back something into the profession he loved was what we had come to expect from him. Not only had he been a mainstay, for many years, of the NSW Bar Reading Course but also Paul served for a record period of eighteen years on the Board of Counsels' Chambers Limited including two years as its chairman. He played a very large part in the revival of that company's fortunes.

Whichever way you look at it, Paul had an outstanding and wonderful career as a lawyer. I can't help feeling, however, that his career was still incomplete or unfinished when he was so tragically and peremptorily taken from us. I think that he was poised to achieve even greater professional rewards and recognition. Sadly, we will never know.

Appropriately for a man with such an enthusiasm for life and a love of people, Paul Donohoe had a rich, highly satisfying and greatly enjoyed life both personally and professionally.

He loved the law and his colleagues in it but his first love and his main priority was always his family, especially Louise and his children. He regarded his children as his greatest achievement.

Their grief is shared by us all. He was a loving husband, a devoted father and an outstanding barrister. But, most of all, he was a wonderful human being.

Principles of Criminal Law

by Simon Bronitt and Bernadette McSherry
LBC Information Services, 2001

As someone who has been a part-time lecturer in a university law school for some years, while continuing to practice at the Bar, I have often been struck by the apparent chasm between the academy and practitioners. At times, it seems that academic lawyers and practicing lawyers live in two different worlds, speaking different languages and with completely different views of the law.

Practitioners, at least those in the private profession, tend to focus on the minutiae of particular cases with which they are dealing. They immerse themselves in the factual, tactical, psychological, emotional, evidential, and, above all, practical, issues which each case throws up.

Of course, the law is the framework within which the practitioner operates and sometimes a particular legal rule or principle will be of critical importance. In order to provide good advice to clients, and to represent them effectively in any legal environment, the law needs to be known. Occasionally, uncertainty as to the true legal position will require some consideration of the arguments which might be marshalled to achieve a particular legal outcome. But, for the most part, the practice of law is about real people, what they have done in the past and what they might do in the future, about real things, on the micro rather than the macro level.

For academic lawyers, a large part of what makes the practice of law fascinating for practitioners is simply missing. There is no direct involvement with people with real legal problems, needing help in a complex world. There is no opportunity to taste the satisfaction which comes from applying knowledge of the law to help clients avoid legal pitfalls, resolve disputes and emerge victorious from litigation.

Accordingly, the academic lawyer must find job satisfaction elsewhere. Traditionally, one source was developing mastery of a field of law, organising it and making sense of it. Such knowledge could be passed on by lectures to students and, by the writing of legal texts, to the wider legal community. Many academic lawyers still engage in this task. However, over the last few decades the legal academy has increasingly turned its focus to a different priority - critique of the law.

While the academy has always seen one of its roles as legal criticism, this had tended to be simply one of a number of functions. In the process of explicating the law, it is necessary to examine the principles and policies upon which it is based. While they might be the subject of criticism, the focus of criticism tended to be narrow. Logical fallacies, poor reasoning, inconsistencies in approach, conflicting principles, were the primary tools. That has all changed by the injection of what might be called, loosely, sociology and politics.

The dominant model of academic legal study and analysis now involves an attack on the social and political underpinnings of the law. There is little interest in descriptive endeavours, or in the minutiae of particular cases. While there may be some explication of what the law is, this is usually only a prelude to a comprehensive attack on, and dismantling of, that law. No doubt, considerable intellectual excitement can be derived from the trashing of judicial authority figures and lawmakers, and from the advancing of deeply felt political and moral views with the goal of achieving some model of justice.

I should make it clear that I am not condemning such forms of academic endeavour. It cannot be doubted that the law is politics, and that the content of the law derives from complex historical, political, social and moral forces. Anyone is entitled to challenge the underpinnings of the law and to advance a particular political perspective or agenda, so long as they are honest about what they are doing. One may question whether law schools should be dominated by such an agenda, but there is noting wrong in it forming part of the academic world.

Rather, the point I wish to make is that such academic critical legal analysis increases the rift between academic lawyer and practitioner. Books written in accordance with such analysis tend to be structured and written in a way which makes them of little use to practicing lawyers. Perhaps that is too strong. They tend to speak a language and have a focus which is alien to the practitioner. While they may contain much that may be useful, it will tend to be submerged in material that is not.

Again, I should make the obvious point that this may be of little concern to the academic. Books are written for different audiences. Some legal texts are written for practitioners. Others are written for students, to provide the written material upon which the task of legal teaching is to be based. Given that legal teaching is increasingly being dominated by political and social criticism, it is hardly surprising that legal texts are being written based upon that model. Understanding that makes it easier to see why such texts may appear, at least on first inspection, to offer little to the practitioner.

Nevertheless, the legal practitioner should not be too quick to judge. Even someone involved in the day to day realities of the practice of law should occasionally stand back and look at the bigger picture. Long held assumptions should be challenged. More pragmatically, consideration of legal criticism may inform more prosaic, more down to earth, concerns.

This long discursus is by way of introduction to a book on the criminal law which reflects the changing academic paradigm. In the preface, the authors write:

> This book is a result of our commitment to showing how the principles of criminal law reflect the changing social, political and moral concerns about wrongful conduct and particular groups. We set ourselves the daunting task of describing criminal laws across every Australian jurisdiction and, wherever possible, challenging these accounts from interdisciplinary vantage points. Reflecting our broad variety of interests, we have drawn upon a range of disciplines including criminology, criminal justice studies, feminism, legal history, human rights, legal theory, medicine, psychology and sociology, to illuminate the substance and operation of the criminal law. ... What we do hope to impart is a critical orientation to the criminal law, rather than simply a description of the rules, principles and substantive definitions applicable in every jurisdiction. In terms of presentation, we deliberately set out to differentiate this book from other textbooks by including case studies, perspective sections and shorter aside boxes, tables and diagrams. We hope that this translates into a user-friendly book that provides starting points for critical reflection, class discussion and further research into specific areas. Beyond providing critiques of the law, we are keen to point the way toward reform.

I think the authors have largely succeeded in their goals. They have

demonstrated that many criminal justice principles are historically contingent, 'evolving to accommodate changing social, political and moral expectations about the proper function and limits of the criminal law'. Fundamental assumptions upon which much of the criminal law is based are isolated and examined. Recent developments in psychiatry and psychology are highlighted. Useful tables and summaries of the existing law are provided. Discussion of important judgments is often incisive and thoughtful. Areas of the criminal law which have tended not to receive much academic discussion are comprehensively analysed. For the mort part, criticisms of the law are reasonably balanced and well-informed. Proposals for reform are often sensible and cautious.

That said, and adopting the 'critical' mode, some negative points can be made:

- Some claims about the criminal law are supported by questionable authority. Thus, the proposition that 'the right to a fair trial may be viewed as [a] right to a trial that is reasonably fair in the circumstances' (p.103) is supported by an extract from the judgment of Brennan J in Jago v District Court (NSW), failing to mention that his was a minority position on the High Court. Similarly, English and American sources are often relied upon to support doubtful statements about the Australian criminal justice system (see, for example, p.122).
- Some discussions of the parts of the criminal law have failed to keep up with recent developments. For example, the discussion of the law relating to the defences of necessity and duress is severely compromised by the lack of reference to the important decision of Rogers (1996) 86 A Crim R 542.
- Doubtful claims are made, only supported by the writings of other critical legal scholars. This technique is adopted in relation to, for example, the questionable proposition that a jury will be required to apply an 'underlying male standard' when considering the 'reasonableness' of actions said to have been taken in self-defence (p.307). Another example is the assertion that unlawful police conduct is 'permitted, in effect, licensed' by the law, supported by a 1981 English sociological text (p.873).
- Some assertions about the legal system do not accord with my observations of the day to day operations of the courts. They seem to derive primarily from ideological positions. For example, at p.96 the authors write:

  > In the lower courts, where most suspects are processed, an 'ideology of triviality' pervades summary proceedings. Rather than venerate fairness values, empirical research has revealed that trial procedures, especially those in lower courts, operate as ritualised degradation ceremonies.

Unfortunately, the 'empirical research' is not summarised and the references in support are to other texts, including a 1979 American book. Another example is the proposition advanced at p.97 that 'judicial rhetoric venerates fairness and legality in the administration of criminal justice while systematically denying them in the specific application of rules, discretions and remedies'. Evidence for this rather strong claim is not provided, at least at that point in the book.

- Legal arguments which do not find favour with the authors are sometimes demolished by careful use of language. Thus, it is observed that 'defence counsel have argued that rape trials should be permanently stayed on the ground that 'rape shield laws', which aim to limit humiliating and degrading cross-examination on the complainant's sexual history, violate the accused's right to a fair trial' (p.105). A rather more neutral formulation would have acknowledged that those defence counsel no doubt submitted that the accused was prevented from obtaining important evidence by those very laws. An even more egregious example is the proposition that 'the fair trial principle' has 'been invoked to stay proceedings where the complaint is substantially delayed because the complaint relates to sexual abuse perpetrated on the victim as a child' (p.105). Putting to one side the assumption that the complainant was indeed a victim of sexual abuse, the failure to refer to the impact of what is often decades of delay on the possibility of an effective defence is unfortunate.
- Criticism is advanced of law reform bodies which fail to consider external perspectives on the law, without acknowledging that sometimes those bodies operate on the basis of terms of reference which preclude such analysis. Thus the Model Criminal Code Officers Committee should not be criticised for failing to engage in lengthy analysis of 'the relevance of culture and setting to drug use and the effectiveness of alternative approaches to drug control based on regulation rather than criminalisation' (at 34) in its discussion of serious drug offences, when the Committee's task was narrowly circumscribed by its political masters.

Interestingly, in the preface to their book the authors acknowledged that 'writing about law from an interdisciplinary perspective is not without its own hazards and pitfalls'. Quoting a Canadian law professor writing in 1998, they referred to disparagement from more traditional legal academics and scholars in other disciplines who 'do not always appreciate encroachments by their neighbours'. They expressed 'optimism that the Australian legal community will be receptive of such endeavours'.

In my experience, the authors have little to be concerned about in the academic legal community. It seems clear that critical, inter-disciplinary, legal analysis is no handicap to career advancement. Quite the reverse. On the other hand, the private profession will not be so receptive. As for the views of political scientists, psychologists, sociologists and other like experts, I will leave it to them to judge.

Reviewed by Stephen Odgers S.C.

The arbitrators' companion

by Geoffrey Gibson
Federation Press, 2001

This book, as its title suggests, has been written principally to provide an introduction and guide to law for arbitrators. It is divided into five parts.

Part 1, headed 'The law relating to arbitration' provides a useful conspectus, both for lay arbitrators and also for lawyers seeking an introduction to the topics covered, of the various stages and particular principles relating to arbitration. As the author acknowledges, matters dealt with in this Part are themselves the subject of specialist texts which necessarily contain a far fuller discussion of the principles. As such, the book does not claim, and rightly so, to provide an authoritative or exhaustive discussion of topics such as international arbitration, applicable law, jurisdiction or stays of court proceedings in favour of arbitration, domestic or international.

Although the text does make reference to some recent Australian and English decisions on topics relating to arbitration, there are at least three recent important intermediate appellate Australian decisions, the failure to refer to which is somewhat surprising. *Francis Travel Marketing v Virgin Atlantic Airways* (1996) 39 NSWLR 160 deals, inter alia, with questions of the scope of arbitration clauses and whether, for example, a Trade Practices Act claim may be referred to international arbitration. *Hi-Fert Shipping Pty Limited v Kuikiang Maritime Carriers Inc* (No. 5) (1998) 90 FCR 1 was a decision of the Full Court of the Federal Court dealing also with questions of scope of arbitration clauses, in a manner which went somewhat against the 'one-stop shopping' trend referred to on page 25 of the text. It also considered the constitutional validity of the *International Arbitration Act 1974* (Cth) and raised doubt, obiter dictum, in arguable tension with the decision of the Court of Appeal in *Francis Travel*, as to the validity of an arbitration clause referring a Trade Practices Act claim to an international arbitration. Nor did the text refer to *Raguz v Sullivan* (2000) 50 NSWLR 236, an Olympics case concerned with the Court of Arbitration for Sport, which contains an extensive and learned discussion by Spigelman CJ and Mason P of both the *Commercial Arbitration Act 1984*, the notion and significance of the seat of the arbitration (*locus arbitri*) and appeals from awards.

Part 2 of the text headed 'The practice of arbitration' provides a brief overview of the main procedural steps of an arbitration, together with a worked example or case study designed to illustrate in a practical way the time line of an arbitration from the inception of the dispute to the completion of the award. The text, however, provides very little discussion indeed, even by way of overview, of principles relating to the enforcement of awards.

Part 3 of the text is entitled 'Elements of law for arbitrators'. Again, as its title suggests, this aspect of the book is particularly directed to lay arbitrators. It provides a necessarily brief overview of the following topics: the Australian legal system, contract, discovery, equity, estoppel, evidence, interpretation, misleading and deceptive conduct, natural justice, negligence, pleadings, privilege and restitution. This, in 60 pages, may provide useful introduction to lay arbitrators. It would be alarming, however, if it was of value to practitioners. In fairness to the author, it is not directed to them. In similar vein to Part 3 is Part 4 of the book, headed 'Glossary of legal terms for arbitrators'. Again, this is likely to be a principal value to lay arbitrators rather than legal practitioners.

Part 5 of the book, headed 'Sources of law for arbitrators' contains reprints of the *Commercial Arbitration Act 1984* (NSW), the *International Arbitration Act 1974* (Cth).

Whilst the text of the book runs to 248 pages, what appeal it may have to a practitioner wishing to inform him or herself in a general and introductory way of the framework of arbitration lies in the first quarter of the text.

Reviewed by Andrew S. Bell

Lumb & Moen's The Constitution of the Commonwealth of Australia (Annotated 6th ed)

By Gabriel A Moens and John Trone
Butterworths, 2001

Firstly, it must be acknowledged that this edition marks the death of one of the original authors of this text, namely, Professor Darrell Lumb. One of the seminal legal writers on Australian constitutional law and indeed whose text *The Constitutions of the Australian States* (first published in 1963) has no rival, his passing will greatly lamented amongst academic and practicing public lawyers alike.

Secondly, to be frank, it is difficult to say anything very original about this celebrated annotation. Since its initial publication in 1974, this text has unfalteringly provided practitioners and academics alike with the essential commentary and case law required to navigate one's way through the Constitution. There are, of course, weightier tomes on the market but none that have consistently presented themselves in such a concise and yet relatively comprehensive fashion.

It is of course no mere coincidence that (judging by the book's cover, aphorisms aside) the 6th edition has been published during the centenary of federation. In this regard it was somewhat disappointing to see less, rather than more, material in the 'Introduction' on subjects such as 'Relations With the United Kingdom' and the complete excising of all commentary on the *Australia Acts 1986* (UK and Cth).

However, the sixth edition is a fully revised edition referencing most of the recent developments in constitutional law since 1995. For example, there is now a discussion of proportionality in light of decision in *Leask v Commonwealth* (1996) 187 CLR 579. Chapter I has undergone significant revision, incorporating many of the cases concerning representative democracy and responsible government, including implied freedoms. For example, *McGinty v Western Australia* (1996) 186 CLR 140, *Kruger v Commonwealth* (1997) 190 CLR 1 and *Lange v Australian*

Broadcasting Corporation (1997) 189 CLR 520. Equally, there is mention in Chapter I of the plethora of new decisions concerning the Commonwealth legislative powers contained in s51 of the Constitution. Cases such as *Victoria v Commonwealth* (1996) 187 CLR 416 (on the legislative implementation of treaties) and *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (on the races power).

Chapter III contains a pithy discussion of the recent rush of decisions concerning the judicial power of the Commonwealth. As one would expect, reference is made to the important decisions of *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Likewise, Chapter IV on finance and trade outlines the changes effected to s90 in light of the decision in *Ha v New South Wales* (1997) 189 CLR 465, whilst Chapter V's discussion on 'The States' has been expanded in line with the developments to the Cigamatic doctrine as a result of *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

The structure of the text is clear and in addition to the standard table of cases, the annotation has a useful table of statues and an extremely useful table of constitutional provisions for quick access and reference.

The only criticism, and it is not perhaps the fault of the authors', is that curiously the currency of the content of the text is as at 1 January 2000. Thus nearly two years later and the book is already a little out of date. For example, omitted is any reference to *R v Hughes* (2000) 171 ALR in the chapter on judicial power.

This complaint aside, the annotation is nevertheless commendable. It will prove to be an invaluable acquisition for those who only occasionally have recourse to constitutional law in their practice and an essential complement to the constitutional libraries of those who are more conversant with this field of law.

Reviewed by Rachel Pepper.

Architects, engineers and the law (3rd edition)

By J R Cooke
The Federation Press 2001

I am not sure what to make of this book. In many ways it is good, but ultimately it may be too complicated to be useful.

When I commenced to read the book I was negative toward it, thinking it would be no more than a non-lawyers book, perhaps to be used as a text in some introductory course to the law for non-lawyers. But the book is much more than that. In the first place there are the remarkable qualifications of the author, Dr Cooke, who holds bachelors degrees in architecture and law, a masters degree in building science and a doctorate in architecture. Dr Cooke is described as a chartered architect, a solicitor and an arbitrator. The scope of the book is ambitious: it commences with an introduction to the legal system, and then proceeds to touch upon a remarkably diverse group of subjects - contract, tort, trade practices, agency and employment, damages, limitation periods, defamation, copyright and the professional conduct of engineers and architects. There is an extensive section on matters relating to particular building contracts as well as planning and environmental issues. There are even specific sections on, for example, waiver, quasi-contract and equitable estoppel.

I think the book tries to do too much: it is very detailed which is obviously the product of an enormous amount of research. The author constantly refers to decisions of courts and tribunals, not just in Australia, but cases decided in the UK, Canada and America. In fact, this probably constitutes the downfall of the book, which ultimately fails to identify principles, preferring to refer to all sorts of decisions from all around the world. In this context it is irresistible to mention that Dr Cooke cites, as authority for the proposition that foreseeability alone is inadequate to establish the existence of a duty of care in tort, the case of *Crochet v Hospital Service District No 1 476 So 2d 516 (1985)* - a decision of the Court of Appeal of Louisiana.

By trying to do too much, some fundamental things get lost. For example, although the book (which was published in June 2001) has a section on contributory negligence, *Astley v Austrust Ltd* does not get a mention. And although issues of the availability of pure economic loss are discussed, *Perre v Apand Pty Ltd* is missed altogether. While the *Trade Practices Act 1974* (Cth) must have a significant impact on the liability of architects and engineers, the whole matter is covered in less than three pages.

For the general lawyer I would hesitate before recommending Dr Cooke's book, but it is not possible to simply dismiss it, as it does constitute, at least for a person interested in construction law, an invaluable list of decisions with a construction-bent. This is especially so in the second half of the book, much of which deals with specialist matters relating to particular building contracts - the interpretation of particular clauses and so forth.

Reviewed by Geoffrey Watson

NSW Bar Association v Queensland Bar Association cricket game

By Anthony McInerney

On the weekend of 8/9 September 2001, the New South Wales Bar Association XI travelled to Brisbane for the annual NSW Bar Association v Queensland Bar Association cricket game. Despite assurances from many, and confidence that two teams would travel to Brisbane for the festivities, a keen but not overly skillful group of twelve arrived at the Alan Border Oval to take on the might of the Queensland Bar, as part of the Goodwill Games. From the time the New South Welshman arrived, the result was fairly predictable. New South Wales scored too few, whilst Queensland scored too many. As a result, memories of the game have faded more quickly than one would ordinarily expect. In addition, the score book has mysteriously disappeared, photographs taken at the time have not been developed, and players thought to have participated now deny they were present (Poulos Q.C. denies ever having been to Brisbane, let alone to the Allan Border Oval. Suggestions that he is feigning or malingering have been vigorously disputed).

'...and players thought to have participated now deny they were present...'

For those who played, the batting was more memorable than the fielding. Dalgleish contributed a handy knock at the top of the order of 40 or so. Neil and Foord hit a few, whilst Reynolds S.C. was steady. Gyles belted a quick fire thirty odd; and Ireland Q.C. and Toner S.C. did well at the end. King S.C. and Frank Curran provided admirable tail end support. Unfortunately Poulos Q.C., White S.C. and McInerney did not trouble the scorers.

The less said about the fielding the better, other than to note that King S.C. pushed off the fence to open the bowling with his usual venom, and Ireland Q.C. kept the wickets well. Frank Curran showed his commitment to the cause by keeping score, notwithstanding that his beloved Sydney University Rugby Club were in the first grade final that afternoon. Our thanks go to the Queensland Bar Association for their warm hospitality; a very pleasant evening was spent at the home of Morris Q.C. and we are much indebted to him and to the Queensland Bar. All are looking forward to the return match next year.

Barristers hockey match 2001 NSW Barristers v Victorian

By Andrew Scotting

Just over one year after the games, the Olympic Hockey Stadium again came alive to the excitement of the greatest game of all, when the New South Wales Bar took on the Victorians, on 13 October 2001.

Last year they called us too old, too fat and too slow. This time we were almost too good. The brave underdogs of NSW registered a hard fought and well-deserved 2-all draw, against all odds.

Sydney turned on a perfect spring day to warm the hearts of the Victorians. They arrived early by all means, of planes, trains and automobile, following the Ansett collapse. Appropriately dressed in black, they were brimming with confidence and eager for the contest. Again, they managed to gather a youthful outfit, although this year they fielded Dreyfuss Q.C., who was far too agile be a silk.

Strict instructions had been given to New South Wales that alcohol was not part of this year's preparation. Unfortunately, the match against the NSW Solicitors team, one week earlier, had taken its toll. Injuries played havoc with the NSW game plans. Bellanto Q.C. (knee), Mallon (knee) and Moen (knee) were all unavailable to play. Looking back, we should've had Merv Cross on retainer.

The presure of on-field captaincy showed on Larkin's face.

However, hometown advantage proved invaluable, with the NSW selectors having 15 players to choose from. The interchange bench, particularly Callaghan S.C., provided great vocal support throughout the match.

NSW started strongly in the first half, Warburton scoring an early goal from a well-taken penalty corner. Thereafter the Victorians replied with some sustained attack. Their persistence paid off, and they scored two goals in the remainder of the first half. Worthy of note in the dying moments of the first half was a valiant attempt by Scotting to score a 'length of the field' goal. Hockey folklore awaited him (scoring a goal from full-back is a lifetime achievement). Free in the circle, unfortunately, the last pass was just out of reach.

The second half was a hard fought affair, with the honours being evenly shared. In the end we were hungry and Pritchard scored the equaliser with only minutes to spare.

The New South Wales effort was based on heart and in this department players like Robertson, Jordan, Giagios, Rana and McManamey, gave 110 per cent. Welcome additions to last year's side were the new recruit Asha Belkin, and Ridley, a warrior, who played in his usual bruising style. Larkin was inspirational as on-field captain.

The teams adjourned to the player's bar overlooking the stadium and drank to the success of this year's game. Later, the teams got together at 'the Little Snail' at Ultimo for dinner. Katzmann S.C. spoke on behalf of NSW, setting the platform for many years of future rivalry. Burchardt replied on behalf of the Victorians, declaring that the

contest should become an annual event.

Last year I received many copies of the match report that appeared in the Victorian *Bar News* from concerned NSW members. I hope this year's result has restored faith in the noble few who defend the honour of the NSW Bar. Shagger and Bunter would be proud.

'Last year they called us too old, too fat and too slow. This time we were almost too good.'

Thanks to Phillip Burchardt for gathering the Victorian team, Patrick Larkin for organising the ground and refreshments and our umpires Chris Smith and Alison Robertson.

Chris Smith (umpire),Lawrence (ring-in), Giagios, Callahan S.C., Robertson, Jordan, Ireland Q.C., Scotting, Ridley, McManamey, Rana, Warburton, Katzmann S.C., Pritchard, Larkin, Belkin, Alison Robertson (umpire).

2001 – A chess odyssey

By Paul R Glissan
Captain of the Bench and Bar Team

In recent weeks I have been stopped in crowded Selborne lifts and besieged with enquiries as to the whereabouts of the Terrey Shaw Memorial Shield, following its sudden disappearance from the trophy cabinet in the Bar common room, where it had held pride of place for as long as most could remember.

To all these enquirers I reply:-

Ah, Majesty, what labour it would be
to go through the whole story! All my years
of misadventures, given by those on high!
But this you ask about is quickly told.
*(*Homer, *The Odyssey)*

On 6 September 1993 Shaw, for many years one of Australia's Chess Olympiad representatives and chess editor of *The Bulletin*, startled the president of the NSW Bar Association, John Coombs Q.C., with the following news:

> For some years now several colleagues and myself have noted with disappointment a glaring omission in the Bar's calendar of social events: a Bench and Bar v Solicitors chess match.
>
> This year we have decided to galvanise ourselves into action and organise such a match. We would like to confirm that our team which charges into battle on 5th November will do so with the imprimatur of the Bar Association Council, so that our standard-bearer will be carrying the official colours, so to speak.

To its eternal credit, the Bar Council gave its imprimatur, and, on 5 November 1993 Shaw carried the Bar's colours into battle, ably assisted, on behalf of the Bench, by former Australian chess champion, Justice J S Purdy of the Family Court of Australia.

The Bench and Bar won the inaugural match by the comfortable margin of 9-3, but thereafter the going got harder and the outcome of subsequent matches often depended on the final game to finish on the night.

In 1994 the Bench and Bar won by 10-8, in 1995 by 11-7, in 1996 by 10-8 and in 1997 by 11-9; in 1998 the match was tied 8½-8½; in 1999 the Bench and Bar again won, by 8½-5½; last year the match was again tied 6½-6½. Shaw played on board one for the Bench and Bar in each of the first four matches.

The first three matches were played in the genteel University and Schools Club, and were followed by long post mortems over succulent roast beef and copious libations.

In 1996 Shaw handed over the Bar's colours to me and the match was played in the Bar dining room, and was followed by a reception in the Bar common room.

Since 1997 the match has been played at the Law Society's lounge and dining room. Since then, like Trojans, our adversaries have awaited our annual incursions to do battle with them, peering down over the ramparts. Since then, unlike Greeks, we have come without bearing gifts, but proudly carrying the shield aloft.

This year, on 19 October, with fourteen

Glissan and Chek with the Shaw Shield.

members at their oars, including the legendary Kintominas (the memory of whom winning with three queens against a former opponent's two queens will live with me for a long time) and the mighty Ioannou, we set off across a wine dark sea in defence of the shield. As we approached the enemy camp, the gallant Gordon McGrath, with a perfect record of eight wins under his belt, was overheard muttering, 'the solicitors have me in their sights this year', and Watts was overheard confessing that he had not played any chess in the past twelve months (including against his computer). Inauspiciously, we were again without Bullfry Q.C., who had gone to his Christmas Island Chambers in expectation of a boatload of clients, who insisted on a rigorous application of the Cab Rank Rule. More importantly, we were without Justice Purdy.

To make our task even more difficult, all our rated players were matched against

opponents with higher ratings. Whilst we were strongly led by the current City of Sydney Champion, Tim Reilly, on board one and by Ben Ingram on board two, our opposition was formidable: the current North Sydney Club Champion, Malcolm Stephens, on board one, a former State champion, Roy Travers on board two, 2126-rated Jeremy Hirschhorn on board three, a former Australian Chess Championship third placegetter, Ian Parsonage, on board four, and giant-killer Adrian Chek on board five. Nevertheless, as in previous years, we were relying on our unrated players on the lower boards to secure victory for us.

As the match progressed I was preoccupied with my game against Parsonage on board four and I mistook the frequently overheard 'check, mate' as an expression of friendship by the solicitors uttering those words to their opponents, until our perennial Director of Play, Maurice Needleman, whispered to me, 'history is being made'. After conceding my own game I then discovered that an upset had occurred, and the solicitors had won the match for the first time, and by a landslide margin of $11\frac{1}{2}$-$2\frac{1}{2}$. McGrath's foreknowledge of his own fate had been delphic. Our only points were scored by Bleicher and Cochrane (with wins each) and by Ioannou (with a meritorious draw on board 14).

This year the solicitors were simply too strong for us, and were worthy winners. I must admit, I can understand the elation of their Captain, Chek, resplendent in a yellow tie emblazoned with chess kings, as the shield was presented to him and he triumphantly raised it above his head in a Leyton Hewitt type gesture. Were it not for the plush carpet, he might have done a soccer style knee slide.

Consequently, the shield is now in the hands of the solicitors until we can win it back and restore it to the Trophy Cabinet. To this end once again we will assemble next year and set off across a wine dark sea in quest of the shield. Hopefully, when we return we will be able to say:

Your banqueting young lords are here in force,
I gather, from the fumes of mutton roasting
and strum of harping - harping, which the gods
appoint sweet friend of feasts!

*(*Homer, *The Odyssey)*

Over the bridge for lunch

By John Coombs Q.C.

A most pleasing judgment from Puckeridge DCJ brought lunch to mind and one of the team suggested the Belgian beer hall-type restaurant, Epoque Brasserie in Miller Street Cammeray. The Cammeray shopping centre car park is just behind it (handy), and you can go in from the car park or from Miller Street.

It is bright and open, with a bar, booths and tables to suit. It specialises in mussels and stews cooked in beer and is at the Flemish end of the Belgian spectrum. There are four Belgian beers on tap (the Nesse Blonde is yummy, a very rich, hoppy and tangy beer) and lots of other beers from all over – in bottles.

They had four types of mussels on. We tried mussels poullette, with white wine, leeks, onions, and spinach which were tender and flavoursome, and mussels provencale, traditional tomato, garlic and herbs, also excellent. All the mussel dishes come with a bowl of chips and a frothy mayonnaise on the side for dipping. This is Flemish in style and it was a very good home-made light mayonnaise indeed.

Next, a daily special of andoullité sausages, a Belgian specialty filled with tripe and boned pigs' trotter meat, served with seed mustard gravy on a bed of delicious mash. This was a super daily special. The service was Belgian – hearty and prompt enough. We stayed with the beer because it seemed right for the bangers and mash.

We loved the place and,
like Macarthur, will return!

Epoque Brasserie

429 Miller St, Cammeray

Ph: (02) 9954 3811

Hours: Mon to Sat Midday to 10 pm

Bar: Midday to Midnight

Cards: MC, Visa, Diners, Amex