

**Index to compilation of speeches delivered by
the Hon. Justice Einstein**

Date speech delivered	Description	Page number reference within pdf compilation
10 March 2009	Reflections on the Commercial List as at the commencement of 2009	Page 2 of 125
11 May 2008	Judging the Judges	Page 18 of 125
July/August 2005	Trends in International Commercial Litigation Part II* - The Future of Foreign Judgment Enforcement Law	Page 26 of 125
May/June 2005	Trends in International Commercial Litigation Part I – The Present State of Foreign Judgment Enforcement Law	Page 40 of 125
2004	Principles and Rules of Transnational Civil Procedure and their Application to New South Wales	Page 50 of 125
October 2004	Judicial Ethics [In Court perspective] - Paper 1	Page 59 of 125
October 2004	Judicial Ethics [Out of Court perspective] - Paper 2	Page 69 of 125
October 2004	An Examination of the Application of the General Principles of the Rule of Law to the Court Structure and Judiciary of the State of New South Wales	Page 75 of 125
15 August 2001	Technology in the Court Room - 2001 - [Friend or Foe?]	Page 91 of 125
14 November 2000	Understanding the Evidence Act 1995 - A Daunting Task !	Page 98 of 125
1 September 1997	Swearing-In Ceremony of the Honourable Justice Einstein	Page 121 of 125

Reflections on the Commercial List as at the commencement of 2009

Clifford Einstein¹

[Paper delivered at the seminar on Building and Construction Law hosted by the University of New South Wales on 10 March 2009]

'In thousands of years there has been no advance in public morals, in philosophy, in religion or in politics, but the advance in business has been the greatest miracle the world has ever known.'
E W Howe: The Blessing of Business, 1918

- 1 Whether or not the above observation remains true towards the beginning of 2009 there is little doubt but that those involved in commerce continue to rely very heavily upon the swift adjudication of their disputes by the disparate curial and extra-curial means available. The immediate candidates are the courts, and in particular the specialist lists operated by the courts, or the alternative dispute resolution procedures, the most common of which are mediation and arbitration.
- 2 This paper seeks to examine some of the various topical issues which arise in commercial litigation, with a specific focus upon the cases which commonly come before the Commercial List of the New South Wales Supreme Court. In recent times, developments in technology and case management principles have presented the courts with new options and opportunities for the management of complex commercial litigation. At the same time, these developments have also resulted in new challenges, creating problems that must be dealt with in accordance with the Court's overriding goal of facilitating the "just, quick and cheap resolution of the real issues in the proceedings".
- 3 In the technological realm, electronic communication has offered new opportunities to the Court in the conduct of its day-to-day operations. At

the same time, its proliferation in the world of business has resulted a greatly increased amount of material subject to discovery, and required new forensic processes to deal with the authenticity and verification of such electronic data.

- 4 The problems caused by large amounts of material being subject to discovery are exacerbated when documents which ought to have been discovered are produced late or on subpoena. In response, the Court has developed various strategies for weighing up the interests of both parties, and balancing the competing needs of justice and efficiency.

- 5 The complexity and variety of the issues which appear on the Commercial List make it essential that the parties concerned confine their arguments to those issues which are central to the case, and present those issues efficiently. Various case management techniques have been developed by the courts in order to promote and encourage efficiency, and to ensure that the most effective use is made of court time. Invariably, which techniques are appropriate will depend upon the circumstances of the individual case. A separate question order, for example, is effective and beneficial only in a limited subset of cases and circumstances. More controversially, this paper will contend that the presentation of key evidence by statement and affidavit, while generally accepted by the legal community, may not be appropriate in every instance.

The overriding purpose rule

- 6 The lodestar by which the practice and procedure of the Commercial List is steered is to be found in the overriding purpose rule set out in section 56 of the *Civil Procedure Act 2005* ["the CPA"]:
 - (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just,

quick and cheap resolution of the real issues in the proceedings.

7 Both the Court, the parties to the proceedings and their legal counsel are required to give effect to and promote this overriding purpose. The CPA also goes on, in sections 57 and 58, to set out the objectives of case management, and to detail a range of matters to which the Court may have regard when making an order or direction, in order to ensure that such orders are in accordance with the dictates of justice. These elements include:

- (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities;
- (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties;
- (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3);
- (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings;
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction;
- (vii) such other matters as the court considers relevant in the circumstances of the case.

8 Sections 59 and 60 of the CPA also go on to emphasise the need for the Court to take into account the need to minimise delay and ensure that costs to the parties remain proportionate to the issues in dispute.

- 9 It is difficult to overemphasise the significance which these provisions have had in terms of the constraints placed upon the Commercial List by the exigencies of the complex litigation which constitutes its daily fare. In many ways the transformation of the anterior overriding purpose rules of the Court into statutory form has given a new lease of life to the curial process where, over past decades, case management procedures were alternately hailed or derided.ⁱⁱ
- 10 With the passage of time, judges continue to approach the due administration of justice conscious of the importance of weighing carefully the alternate claims put forward by those seeking the indulgence of the Court [as for example to make late amendments or to introduce late witness statements] and the claims of those resisting such orders [as for example on the grounds that they will suffer irremediable prejudice were the Court to grant such leave]. These are issues which can only be determined on a case-specific basis.
- 11 In *Queensland v J L Holdings Pty Ltd* (1997) [189 CLR 146], Kirby J (at 170) made the observation that courts now take into account the strain which litigation may place upon those involved and the natural desire of most litigants to be freed, as quickly as possible, from the anxiety, distraction and disruption which litigation causes. At the same time his Honour, with respect entirely correctly, observed that departures from a court-ordered timetable, whilst relevant to the court's power to sanction such departure, was not decisive. As his Honour put it "[s]uch orders are the servants of justice" (at 170).
- 12 The classical statement of the approach to be taken in the exercise of the discretions to permit pleading amendments [and I would add, like case management granting leave to depart from set directions] is found in the opinion of Bowen LJ in *Cropper v Smith*, in which his Lordship held that:

“it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.”^[iii]

- 13 Whilst this statement remains strictly accurate, I would venture to suggest that, with the advent of sections 56 to 60 of the CPA, the court is now required to consider the degree and type of injustice which each party may suffer as a result of the order sought, and to do so in the context of other factors, such as the elimination of delay and the desire to ensure that disproportionate costs are not incurred in the proceedings.
- 14 *Dennis v Australian Broadcasting Corporation* [2008] [NSWCA 37] is a recent decision by the Court of Appeal of particular significance which emphasises what I have indicated in terms of the statutory underpinning of the overriding purpose duty. Relevantly Nicholas J at first instance had refused to grant leave to the applicant to replead and in doing so exercised the discretion solely on the basis that the limit to which leave should be given to replead “has been well and truly reached” by what was effectively the sixth pleading. The holding was that the trial judge was correct to do so. Further and in any event, no error had been identified which would justify this Court of Appeal interfering with the exercise of the discretion.
- 15 The Chief Justice [with whose reasons Basten and Campbell JJA agreed] put the matter as follows:

[28] The respondent invoked the authority of *Queensland v J L Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 in support of its ability to amend, even for the fifth time. Case management practices in all Australian courts have changed significantly in the decade since that judgment. Although it remains binding authority with respect to the applicable common law principles, the circumstances of the case were significantly different from those in the present case and do not dictate its outcome. In any event, such principles can be, and have been, modified by statute both directly and via the statutory authority for Rules of Court.

16 In this State, *J L Holdings* must now be understood as operating subject to the statutory duty imposed upon the courts by s 56(2) of the *Civil Procedure Act 2005*, which requires the Court in mandatory terms – “must seek” – to give effect to the overriding purpose – to “facilitate the just, quick and cheap resolution of the real issues in the proceedings” – when exercising any power under the Act or Rules. That duty constitutes a significant qualification of the power to grant leave to amend a pleading under s 64 of the *Civil Procedure Act*, and other similar discretionary powers of the Court.

Emails

17 In 2008 any judicial officer dealing daily with complex commercial disputes would be in a position to testify to the huge difficulties which arise by reason of the proliferation of emails. These difficulties arise in terms of the discovery process and in terms of the presentation of cases. It is not uncommon for hundreds if not thousands of emails to be produced on discovery and for voluminous emails to be sought to be tendered in evidence.

18 The advances in technology have brought with them the need for the forensic process to involve the calling of experts to treat with matters such as the interpretation of computer meta data^{iv} which will, for example,

indicate the last accessed date of a document which may have been deleted from a computer file; cases in which scanning procedures may have been utilised in order to manipulate signatures and original documents, as well as a variety of other technical issues. The world of commercial litigation towards the conclusion of 2008 would rarely see a judicial officer without some extensive background knowledge of many of these matters. Nor is it uncommon for applications to be made for the issue of a letter of request addressed to another jurisdiction for the purpose of a party being in a position to have its own experts seek to recover material from the 'deep memory' of a particular computer.

Late discovery

- 19 Informal discussion with the profession regularly throws up the proposition that, at least in some cases, late production on subpoena will produce materials which should have been discovered, so that the innocent party only then becomes cognisant of documents and emails that, on occasion, are highly prejudicial to that party. Naturally, this type of event is calculated to lead to difficulties in the achieving of a timely and regular conclusion to the litigation.
- 20 Generally, in relation to discovery, the Commercial List practice note endorses a flexible rather than prescriptive approach to discovery in order to facilitate the making of orders to best suit each case.^v Subject to an order of the Court, or unless otherwise agreed between the parties, discovery is required to be made electronically. An important provision in the practice note is as follows:

For the purposes of ensuring that the most cost efficient method of discovery is adopted by the parties, on the application of any party or of its own motion, the Court *may limit the amount of costs of discovery that are able to be recovered by any party.* [emphasis added]

21 This particular provision empowers the Court in terms of a general discretion to control any aberrant behaviour by a party in terms of the antics which occasionally arise: as for example by a party clearly being out of order in its approach to providing proper discovery or insistent upon inappropriate discovery. The matter of what costs ought be or not be permitted remains in the hands of the Court.

Efficiency in presentation

22 The variety of causes of action relied upon in the substantial litigation which comes before the Commercial List is a matter of record. Almost every case throws up issues of contract, misleading and deceptive conduct, estoppel, causation and the usual suspects in terms of claims for damages. The sub-issues of fact and law include: whether a contract was entered into at all; if a contract was entered into, what were the implied terms thrown up by that contract; should the contract be rectified; whether a party has repudiated the contract; if so whether such repudiation was accepted; whether misleading and deceptive conduct has been proven; whether there was reliance upon such conduct; the differences in the relief available on the one hand for breaches of contract and on the other hand for breaches of the *Trade Practices Act* and its analogues; or whether the claim to a form of estoppel has been made out and if so giving what, if any, entitlement to relief: cf Handley, *Estoppel by Conduct and Election*, Thomson-Sweet & Maxwell 2006.

23 With such a variety of complex issues being presented before the Court, it becomes even more important that the parties present their cases with the maximum of efficiency, confining their arguments to the central issues, and avoiding what has sometimes been described as ‘a voyage of discovery’ which may complicate and lengthen the proceedings.^{vi} It is trite that many complex commercial disputes will ultimately throw up but

a few critical documents including emails and a few conversations. The tragedy of our times involves the difficulty in moving directly to the real issues thrown up by these pieces of paper and conversations.

24 In a recent interview^{vii}, Chief Justice Gleeson answered a number of questions concerning the way counsel presently go about their business. It was put to the Chief Justice that everything seemed to have lengthened out, that everything was more complex. In particular, the Chief Justice was asked the question as to how we had reached this stage. The answer was clearly instructive:

"It may be an aspect of modern society that people generally now are less ready to submit to restraints on their capacity to argue about things.

When I came into legal practice more than 40 years ago, if you were acting for an accused person in a criminal trial as a lawyer you might say 'look, I think there is only one point worth running in this case and that's the point I am going to argue'.

Modern lawyers, I think, find it difficult to deal with the client on that basis. The client will say to them 'what are the possible arguable points' and if the lawyer says 'well, there are possibly 20', the client is going to say "I do mind that you argue all those points."

25 In responding to the further question as to whether clients were necessarily better informed to make those observations or were simply more demanding, the Chief Justice made the points that:

- i. clients may be more assertive;
- ii. judges are more and more reluctant to say 'there is only one point worth arguing in this case, go to it'.

26 The Chief Justice further sought to respond to the question as to how judges should then reassert control. Having referred to the problem of judges being accused of being unfair, he was asked 'where is the balancing line?' His answer included a reference to that form of judicial control

operative in the High Court: where in special leave applications it was an every day occurrence for the Court to adopt a rigorous approach to holding counsel to address for a specified time limit only. It was his view that state and other courts could and indeed in some cases, had already taken a lead from this approach.

27 To my knowledge a number of my colleagues and I have approached complex hearings with precisely this approach. In this area the furnishing of written submissions at the end of the proceedings is a valuable aid to efficiency in the amount of courtroom time taken in final address. Some stopwatch trial hearings have taken place^{viii}.

28 Further it is not uncommon for hearings before my own Court to be regulated in terms of limiting the time for cross-examination: counsel are first invited to give their best estimate of the likely length of the cross-examination; the Court then determines what period will be permitted, making plain that upon the expiration of the nominate time, an application for an extension of time may be made, and will be dealt with on its merits. My own experience has been that very often this approach leads to the cross-examination terminating even before the nominated period.

Separate question orders

29 The making of orders for the hearing of separate questions to be determined prior to the termination of other issues in the case pose special difficulties. Whilst there are certainly a number of circumstances in which separate question orders can be the expeditious route to an early decision in favour of one party or another, experience shows that the longest route will often prove to be the shortest route to the termination of proceedings.

30 The accepted principles which inform applications for the making of separate question orders include the following:

- (1) The Court begins with the proposition that it is ordinarily appropriate that all issues in a proceeding should be disposed of at the one time: *Tallglen v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130 at 141 per Giles CJ in Comm D, *Hadid v Australis Media Ltd* (unreported, Supreme Court of NSW, 29 March 1996 per Rolfe J). Accordingly, it is for the party who wishes to have a question separately determined to show that it is desirable for that to occur.
- (2) Without being exhaustive, the separate determination of an issue may prove to be an appropriate procedure in at least the following sets of circumstances:
 - (a) where the resolution of that separate issue will have the effect of resolving the entirety of the litigious controversies or of substantially narrowing the field of litigious controversy: *CBS Productions Pty Ltd v O'Neil* [1985] 1 NSWLR 601 at 606 per Kirby P, *Dunstan v Simmie & Co Pty Ltd* (supra, at 671 per Young CJ and Jenkinson J);
 - (b) where the resolution of that separate issue carries with it a strong prospect that the parties will thereafter be able to resolve their dispute themselves and thus avoid further litigation: *Tallglen v Pay TV Holdings* (supra, at 141 - 142 per Giles CJ in Comm D);
 - (c) where there is a clear demarcation between that issue and all other issues in the case, including issues going to the credit of witnesses: *CBS Productions Pty Ltd v O'Neil* (supra, at 606 per Kirby P), *Tallglen v Pay TV Pty Ltd* (supra, at 142 per Giles CJ in Comm D), *Rajski v Carson* (1988) 15 NSWLR 84 at 88 per Kirby P and Hope JA.
- (3) Conversely, the separate determination of an issue will rarely be an appropriate procedure where:
 - (a) there are intertwined issues of fact or law between the separated question and the other questions such that the determination of the separate question will not have any substantial effect upon the width of the field of litigious controversy or the prospect of the settlement of the balance of the litigation: *Law Society of NSW v Bruce* (unreported, Supreme Court

of NSW, 23 April 1996, per Rolfe J), *Parramatta Stadium Trust v Civil and Civic Pty Ltd* (unreported, Supreme Court of NSW, 27 August 1996, per Hunter J).

- (b) where there is a commonality of witnesses and issues of credit as between the separate issue and other issues in the case which will or may necessitate a ruling on the credit of one or more of the common witness, thus possibly precluding that same judicial officer from again dealing with the matters going to the credit of the common witness in accordance with the decision of the Court of Appeal in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411; *Story of Sydney Pty Ltd v Ling* (unreported, Supreme Court of NSW 15 November 1994, per Rolfe J), *Century Medical v THLD* [2000] NSWSC 5; (unreported, Supreme Court of NSW, 3 February 2000, per Rolfe J).
- (c) there is a possibility that the resolution of the separate issue will not finally determine the issue but will merely result in an appeal from that decision in relation to that separate issue, creating a multiplicity of proceedings, interruption to the court and undesirable fragmentation of the proceedings: *Story of Sydney Pty Ltd v Ling (supra)*, *Century Medical v THLD (supra)*.
- (4) The experience of courts suggests that the separation of proceedings often does not result in the quicker and cheaper resolution of proceedings as anticipated, but often has the reverse effect, merely causing added delay and expense to the resolution of the litigation. Thus, before an issue is to be separately determined, it must be possible to clearly see that it will facilitate the quicker and cheaper resolution of the proceedings: *Tallglen v Pay TV Pty Ltd* (supra, at 142 per Giles CJ in Comm D), *Parramatta Stadium Trust v Civil and Civic Pty Ltd* (supra), *Century Medical v THLD* (supra).

31 As Giles CJ in Comm. D (as his Honour then was) said in *Tallglen* (supra, at 142):

"In the ordinary course, all issues in proceedings should be decided at the one time, but separate decision of a question may be appropriate where, for example, the decision of the question is critical to the outcome of the proceedings and (at least if decided

in one-way) will bring the proceedings to an end. In particular circumstances the separate decision of a question may be appropriate even if it will not bring the proceedings to an end, such as where there is a strong prospect that the parties will agree upon the result when the core of their dispute is decided or where the decision will obviate unnecessary and expensive hearing of other questions, but such occasions must be carefully controlled lest fragmentation of the proceedings (particularly when the exercise of right of appeal is borne in mind) brings delay, expense and hardship - that which the making of an order was intended to avoid. It is often the case that the need to make findings of fact for a decision of the separate question, especially findings which may involve issues of credit, tells strongly against the making of an order because related facts, and renewed issues of credit, will or may arise at a later stage in the proceedings. Experience teaches that it should be able to be seen with clarity that decision of a separate question will be beneficial in the conduct of the proceedings and the resolution of the parties dispute." The separate determination of issues is not a suitable process for determining wide-ranging and contested factual matters: *Hathway v Cavanagh* (2002) 43 ACSR 497 at 506 [40].

32 In the result the Court will have regard to the following matters in exercising its discretion whether or not to make an order for the separate determination of a question:

- whether there is some preliminary question of fact or law that is dispositive of the proceedings: *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 1 Ch 93; *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 606;
- whether resolution of the separate question may promote early resolution of the proceedings or, by narrowing the disputed issues, avoid expense and delay: *Love v Mirror Newspapers Ltd* [1980] 2 NSWLR 112; *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* supra at 141-2; *CBS Productions Pty Ltd v O'Neill* at 606;
- whether the question is clearly severable, as opposed to where the question proffered:
 - involves the whole subject matter of the proceedings;
 - involves alternative causes of actions or defences;
 - requires findings of fact likely to be contentious on remaining issues in the proceedings; or

- involves the credibility of witnesses material to the remaining issues in the proceedings [1995] NSWSC 1273 *Idoport*.

The difficulties encountered with the current practice of permitting evidence by statement and affidavit

- 33 During the 1970s the current practice of requiring the parties to exchange evidence in affidavit or statement form came into vogue and was written into the *Supreme Court Rules*. This generally replaced the common law approach which involved the giving of oral evidence by witnesses from the witness box. It was thought that the affidavit or statement form of exchanging evidence in written form would lead to a dramatic saving of the time taken to adduce oral evidence from the witness in Court. It was also thought that there were considerable advantages in the mutual disclosure of written evidentiary statements prior to the hearing. In particular it was believed that many cases may settle once the real detail of the evidentiary statements had been exchanged.
- 34 Regrettably, the hearing of complex commercial proceedings in 2008 will likely commence with the trial judge receiving numerous statements, dealing with objections to those statements and then permitting the witness to ascend the witness box for the purpose of cross-examination. The common experience is that the statements will usually have been prepared with the detailed care and assistance of solicitors and will often have been vetted by counsel. There is a general consensus that in many cases, such great care has been taken in the preparation of such statements as to mean that, although the essential gravamen of what the statement may well accord with the instructions given to the legal advisers, there is often no way in which the witness would have used the same words had he or she been required to give evidence orally. This can occasion real difficulties both for the witness and for the cross-examiner. The witness is

faced with having to justify every word in the written statement, although those words may very well not be part of the common parlance of the witness. Further the cross-examiner is armed with every inconsistency in the statement well before the hearing. Hence the cross examiner is very often able to suggest that the witness is not telling the truth where one section of his statement is inconsistent with another. On many occasions this form of cross-examination proves *de minimus*, but it is possible for real questions of reliability to arise.

- 35 My own view is that in many cases there is at least some real merit in a case management technique which would require the giving of oral evidence, at least in relation to the critical conversations which are in issue. There is a world of difference between the witness who goes into the witness box armed with his or her carefully drawn witness statement and expecting to be cross-examined on that statement, and on the other hand, the witness who goes into Court cognizant that he or she will have to give oral evidence in relation to the critical issues in the witness box.

Concluding observations

- 36 The control of complex commercial litigation continues to present many difficulties, only some of which have been treated with in this paper. The mega-litigation of recent years has clearly cast a spotlight upon the difficulties: on the one hand the need for parties to such litigation to obtain a fair hearing, and on the other hand, the need for the court to balance the limited judicial resources so that smaller litigants will not be preemptorily pushed out of the way.
- 37 Our system of justice is there for all. As at the commencement of the law term in 2009 there is no doubt but that the judges of the court require to be

vigilant to ensure a balanced approach to the case management needs appropriate to the due administering of justice.

ⁱ A Justice of the Supreme Court of New South Wales sitting on the Commercial List of the Equity Division.

ⁱⁱ A number of the earlier authorities were examined in the seminal decision of the High Court of Australia in *State of Queensland v JL Holdings Pty Ltd* 189 CLR 146 where the majority judgement of Dawson, Gaudron and McHugh JJ observed [at 154] that case management was not an end in itself although being an important and useful aid for ensuring the prompt and efficient disposal of litigation. Their honours observed that it ought always to be borne in mind that the ultimate aim of a court is the attainment of justice and that no principle of case management could be allowed to supplant that aim.

Kirby J [at 163] chronicled the many differences of opinion which had arisen amongst appellate judges in relation to this area and in dealing [at 166] with the evolving case law on pleading amendments in particular, pointed out that in *Sali v SPC Ltd* (1993) [67 ALJR 841] High Court had endorsed the need to consider the competing claims of other litigants and the public in the following terms :

"In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the Court as well as the interests of the parties... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources"

ⁱⁱⁱ 1884 26 Ch D 700 at 710-711

^{iv} Commonly described as 'data about data', metadata consists of the information relating to how the original data was created, managed and stored. In the context of information systems and computers, meta data broadly refers to the information about individual data items or computer files which typically includes the name, type and history of the file.

^v Practice Note SC Eq 3 (30 July 2007) at 27.

^{vi} Attributed to the late Justice Gordon Samuels, late of the NSW Supreme Court, who described certain barristers as intent on a 'voyage of discovery, both for themselves as well as for the Court!'

^{vii} Interview with Murray Gleeson by Michael Pelly *The Australian* 1 February 2008

^{viii} a stopwatch hearing can adopt different formats but the principal notion involves the parties each being given a nominate a period of time in which to present their respective cases and in which to cross examine: how they spend their time is a matter for them but they are held to that time.

Judging the judgesⁱ

Clifford Einstein¹

11 May 2008

Confidence in the judiciary stands as a bastion supporting the rule of law

1 There is no doubt that judges exercise great power. Relatively unique in all human relationships is the privilege to exercise power which will recognize or dismiss claims to rights and in dismissing such claims will often cause much suffering. The matter has been expressed as follows:

"[The judges] are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before the judges. Citizens cannot be sure that they or their fortunes will not someday depend upon judgement. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations..."ⁱⁱ

Are judges accountable and if so to whom?

2 There is often considerable confusion in the public arena as to whether or not judges in Australia are accountable and if so to whom. The matter is of considerable significance.

3 This paper seeks to examine a number of topics germane to the accountability of judges including the concepts of judicial independence, appellate review, extra curial review and the judicial oath.

¹ A Justice of the Supreme Court of New South Wales.

Judicial appointment

- 4 Judges in NSW are appointed by the NSW Governor on the recommendation of the NSW Attorney-General. Although they are selected by the government of the day, it is important that there be no perception of partisanship. Recently, there has been a proposal to introduce a formal set of criteria against which candidates for judicial office would be assessed.ⁱⁱⁱ

The judicial oath and its immense significance

- 5 Upon appointment to the Supreme Court of New South Wales a judge takes a judicial oath in the following terms:

"I ... do swear that I will well and truly serve our Sovereign Lady Queen [Elizabeth II] in the office of [a justice of the Supreme Court of New South Wales], and I will do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will. So help me God".

- 6 The words "without fear or favour, affection or ill-will" give express recognition to the crucial requirement that a judge act impartially. This obligation requires that the judge be in a position to determine the case fairly and impartially on the evidence, hence bringing an entirely unprejudiced mind to the resolution of the dispute.
- 7 Hence the first important parameter which binds the judge from the day of his/her appointment becomes the lode star of every judicial act which he or she carries out.
- 8 The judicial oath implicitly requires that the judge be intellectually honest in the exercise of all of his or her functions.

- 9 What this means is very simple. The judge is the decision maker. The decision to be made will involve the determination of issues of fact and law. But in each of these determinations, intellectual honesty will be called for. It is called for in relation to the issues of fact which will usually involve a decision as to which witnesses to accept as having given reliable evidence and as to which witnesses to reject as having given unreliable evidence. This is not a question of which witnesses the judge likes the look of. Nor is it a question of which witness is the more articulate. It is a raw question of which witnesses' evidence appears best to fit with the probabilities when one takes into account *all* of the evidence before the court. Clearly the decision as to the facts would involve many many factors. Equally clearly the judge is in the unique position of hearing all of the evidence before having to make the decision as to what on the balance of probabilities is likely to have happened.
- 10 In dealing with the legal principles applicable to the facts it is a very common experience to find ambiguity or nuances in interpretation. Problems of application of the known legal principles are commonly thrown up where the particular facts on one view almost fit the principle but another view are perhaps outside the principle. On such occasions the proper course is for judges to approach the matter using the very same intellectual honesty to which I have already referred.
- 11 Having carefully examined the suggested relevant principle or provision and the particular facts proven on the evidence to have taken place, the judge reaches a decision giving full reasons explaining why that principle or provision requires to be applied or alternatively explaining why the facts proven take the particular matter outside of the established principle or provision [in which case the judge must identify some other principle or provision in order to be in a position to hand down a principled decision for the parties].

Judicial independence

- 12 High Court judges may only be dismissed by the Governor-General on address by both houses of the parliament and State judges by address from both houses.
- 13 The procedure is for a formal motion that a judicial officer be called upon to address both houses of Parliament and to show cause why he/she should not be removed from office. Parliament could be expected to grant leave to the judge in question to attend at the Bar of the joint sitting in person or by his legal representative, to show cause why he/she should not be removed from office.
- 14 Clearly the circumstances in which a judge may be removed could only involve very grave misbehaviour. Since colonial times, no judge has been removed from office, albeit that two or three have come extremely close.

Appellate review

- 15 The court system in this country provides for a series of methods of review of decisions of lower courts. Each of these procedures may be likened to a staircase. Although not every decision of a first instance judge is amenable to appellate review, many of such decisions are appealable.
- 16 Taking the Supreme Court of New South Wales as one example, a decision of a single Justice of that court will often be able to be appealed from. The New South Wales Court of Appeal will hear the appeal and in due course either dismiss the appeal or allow the appeal, or in some cases would order that the matter be re-tried.

- 17 Even the decision of the New South Wales Court of Appeal may then be appealed in certain circumstances. The procedure for this form of appeal is an application to the highest court in this country, the High Court of Australia, which requires to give special leave before it will deal with an appeal.
- 18 It is therefore apparent that there are a series of checks and balances which can often be called upon when a first instance trial judge has given the judgement. This form of accountability involves an internal review of the decision at first instance, the common procedure being that three judges of the Court of Appeal sitting together would have to determine the appeal. If the High Court of Australia had granted special leave then commonly at least five justices of the High Court would sit to hear that further appeal.

Extra curial review

- 19 On only a very few occasions Royal Commissions of Enquiry have been appointed to enquire into particular cases which have called for such an unusual procedure. Such Commissions have generally dealt with whether the trial miscarried. One of the best-known reasonably recent examples was the Royal Commission of Enquiry into the convictions of Lindy and Michael Chamberlain on 8 May 1986, in Darwin.
- 20 Another form of extra curial review of the decision is to be found in the close attention given by the media and the legal profession to decisions of the courts and in particular to decisions of the superior courts. There is no shortage of academic commented on the merit of particular decisions. It is extremely common for decisions, even of the highest court in this country, to be questioned by many commentators. The intellectual rigour necessary for the judgment to be carefully reasoned is tested and tested again.

The need to give reasons

21 Finally it is important to note that the system of law operating in this country by and large places heavy emphasis upon the need for judges to give detailed reasons for their decisions. This is a very important part of a judge's functions. The judge is required to provide careful and detailed reasons for the decision. It is not uncommon to find the grounds of appeal including claims that the reasons provided by the judge were insufficient, or insufficiently clear.

A parting observation

22 Law is not a science. This has to be understood. The myriad of cases thrown up for decision by judges range across many forms of endeavour and it is very rare to find any two cases having exactly the same facts. Hence it is that by definition, a judge is engaged in an endeavour to ascertain what happened in the past. Once having by the appropriate formal route involving detailed evidence determined the facts, the judge is called upon to apply the rules of law to those facts in order to reach the ultimate decision as to which party has been successful.

23 Judges are not superhuman. They will make mistakes. Hopefully those mistakes will not be made often. Hopefully when such mistakes have been made they will be able to be corrected by appellate review.

24 At the end of the day the system can only operate properly if very great care is taken to appoint persons of real judgement and experience to the Court. And at the end of the day the matter of approaching their work in a principled, fair and just way, rests with the judge as a matter of conscience. I cannot put the matter in clearer fashion than to quote the words of Sir Gerard Brennan^{iv}:

"Judging is a lonely life. When the evidence is heard and the argument is over, when the books have been read, we come to the point of judgment. No conscience other than the judge's own can be the guide. No pen but the judge's own can write the reasons for decision or sketch the summing up. No expression of satisfaction can satisfy the judge unless the judge's own standards be satisfied."

- 25 In short it is convenient to consider the judge's own state of mind as it should be *after* the handing down of the judgment. In my view having given a judgment often knowing that your decision may very well cause the losing party to become bankrupt or which will have other serious legal consequences for that party, the Judge must be able to look into the mirror and to say to himself/herself:

"I have done my utmost to examine all of the evidence extremely carefully and to work out for myself what has been properly proven to have occurred. I am entirely satisfied with my judgment as having been given with intellectual honesty. I have not overstated the case for one party nor understated the case for another party. I have been fair. I have been entirely impartial. I have not been unfairly favourable to any witness or party my touchstone having comprised a full examination of all of the evidence called before the court."

- 26 In short you will be able to honestly say to yourself:

"I know that what I have done in the lonely hall of my conscience 'comprises justice according to law'."

ⁱ Paper delivered at the Sir Moses Montefiore Jewish Home, Sunday 11 May 2008.

ⁱⁱ Sir Gerard Brennan forward to Judicial Ethics in Australia by Justice J. B. Thomas, The Law Book Company Ltd, second edition 1996 at page 9

iii Professional Criteria

- Proficiency in the law and its underlying principles
- High level of professional expertise and ability in the area(s) of professional specialisation
- Applied experience (through the practice of law or other branches of legal practice)
- Intellectual and analytical ability
- Ability to maintain authority and inspire respect
- Ability to discharge duties promptly
- Capacity to work under pressure
- Effective oral, written and interpersonal communication skills with peers and members of the public
- Management skills (including case management skills)
- Willingness to participate in ongoing judicial education
- Ability to use modern information technology

Personal qualities

- Integrity
- Independent and Impartiality
- Good character
- Common sense and good judgment
- Courtesy
- Awareness of racial, gender and cultural issues.

^{iv} " Why be a Judge"? Paper delivered to New Zealand High Court and the Court of Appeal Judges' Conference, Dunedin 12-13 April 1996

Trends in International Commercial Litigation Part II - The Future of Foreign Judgment Enforcement Law

Trends in International Commercial Litigation Part II* - The Future of Foreign Judgment Enforcement Law THE HON JUSTICE C.R. EINSTEIN** and ALEXANDER PHIPPS***

In view of the difficulties occasioned international litigants as a result of the enforceability of foreign judgments remaining largely a matter of national law, examined in the Australian context in part one of this paper [1], for the last decade the Hague Conference on Private International Law has been attempting to formulate a comprehensive international convention in this area. Part two of this paper examines the progress of the Hague Conference in this respect, and observes that substantial work remains to be done if regional and national disputes concerning, in particular, the acquisition and exercise of jurisdiction are to be overcome. It concludes, with reference to developments in Canadian case law, that notwithstanding seemingly intractable delays at the diplomatic level, significant advancements can be made at the domestic level in the interim.

I. The problem stated: harmonisation v disparate national traditions

The proposition, discussed in part one of this paper, that national laws relating to the enforcement of foreign judgments are in drastic need of harmonisation is by no means novel; as stated by the then Attorney General of the Commonwealth of Australia, Michael Duffy, in his second reading of the Foreign Judgments Bill 1991:

Considerations of justice, convenience, greater certainty in international transactions and comity between nations show the desirability of the scheme reflected in this Bill. With the increased mobility of persons and money across borders, the need for, and benefits of, an effective capacity to enable a judgment given in one country to be enforced against assets in another country are obvious.[2]

In a more exact sense, international transactions are already subject to manifold, unavoidable commercial risks such as fluctuating exchange rates and language barriers; thus it is nonsensical to add to such uncertainty the legal risk of an inconsistent ability to enforce judgments internationally. Indeed, and again as discussed in part one of this paper, the imperative of harmonisation in the enforcement context has recently been reinforced by the promulgation of the Principles and Rules of Transnational Civil Procedure by the International Institute for the Unification of Private Law (UNIDROIT) and the American Law Institute (ALI).[3] That is to say, the procedural streamlining of transnational commercial litigation that the ALI/UNIDROIT Principles and Rules have the potential to engender will be manifestly undermined should similar progress not be made in the judgment enforcement context.

Set against that obvious proposition, however, is the equally manifest state of affairs that "systems of procedure do indeed show very pronounced differences from one country to another, and that one cannot reasonably expect them to disappear as a result of efforts at harmonisation." [4] The means by which litigious disputes are resolved, and indeed the substantive laws from which actionable rights spring, are deeply enmeshed with cultural traditions and understandings very often valued well above the demands of international commerce; thus it is only understandable that national courts and legislatures have shown a proclivity for retaining means to protect their citizens and residents from foreign judgments rendered contrary to such traditions. As stated by Kirby P in *Wentworth v Rogers*, [5] for example, domestic courts of most legal systems have jealously guarded an entitlement to "reserve to themselves an assessment of the integrity of the process upon which the [foreign] judgment was based." Viewed from this perspective, it is the sheer diversity of procedural and substantive systems and the reluctance of states and regions to forfeit their specific legal heritages in favour of uniformity that presents the most fundamental obstacle to the creation of a wide-ranging convention on the enforcement of foreign judgments.

II Particular obstacles to harmonisation

There are two areas of difference that have presented themselves as especial obstacles to harmonisation:

1. Rules as to the Assumption of Jurisdiction: The Persistence of Exorbitance

As detailed elsewhere by the authors in respect of the acceptable bases of jurisdiction under ALI/UNIDROIT Principles and Rules,[6] the manner in which municipal courts seize and exercise jurisdiction over defendants not ordinarily domiciled or resident within their territorial jurisdiction is a matter of great controversy between different legal systems. For example, the 'tag' or 'long arm' jurisdictions claimed by most common law countries is repugnant to many civil lawyers, particularly when such jurisdiction is enlivened by the service of process overseas. Whereas according to the common law the drafting and service of process is an essentially private act, albeit with the imprimatur of the court, the equivalent procedure under many civil law systems is an act of state, with the result that service abroad is often conceived as an impost upon the sovereignty of the state in which it is effected. The common law perspective has been elucidated by one commentator as follows:

"Another problem that arises in international litigation is service of litigation documents in a foreign

country. Many foreign countries are inclined to regard such service as an official act that, if done without their consent, infringes upon their sovereignty. This attitude is regrettable. Service of litigation documents in a foreign country is designed merely to give notice of proceedings brought in another country. The proper governmental attitude should be to permit and facilitate such notification, unless the foreign proceedings themselves can properly be regarded as unfair or improper." [7]

In response, however, a civil lawyer might argue that objection can be taken to the enlivening of long arm jurisdiction not merely on the basis that it involves service abroad, but further that it exposes foreign defendants to the potentially massive expense of defending common law proceedings on the basis that procedural institutions such as jury trials, exemplary damages and pre-trial discovery form no part of the various civil law systems.[8] Thus when the United Kingdom and Ireland acceded to the *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968* (the Brussels Convention) - which adopts the defendant's place of domicile as the principal basis upon which jurisdiction can be acquired and exercised, save insofar as there is a substantial connection between the defendant and another Contracting State[9] - Article 3 of that instrument was amended so as to specifically record 'tag' jurisdiction as one of the prohibited bases of jurisdiction in respect of domiciliaries of Contracting States.[10]

Of course, it is not merely common law courts that have long manifested a tendency towards an expansive assertion of jurisdiction. Perhaps most infamously of the continental legal systems, Article 14 of the French Civil Code provides for a breathtakingly exorbitant territorial jurisdiction in the following terms:

"An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; [and] he may be *called before the courts of France for obligations contracted by him in a foreign country towards French persons.*" [Emphasis added.]

Provided that the plaintiff is a French national, therefore, Article 14 enlivens the jurisdiction of the French courts over an alien defendant regardless of his/her place of domicile, the locus contractus, the place of performance or indeed the place of breach. Turning upon the nationality of the moving party alone, this is claimed jurisdiction well in excess of the typical bases of common law long arm jurisdiction. Similarly, Article 23 of the German Code of Civil Procedure (Zivilprozessordnung) provides, in effect, that the German courts are competent to take jurisdiction when the defendant owns property in that country and regardless of any other connection between the forum and the cause, the parties or the subject matter of the dispute.

Accordingly, national conflicts rules manifest a clear reluctance to enforce foreign judgments rendered in pursuance of all but the most circumscribed bases of jurisdiction. Taking Australia as an example, and as detailed in part one of this paper, at both common law and under the *Foreign Judgments Act 1991* (Cth) (the FJA) a foreign judgment is incapable of enforcement in this country unless the judgment debtor was resident or present in the forum at the time of commencement, there was an express contractual submission to the jurisdiction of the foreign court or the judgment debtor voluntarily submitted to the jurisdiction of the foreign court. Such a narrow approach is undoubtedly illustrative of the extent to which this area remains concerned with the protection of persons domiciled in Australia from the aggressive assertion of jurisdiction by foreign courts and is, to say the least, incongruous in light of the extent to which Australian courts are *themselves* prepared to seize jurisdiction over matters involving defendants located offshore. This contradiction notwithstanding, however, the fact remains that "one of the most fundamental, and probably the most important and troublesome, conditions that any foreign judgment must satisfy in order that it be entitled to recognition and or enforcement in the forum is that it must have rendered by a court which had jurisdiction." [11]

2. United States Procedural, Damages and Antitrust Law

In *Smith, Kline & French Laboratories v Bloch*, [12] Lord Denning MR said:

"As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. They lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such cost deterrent as we have. There is also in the United States a right to trial by jury. They are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards. "

Whilst this is, with respect, perhaps a somewhat unkind and exaggerated assessment, it is undoubtedly the case that in respect of institutions such as notice pleading, oral discovery, liberal class action mechanisms and jury-assessed damages, United States civil procedure is largely unique. Moreover, United States competition and consumer law is notorious in its extensive use of 'treble' and punitive damages; as recently stated by Le Bel J of the Canadian Supreme Court:

"The most common source of punitive damages awards that are unusually high by international standards is the United States. In that country, it is more common to use punitive damages as an instrument of social engineering than it is in Canada, and American law tends to permit larger awards as a way of modifying the behaviour of well-funded defendants." [13]

Certainly, the United States cannot be begrudged the right to formulate its procedural and damages laws in a manner calculated to further its chosen public policy goals, particularly considering that many such objectives go to the heart of that country's political *raison d'être*. The right to trial by twelve ordinary citizens, whether in respect of a charge of murder or the assessment of damages in massively complex antitrust litigation, is a cherished institution of representative democracy that will not be lightly abandoned in the interests of international commercial expedience or the harmonisation of world conflicts rules. However it is equally true that the existence of such legal devices, when coupled with the United States' status as the world's most powerful trading bloc, is one of the most intractable obstacles to be overcome in any move towards a substantially global judgment enforcement convention. [14] In the late 1970s, for instance, negotiations between the United States and the United Kingdom on a bilateral convention collapsed due to concerns expressed by the English insurance industry over the enforcement of United States antitrust judgments; [15] and this notwithstanding the relative similarity in nearly all other relevant respects between the two countries' legal systems. Equally, one commentator has stated of the civil law's reaction to the phenomena of treble or punitive damages that:

"many on the continent fear the punitive damages often awarded in US courts. The availability of punitive damages when no actual damage has been caused has led legal experts on the continent to think that punitive damages are an abuse of the litigation process." [16]

Regardless of how meritorious their reasons for existence in a social sense, that is to say, the application of such procedural institutions to foreign defendants has led to widespread consensus in diplomatic and academic discourse that "US civil litigation fulfils the function of policy formation and social reformation in addition to the more traditional judicial functions of dispute resolution"; [17] being a function considered wholly unsuited to, in particular, international commercial litigation.

Indeed, the reluctance of other jurisdictions to readily enforce United States treble and punitive damages awards against their residents has in many cases escalated into the enactment of statutory provisions positively nullifying the effect of such awards or 'clawing back' monies obtained pursuant to them. Again taking Australia as an example, s 9(1) of the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) empowers the Attorney General to declare by instrument that, in respect of certain foreign antitrust judgments, "the assumption of jurisdiction or the manner of exercise of jurisdiction by the foreign court, or the exercise of a power or the manner of the exercise of a power by the foreign court, was contrary to international law or inconsistent with international comity or international practice." In turn, s 9(2) provides that any judgment the subject of such an instrument is either not enforceable in Australia per se, or not enforceable over and above an amount specified by the Attorney in that instrument. Moreover, when the judgment debtor is an Australian citizen or corporation, s 10 provides a cause of action to such persons to 'claw back' any damages already recovered from them in respect of judgments for multiple damages in foreign antitrust proceedings, or, alternatively, any damages already recovered and in excess of any amount declared by the Attorney pursuant to a s 9 instrument. [18]

III Overcoming the obstacles

Shortly stated, therefore, the lodestar of a truly international judgment enforcement convention- or even the liberalisation of existing domestic laws- is dimmed by the general reluctance of states to relinquish firmly entrenched bases of jurisdiction, enforce foreign judgments obtained pursuant to the exorbitant jurisdictions of other states or expose their residents to liability under substantive laws whose effect is considered to be unduly harsh. The challenge facing legislators, judicial officers and plenipotentiaries is thus to find means by which these contradictory attitudes can be reconciled, provided always that such reconciliation is consistent with the ultimate goal of reducing the legal risk inherent in international commercial transactions. While this is by no means a straightforward task, the seemingly intractable obstacles in the path of a workable convention in this area do not foreclose the domestic implementation in Australia of a variety of reforms designed to broaden the range of foreign judgments susceptible to enforcement. Specifically, it is open to variously; reformulate both the common law and FJA test by which the exercise of jurisdiction by a foreign court is considered acceptable for enforcement purposes (in line with recent developments in Canadian jurisprudence); discard the rule in *Abouloff v Oppenheimer* as to scope of the defence of fraud on the foreign court; [19] implement procedures in the form or to the effect of the ALI/UNIDROIT Principles and Rules pursuant to which foreign judgments could be more expeditiously enforced at common law; and seek to become a party to the *Lugano Convention on Jurisdiction and Enforcement in Civil and Commercial Matters 1988* (the Lugano Convention).

1. Existing regional agreements

At present there are a mere three multilateral judgment enforcement conventions in existence, being the Brussels Convention, the Lugano Convention and the 1979 *Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (the Inter-American Convention).

a) The Brussels and Lugano Conventions

The Brussels Convention, now an EU Regulation, [20] was originally concluded in 1968 between the six founding states

of the European Economic Community, and was supplemented two decades later by the coming into force of the substantially identical Lugano Convention. The need for two parallel instruments arose from the fact that certain significant European economies- Spain and Portugal especially- were not then members of the EEC such as to be bound by Brussels, with Lugano therefore extending in effect to all member states of the broader European Free Trade Association.[21] Taking Brussels as the example, the two Conventions operate so as to, first, provide for the mutual recognition and enforcement of money judgments rendered in "civil and commercial matters" (Art 1) amongst Contracting States and, second, to prescribe the acceptable bases of jurisdiction which may be exercised by national courts if the resulting judgment is to be so enforceable. Thus the basal rule is that judgments issued in the courts of one Contracting State are accorded extraterritorial effect in any other, it being mandatory that such judgments be enforced "without any special procedure being required" (Art 26), provided that it has been rendered on the basis of various, expressly enumerated heads of jurisdiction. In this respect, the general rule is that "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State" (Art 2), consistent with the actor sequitur forum rei theory dominant in continental legal systems- that the plaintiff must follow the defendant to the place of the alleged wrong [22]- and subject only to the exceptions listed in Title II and detailed by the authors elsewhere.[23] Provided that these conditions are met, a judgment is thus conclusive on the merits (Art 34) and must be automatically enforced in any Contracting State save for a right of appeal against enforcement (Art 37) and the 'safety valve' defence that enforcement would be "contrary to public policy in the State in which recognition is sought" (Art 27).

According to the parlance and by providing for both jurisdiction and enforcement simultaneously, Brussels and Lugano are thus 'convention doubles'. From the perspective of clarity and certainty, such instruments are ideal in that simply by "reading the convention's text, potential litigants can [...] determine at one stroke where they can be sued or be sued, and the availability of recognition and enforcement for any resulting judgment." [24]

b) The Inter-American Convention

By way of contrast, the Inter-American Convention, to which ten states of the Organisation of American States are presently party, is a 'conventions simple', providing for the extraterritorial effect and foreign enforcement of judgments when (Art 2(d)):

"the judge or tribunal rendering the judgment is competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the State in which the judgment, award or decision is to take effect."

What constitutes a judge or tribunal 'competent in the international sphere' to seize jurisdiction is, however, not defined in the convention, and thus whether jurisdiction has been validly enlivened for the purposes of enforcement remains a matter for the national law of the enforcing court. In light of this deficiency and the uncertainty it engenders as to which judgments will be enforced by other Contracting States, in 1984 the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments was opened for ratification, Article 1 of which specifies, in the manner of Brussels and Lugano, precisely what constitutes a court 'competent in the international sphere' for the purposes of Art 2(d) of the 1979 treaty. However, with Mexico the sole signatory to have deposited ratification this convention at time of writing is yet to enter into force.

2. The Hague Conference and the attempts to formulate an international convention

a) Origins of the Draft Hague Convention

In respect of the formulation of an enforcement convention at supra-regional level, it is certainly true that, like so many other nascent reforms in this area, the idea is far from new; the Netherlands' government memorandum accompanying the diplomatic note calling the first Hague Conference on Private International Law in 1893, for instance, raised the possibility of the conclusion of an international treaty on the subject, providing for both mechanisms of enforcement and uniform rules of jurisdiction.[25] To this end, buoyed by the existence of Brussels and Lugano as potential templates, in October 1992 the American delegation to the Hague Conference Special Commission on General Affairs and Policy recommended the founding of a working group for the purposes of examining the feasibility of drafting a multilateral jurisdiction and enforcement convention. Thus the following year, delegates from thirty-five states- including Australia- began work on a text that, while roughly based on Brussels and Lugano, was expected to take several years to complete; indeed the Australian Law Reform Commission in 1994, while heralding the project as being "particularly valuable because it will address concerns about exorbitant jurisdiction and excessive damages awards in US litigation", estimated that the process would take ten years to reach fruition.[26]

b) Form of Text: A 'Convention Mixte'

At the initiative of the United States the form of text chosen was a hybrid of the Brussels/Lugano and Inter-American models- known as a 'convention mixte'- which differs from the latter in that it expressly identifies acceptable and non-acceptable bases of jurisdiction and from the former in that such bases are non-exclusive. More particularly, the United States envisaged the distilling of three 'lists' of jurisdiction comprising:

(a) a 'white list', such as the defendant's place of domicile, the exercise of which would render the judgment automatically enforceable in any contracting state;

(b) a 'black list', such as 'tag' jurisdiction based upon the temporary presence of the defendant, the exercise of which

would render the judgment unenforceable in any contracting state; and

(c) a 'grey list', whose exercise would not render the judgment liable to automatic enforcement under the convention but would, rather, provide a contracting state with a discretion to enforce the judgment pursuant to its own national laws.[27]

The concept was, therefore, to attempt to balance states' desire to both retain potentially idiosyncratic bases of jurisdiction and refuse enforcement to certain judgments via the grey list, while using the white and black lists to provide greater certainty to international litigants.[28]

c) *The Failure to Achieve Consensus: The 2001 Draft*

While the first draft text was prepared by 1999 and subject to intensive scrutiny at the Nineteenth Session of the Hague Conference in June 2001, the above discussed national and regional differences in regards to jurisdiction and damages ensured that consensus on a final text was not achieved. As stated in March this year by two of the Conferences' rapporteurs:

"As work proceeded on drafting ... it became apparent that it would not be possible to draw up a satisfactory text for a "mixed" convention within a reasonable period of time. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention." [29]

Accordingly, it was resolved to truncate the project to the preparation of a text dealing with certain bases of jurisdiction on which some degree of agreement had been reached, including voluntary submission, habitual residence, and the place of acting in physical torts. Even in respect of such restricted subject matter, however, resolution still proved impossible and the project was further scaled down, resulting in the preparation and release in May 2004 of a draft text dealing solely with the effect of exclusive choice of court agreements in business to business transactions. This text dictates that the "court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies" (Art 5), with courts in other contracting states before whom proceedings are brought in breach of such an agreement being under a general obligation to suspend or dismiss the proceedings (Art 7). In turn, judgments rendered by a court designated as having exclusive jurisdiction are to be accorded extraterritorial effect and enforced in all other contracting states, subject to the usual defences such as fraud or public policy (Art 9).[30] Thus while the present text retains in a formal sense the structure of the 1992 United States proposal- comprising a white list of jurisdiction pursuant to an exclusive choice of court agreement, a black list of jurisdiction contrary to such an agreement and a grey list of every other possible basis of jurisdiction known to the world's legal systems- it falls manifestly short of a convention that has the potential to do for the global community what Brussels/Lugano has done for the European.

Even the most cursory glance at the 2001 draft [31] reveals the most fundamental areas of division. In respect of the white list, for example, while bases of jurisdiction such as the defendant's place of habitual residence (Art 3), express choice of forum (Art 4) and the place of acting in tort (Art 9) are all present and relatively settled, the United States concept of 'activity' or 'minimum contacts' jurisdiction[32] (Art 6), the application of the text to consumer contracts (Art 7) and jurisdiction to determine rights in rem to immovable property within the forum (Art 12) remain matters of contention. Moreover the proposed contents of the black list (Art 18) was to trigger an even greater degree of controversy, it being proposed but by no means agreed upon to proscribe exorbitant bases of jurisdiction such as the mere location of property within the forum (such as in the German Civil Code), the nationality of the parties (such as in the French Civil Code) or service within the forum (such as in most common law jurisdictions). Certainly, substantial progress was made at the Nineteenth Session in respect of allaying the fears expressed by many states as to the enforcement of large United States damages awards, with consensus reached on a proposed Article 33(1) reading as follows:

"A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin."

Similarly, proposed Article 33(2) provides a discretion to limit enforcement to a lesser amount than the full quantum of damages awarded when the enforcing court considers that sum to be "grossly excessive."

d) *The Future of the Draft Convention*

These advances notwithstanding, it remains evident that, first, "reaching a standard for adjudicatory jurisdiction that is acceptable to all parties represents the greatest challenge to drafting a treaty on reciprocal judgment recognition" [33] and, second, that to settle upon such an acceptable standard will require nothing short of the complete abandonment of many cherished bases of jurisdiction. Further, it is equally clear that it would be of scant utility to attempt to formulate an international convention in the absence of such agreement in the manner of a *convention single*. The whole purpose of the move towards a uniform judgment enforcement scheme is to provide greater certainty to international litigants in an

increasingly interdependent global economy, a goal which would be furthered not at all by leaving it to national courts to apply national law to the process of determining whether the rendering court was properly seised of jurisdiction. While such a convention may well provide for more streamlined avenues of enforcement were the judgment creditor to successfully prove up the question of jurisdiction, it would be of no value whatsoever as a means of enabling litigants to determine the optimal forum in which to sue so as to maximise the possibility that any resulting judgment would be enforceable in any given venue. Indeed, a fortiori Brussels and Lugano have precisely this effect due to their status as *conventions double*, but those Conventions and the jurisdictional compromises upon which they rest must be understood in the context of their particularly European provenance. That is to say, while it is one thing for an Italian plaintiff to have to travel to Belgium to commence proceedings in accordance with the general Brussels rule of *actor sequitur forum rei*, it would be quite another for a New South Wales plaintiff to have to travel to India were many of the bases of jurisdiction now prescribed in, for example, Pt 10 r 1A of the New South Wales Supreme Court Rules^[34] overridden by an international judgment enforcement convention.

Accordingly the Hague Conference judgments project currently faces the task of Sisyphus; to draft a convention dealing with jurisdiction when it is the very question of jurisdiction that will prevent any such draft becoming final. Thus it would seem that lawmakers in Australia, while not abandoning efforts to formulate such a convention, must turn their attention in the interim to the simplification and reform of domestic laws on the subject.

3. Accession to the Lugano Convention

While the Lugano Convention was intended to apply principally to members and future members of the European Free Trade Association, Article 62(b) dictates that it is open to accession by *any other state* provided that an explicit invitation in accordance with the unanimous agreement of all Contracting States is received. In light of the potential benefits to Australian litigants that such accession could potentially engender, principal among which would be the extra-territorial effect of Australian judgments throughout virtually the whole of Western Europe, exploration of the feasibility of such accession was one of the express recommendations of the Australian Law Reform Commission's 1994 report *Legal Risk in International Transactions*.^[35]

However, the rationale behind Australia actively exploring the possibilities of accession extend beyond such practical benefits to the partial neutralisation of the positive disadvantage non-parties to the 'Fortress Europe' created by Brussels and Lugano presently experience. Namely, common Article 4 of those Conventions dictates that "[i]f the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall [...] be determined by the law of that State"; thus in contrast to defendants domiciled in a Contracting State, it is open for defendants in non-Contracting States to be subject to the various grounds of exorbitant jurisdiction whose exercise is otherwise proscribed. For example, while it is not open for a French plaintiff, relying on Article 14 of the French Civil Code, to commence proceedings in France against a British company for a breach of a contract made and performed in Malaysia, the same does not follow in respect of an Australian company in an otherwise identical situation. Furthermore, and as discussed above, a judgment rendered in one Contracting State must be enforced, subject only to a narrow range of exceptions, by the courts of every other Contracting State by virtue of common Article 26. Continuing the example, therefore, while any resulting French judgment would be unenforceable in Australia unless the Australian company voluntarily submitted to the jurisdiction by appearance or express contractual agreement or was present in France at the time of commencement, the French judgment debtor could nonetheless seek automatic enforcement in any Contracting State to Brussels or Lugano in which the Australian company might conceivably have assets. Of course while the obverse is equally true- that the recognition of an Australian judgment by a court of a Contracting State to Brussels or Lugano opens the way to enforcement in any other Contracting State in which the defendant may have assets- the cumulative effect of common Articles 4 and 26 and the relative powerlessness of Australian courts to protect an Australian defendant in such a situation ^[36] is undoubtedly a matter for concern.

It must be noted, however, that a degree of protection for Australian defendants from the enforcement of judgments obtained in like circumstances to the above example has been achieved via the entry into force in 1994 of a bilateral treaty with the United Kingdom providing for the 'Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters'.^[37] Viz, Article 59 of the Brussels Convention provides that:

"This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 [being those exorbitant bases of jurisdiction which cannot be exercised against defendant domiciled in Contracting States]."

In turn, therefore, Article 3 of the 1994 UK-Australia treaty provides that the former will not enforce any judgments obtained against defendants domiciled in Australia and rendered in another Contracting State.

4. Reform of domestic laws as to the jurisdiction of the foreign court

As explored in part one of this paper, at both common law and under the FJA Australian conflicts rules demand as a precondition to enforcement that the foreign court have acquired jurisdiction on the restricted bases of either voluntary submission (by either appearance or contract) or the residence or presence of the debtor in the foreign forum. Especially considering the physical remoteness of Australia from the centres of world trade in Europe, North America or even South-

East Asia, the unfairness potentially imposed upon foreign plaintiffs by this approach is self-evident. Consider the following example; an Australian toy manufacturer contracts in South Korea with a relatively impecunious South Korean distributor for the manufacture and supply of toys specifically to the South Korean market. The duly made and supplied goods are retailed extensively in that country, but are later found to be dangerous to children and are subject to a recall the cost of complying with which drives the distributor into insolvency. Proceedings against the Australian company are commenced by injured parties in South Korea, to which the former responds by declining to appear or otherwise participate.

Were Australia and South Korea parties to Brussels or Lugano, the South Korean plaintiffs would have no need to follow the defendant to its forum, common Article 5(3) providing that proceedings may be commenced in tort in the place where the harmful event occurred rather than exclusively in the place of the defendant's domicile. Indeed the same conclusion would follow even pursuant to the contentious 2001 Hague Convention draft, proposed Article 10(1) permitting a plaintiff to commence in tort in the courts of the State "in which the injury arose" (provided that that place was reasonably foreseeable to the defendant, being hardly an issue on the facts of our example). Under existing Australian law, however, the plaintiffs would be forced to travel to Australia in the certainty that any South Korean judgment would be unenforceable in this country absent the participation in the foreign proceedings by the Australian company. For obvious reasons, therefore, it is simply unacceptable for Australian law to retain such a restrictive approach to the question of the jurisdiction of the foreign court, being an area which, like the Abouloff rule, is of nineteenth century origin.

a) Recent Canadian reforms as to jurisdiction

aa) The First Step: Morguard Investments Ltd v De Savoye and 'Real and Substantial'

In this respect, a potential way forward is contained in recent developments in Canadian jurisprudence. In *Morguard Investments Ltd v De Savoye*,^[38] De Savoye was mortgagor of certain lands in Alberta who, during the currency of the agreement, moved to British Columbia and ceased to have any business or presence in Alberta. Upon the mortgage falling into arrears, the mortgagees (Morguard) commenced proceedings in Alberta and effected service on De Savoye pursuant to the long arm jurisdiction of the Alberta courts, to which De Savoye responded by refusing to participate or appear. Upon the commencement of enforcement proceedings in British Columbia in respect of the default judgment, De Savoye submitted that the Alberta courts were not validly seized of jurisdiction for that purpose in accordance with the traditional test then applicable in Canada (and still applicable in Australia).

La Forest J, delivering the judgment of the Supreme Court (Dickson CJ, La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory and McLachlin JJ), began his analysis by stating that "[t]he common law regarding the recognition and enforcement of judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century."^[39] In contrast, his Honour noted that in the contemporary context "the rules of private international law are founded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner",^[40] resulting in a diminished concern with the right of sovereign states to control absolutely matters within their own territory and an increased focus on the reasonable minimisation of legal risk to those engaged in such trans-border commerce. Shortly stated:

"The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralised political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal."^[41]

Accordingly, the Court effected a significant change to the Canadian common law by holding that the courts of one province will have been sufficiently seized of jurisdiction for the purpose of the enforcement of a judgment in another province when a "real and substantial connection" between the proceedings and the rendering forum can be established. For La Forest J, such a test at once provides a reasonable degree of protection to defendants from being "pursued in jurisdictions having little or no connection with the transaction or the parties" and relieves plaintiffs of the burden of travelling to potentially distant jurisdictions when the matter is substantially connected to their place of domicile.

Thus in this case the Court had little difficulty in holding that the Alberta court was properly seized of jurisdiction, given that the contract was made between an Alberta company and a person domiciled at that time in Alberta, and concerned land situated in that province.

bb) The Second Step: 'Real and Substantial' Developed

Subsequently in *Hunt v T&N plc*,^[42] La Forest J elaborated upon the Morguard test and reiterated that, rather than laying down a "rigid test", the concept of a real and substantial connection is concerned with determining whether it was 'reasonable' or 'fair' to both parties for the rendering court to have seized jurisdiction. That is to say, the question is to turn upon "the gradual accumulation of connections defined in accordance with the broad principles of order and fairness" and not the mechanical accumulation of factors for and against the existence of a relevant connection. Thus more recently in *Muscutt v Courcelles*,^[43] another case concerning intra-Canadian proceedings, Sharpe JA (with whom Feldman and Rosenberg JJA agreed) of the Ontario Court of Appeal noted that by introducing flexible notions of fairness and

reasonableness into an area formerly dominated by the bright line tests of submission and residence or presence, the Supreme Court in *Morguard* "rewrote the law of jurisdiction and enforcement." Moreover, his Honour was of the opinion that the nature of the 'real and substantial connection' to be established "is deliberately general to allow for flexibility in the application in the test";⁴⁴ thus the connection may be in respect of either/or the jurisdiction and the subject matter of the proceedings, the jurisdiction and the parties, the jurisdiction and the wrongdoing or the jurisdiction and the cause of action.

cc) *The Final Step: Beals v Saldanha*

However, of course, neither *Morguard* nor either of the subsequent decisions above directly concerned the enforcement in Canada of a truly *foreign* judgment, as opposed to a mere inter-provincial award, leading to doubts in the academic literature as to its potential application in that regard. Handed down in December of 2003, however, the majority decision of the Supreme Court in *Beals v Saldanha*^[45] appears to have quelled such uncertainties.

In 1981, Ontario residents Mr and Mrs Saldanha purchased a vacant block of land in Florida. Three years later they were contacted by a realtor acting on behalf of Mr and Mrs Beals, who were Florida residents interested in purchasing the still-undeveloped land. The Saldanhas agreed, but were sent a contract erroneously referring to the conveyance of 'Lot 1' rather than 'Lot 2'; the realtor was notified of the error, the contract was changed to refer to 'Lot 2' and returned to Florida executed. The Beals, however, commenced construction on Lot 1, and upon discovering the mistake commenced proceedings against the Saldanhas in Florida claiming- as required by the pleading rules of that jurisdiction- 'damages in excess of \$5,000'. The Saldanhas were served with process in Ontario, and appeared and filed a defence, but the action was subsequently discontinued by reason of having been commenced in the wrong circuit. In 1986 a second action was commenced by the Beals in Florida again claiming 'damages in excess of \$5,000', but differing from the first in its claim for treble damages by reference to allegations of fraud; yet again the Saldanhas, after service of process in Ontario, appeared and filed a defence. However, no defence was filed to a subsequent amendment by the Beals to their claim, being an omission which under Florida law entitled them to default judgment. This having been obtained, the Beals served notice on the Saldanhas of a jury trial to determine the quantum of damages- to which no response was received- which were eventually assessed at US\$210,000 compensatory and US\$50,000 punitive, plus interest from the date of judgment accruing at a rate of twelve percent. In sum, the final award was an amount described later by Binnie J in the Supreme Court as "breathtaking" and "Kafka-esque"^[46] in light of the fact that, while the Saldanhas had paid US\$8,000 for the lot in 1981, by the time of the Supreme Court hearing the judgment debt owing had amassed to over \$1 million Canadian. While the Saldanhas were alarmed at the sheer size of the award, no action was taken to have the jury verdict set aside as they had received legal advice to the effect that it would be unenforceable in Ontario due to their failure to voluntarily submit to the Florida court's jurisdiction. Nonetheless in 1993 the Beals commenced enforcement proceedings in Ontario, and the matter eventually came before the Supreme Court on the questions of whether the *Morguard* 'real and substantial connection' test applied in the international context and the applicability of the defences of fraud, denial of natural justice and public policy.

dd) *The Approach of the Majority*

Writing for the majority (McLachlin CJ, Gonthier, Major, Bastarache, Arbour and Deschamps JJ), Major J was of the firm opinion that the *Morguard* test should indeed be applied to the context of foreign judgments on the basis that:

"International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard* ... and further discussed in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289, can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the "real and substantial connection" test should apply to the law with respect to the enforcement and recognition of foreign judgments."^[47]

From this assumption, his Honour held that "a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction";^[48] in contrast, it will be unreasonable to assume jurisdiction when the relevant connections are merely "fleeting or relatively unimportant." Most significantly, however, the majority in this case determined that the real and substantial connection test of jurisdiction is, with respect to the former position, of an overriding rather than supplementary nature. While under the old law the service of process within the foreign jurisdiction, no matter how fleeting the defendant's presence, was sufficient to ground jurisdiction, under the *Morguard* test as applied in *Beals* such service would merely comprise one indicia relevant to whether the requisite connection was established. As stated by Major J:

"There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard*, supra. A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties."^[49]

On the facts of this case, therefore, the majority found that it was clearly reasonable for the Florida court to have seized jurisdiction given that the subject matter of the action was a transaction in Florida concerning land in Florida.

Moreover, the majority were of the opinion that the more liberal enforcement regime engendered by *Morguard* and the decision in this case should not be circumvented by a simultaneous expansion of the various defences to enforcement of fraud, denial of natural justice and public policy. Thus in respect of the defence of fraud, Major J reiterated that the *Abouloff v Oppenheimer* rule has no application in Canada in the sense that it is only fresh evidence of fraud, rather than allegations that were or might reasonably have been ventilated before the foreign court, that will be sufficient to ground the defence.[50] Similarly the defence of denial of natural justice was explicitly limited to issues of due process rather than the substance of the proceedings, and was, further, held *not* to extend to notice of idiosyncrasies in foreign procedural law at variance with those of the defendant's forum; thus it was irrelevant that the Saldanhas did not know that they were liable to suffer default judgment if they failed to respond to the Beals amended pleading in the second action. [51] Major J said:

"A defendant to a foreign action instituted in a jurisdiction with a real and substantial connection to the action or parties can reasonably be expected to research the law of the foreign jurisdiction. The Saldanhas ... owned land in the State of Florida and entered into a real estate transaction in that state. When served with notice of an action against them in the State of Florida, the appellants were responsible for gaining knowledge of Florida procedure in order to discover the particularities of that legal system." [52]

And, finally, in relation to the defence of public policy the majority rejected the submissions put on behalf of the Saldanhas to the effect that it should be expanded to encompass situations where the *outcome* of a specific case is repugnant to the public policy of the enforcing forum, as compared to the repugnancy of the foreign law *per se*. Given that the whole purpose of the decision in *Morguard* and the majority decision in this case was to liberalise Canada's enforcement laws in light of changed notions of sovereignty and comity in the modern context, this rejection is hardly surprising; as stated by Major J:

"The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application." [53]

Thus, given that there was no fresh evidence of fraud on the Florida court, the Saldanhas had at all stages been put upon notice of the proceedings against them and the mere institution of treble and punitive damages was not repugnant to Canada's sense of basic morality, it was held by the majority that none of the defences applied.

ee) *The Approach of the Minority*

In contrast the minority, represented in greatest depth by the judgment of Le Bel J, manifested a primary concern for the protection of Canadian defendants from potentially vexatious and oppressive foreign proceedings. Thus, for his Honour the question of whether a real and substantial connection exists should take cognisance of "the additional hardship imposed on a defendant who is required to litigate in a foreign country" and the "possibility that the quality of justice there may not meet Canadian standards." [54] More specifically, in addition to factors such as the place of contracting, where the cause of action arose, the place of acting in tort, the location of any relevant property, and so forth, Le Bel J was of the opinion that primary consideration should be given to "the burdens that defending in the foreign forum would impose on a defendant, in order to determine whether it is reasonable to expect the defendant to accept them." [55] Using the example of a Canadian defendant sued on the Continent as an example of his point, his Honour said:

"Such a defendant cannot hope to protect herself unless she retains local counsel who can both negotiate the process on her behalf and explain it to her in a language she knows. It is not a simple thing to find trustworthy, competent, bilingual counsel in a foreign country; nor is it cheap. The plaintiff, who chose the forum, will presumably not face these difficulties, and therefore the parties will not be on a level playing field." [56]

Overall in respect of the application of the *Morguard* test, therefore, Le Bel J was concerned that the "implication of the position of the majority is that Canadian defendants will from now on be obliged to participate in foreign lawsuits no matter how meritless the claim or how small the amount of damages in issue reasonably appears to be, on pain of potentially devastating consequences from which Canadian courts will be virtually powerless to protect them." [57] Given the presence of such an obligation should a Canadian defendant wish to protect his or her assets in Canada, for his Honour:

"the risks and thus the transaction costs to our citizens of cross-border ventures will be increased, in some cases beyond what commercially reasonable people would consider acceptable. Canadian residents may consequently be deterred from entering into international transactions -- an outcome that frustrates, rather than furthers, the purpose of private international law." [58]

Moreover, this protective attitude flows through into Le Bel J's conception of the proper scope of the various defences to enforcement in that the "old, strict approach to these defences struck a balance appropriate to the requirements of international comity under the pre-*Morguard* common law, where the jurisdiction test was a difficult threshold for foreign plaintiffs to cross." [59] Accordingly, the broader bases of recognised foreign jurisdiction under the post-*Morguard* test for Le Bel J justifies a concomitant expansion of the defences of fraud, denial of natural justice and public policy. In respect of the fraud test, while agreeing with the majority that as a statement of general principle the *Abouloff v Oppenheimer* rule should continue to have no application in Canada, his Honour mooted the development of a broader test in cases of foreign default judgments "where the defendant's decision not to participate was a demonstrably reasonable one." [60] Similarly in respect of natural justice, his Honour advocated its expansion so as to encompass "substantive principles of justice" applied to each individual case in a "purposive and flexible manner"; [61] thus on the facts of this case, the Saldanhas should have been put upon notice not merely of the fact of the Florida proceedings, but also that their failure to respond to the amended claim constituted a default. And in respect of the public policy defence his Honour, while affirming that its scope extends only to "the law of the foreign forum, rather than the way the law was applied", [62] discussed (without deciding the matter) its possible extension to particularly egregious United States laws concerning multiple or punitive damages. [63]

ff) Assessment: The Majority Approach Preferable

On balance, the approach of the majority in *Beals* is to be preferred on the basis that, with the greatest respect, the dissenting judgment of Le Bel J appears to have been influenced by the very unusual facts of this case and the plight of the Saldanhas as \$8,000 family investors eventually liable for over \$1 million in damages. [64] In attempting to develop a jurisprudence which affords a significant degree of protection to Canadian defendants, that is to say, it is strongly arguable that the minority lost sight of both the imperative of modernising conflicts rules to suit a highly integrated world economy and the need to accord fairness to foreign plaintiffs as much as domestic defendants.

Certainly, a more liberal enforcement regime in any particular country may increase the transactional risks for domiciliaries of that country by placing their domestic assets at greater risk; but, equally, a more rigid enforcement regime acts as a disincentive to foreign parties wishing to do business with such domiciliaries. And, similarly, while foreign litigation in a distant forum chosen by the plaintiff may not be conducted on a 'level playing field' given the increased burdens on the defendant, to instead force a foreign plaintiff to travel to the defendant's forum is not to level that field but, rather, to merely tip it in favour of the defendant. Considered from this perspective, to refuse to develop conflicts rules in this area out of concern for domiciliaries is to risk perpetuating the nineteenth century, nationally chauvinistic bases of the existing order. In addition, it is strongly arguable that the test of a real and substantial connection as applied by the majority already affords the defendant a significant degree of protection, to which it is unnecessary to add further the primary consideration of the cost to the defendant of defending the foreign proceedings. Specifically, for jurisdiction to be enlivened under the majority's test a Canadian needs to go to the expense of travelling to a foreign forum and conducting business or other activities there sufficient to establish the requisite real and substantial connection, being an enterprise that (as with the Saldanhas) would be typically conducted with the intent of turning a monetary profit. Provided that proper notice of subsequent proceedings in that forum was given, and that the substantive law in issue was not wholly repugnant to Canadian notions of morality, it thus appears incongruous in the extreme to permit a defendant to argue that while he or she was prepared to go to the expense of travelling to the foreign forum in the expectation of profit, it is unreasonable to compel them to travel there for the purposes of defending the litigation. The plaintiff may well have chosen the forum, but a priori the defendant chose to establish a substantial connection with that forum in the first place and the injustice to the plaintiff of continuing to allow the defendant to renege on that choice is manifest.

In respect of the future scope of the various defences, while detailed analysis is not yet possible due to the brevity of Le Bel J's discussion of his proposed reforms it is open as a preliminary issue to observe that to add 'flexibility' to the defences when the prevailing test of jurisdiction after *Morguard* and *Beals* does just that appears to be layering protection upon protection. To posit as the sole test of jurisdiction the reasonableness of the foreign court's assumption of jurisdiction in light of the substantiality of the connection between the parties, the subject matter or the cause of action and the foreign forum is to extend to defendants a degree of protection which did not exist under the pre-*Morguard* test. Thus, for example, the service of process in the foreign forum, regardless of how fleeting the defendant's presence of the relative insignificance of his or her business there, would be conclusive of the issue of jurisdiction under the old test; but following *Morguard* and *Beals*, the sole question would be whether a real and substantial connection in the relevant sense existed, regardless of the place of service. For example, while in *Close v Arnot* [65] the Australian defendant served during a brief holiday in New York had no basis upon which to challenge the jurisdiction of the American court, this conclusion would by no means follow in Canada following *Morguard* and *Beals*. While the new test outlined in those cases does indeed liberalise the range of foreign judgments potentially enforceable in that country, that is to say, it does so primarily in respect of recalcitrant defendants who strategically refuse to participate in foreign proceedings comfortable in the knowledge that any resultant judgment would be unenforceable in their place of domicile, while protecting those whose presence or business in the foreign forum was merely temporary or insubstantial.

gg) The Adoption of Beals v Saldanha in Australia?

Therefore, a strong case may be made to the effect that the *Morguard* and *Beals* test presently applicable in Canada should be followed at common law in Australia, and that s 7(2)(a) of the FJA be likewise amended to incorporate a general test of 'real and substantial connection.' Indeed, Australian courts are already familiar with applying a similar test in a different area of the conflict of laws- namely the determination of which jurisdiction a contract has its 'closest and most real connexion' [66] with in the context of the implied choice of laws in contract- such that the adoption of the Canadian approach would not cause any significant interpretative difficulties. Moreover, the existence of a "substantial

connection" between the defendant and the forum is the primary test of jurisdiction under the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure [67] thus, were specialist rules to the same or similar effect introduced in Australia to apply to the resolution of international disputes, the dual benefit of harmonised procedures for the enforcement of foreign judgments at common law and a merger of case law on jurisdiction would be achieved.

IV. Conclusions and Observations

In light of the substantially reformed state of procedural law in Australia and the recent promulgation of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, it is incongruous in the extreme that the law relating to the enforcement of foreign judgments remains based upon concepts whose provenance lies indelibly in eighteenth to nineteenth century English jurisprudence. Regardless of the degree of harmonisation attained in respect of procedural laws, the benefits of such reform are set at naught in the absence of an efficient and modern system of judgment enforcement. Accordingly, and in view of the sluggish progress being made at the Hague Conference in respect of the finalisation of a comprehensive treaty, lawmakers in Australia must prioritise; (a) the exploration of the possibility of accession to the Lugano Convention; (b) the extension of the FJA to significant trading partners such as the United States, China and India; and (c) the adoption of the Canadian approach in respect of the acceptable bases of foreign jurisdiction. While giving effect to such reforms would require a minimum degree of institutional exertion the benefit of doing so would be little short of the long-overdue propulsion of Australian conflicts rules into the modern era.

END NOTES

* *Teil I* erschienen in *IPRax* 2005, 273 ff. [The published version of this paper is to be found in *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, issue 4, July/August 2005, s293-400, at 365]

** A Judge of the Supreme Court of New South Wales

*** BA (Hons), LLB (Hons). Commercial List Researcher, Supreme Court of New South Wales.

1 *Einstein/Phipps*, *IPRax* 2005, 273

2 Commonwealth of Australia Parliamentary Debates, House of Representatives, 29 May 1991, No 10 of 1991, page 4219.

3 *The American Law Institute/UNIDROIT*, Principles and Rules of Transnational Civil Procedure, Final Draft, November 2004.

4 *Cornelius van Boeschoten*, "Hague Conference Conventions and the United States: A European View" (1994) 57(3) *Law and Contemporary Problems* 47 at 50.

5 (1986) 6 NSWLR 534 at 541.

6 "The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales " (2004) 4 *Unif. L. Rev.* 815

7 *Hans Smit*, "International Control of International Litigation: Who Benefits?" (1994) 57(3) *Law and Contemporary Problems* 25 at 27.

8 See generally: *Cornelius van Boeschoten*, "Hague Conference Conventions and the United States: A European View" (1994) 57(3) *Law and Contemporary Problems* 47 at 50-53.

9 For greater detail on the operation of the Brussels Convention in this regards, see the authors' report paper: "The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales" (2004) 4 *Unif. L. Rev.* 815

10 *Brandon B. Danford*, "The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?" (2004) 23 *Review of Litigation* 381 at 409.

11 *Bradford A. Caffrey*, International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region, CCH Australia, Sydney, 1985, page 76.

12 [1983] 1 WLR 730 at 733-4.

13 *Beals v Saldanha* [2003] SCC 72 at [225].

14 *Jenifer M. Anglim*, "Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes Over Artwork and Other Chattels" (2004) 45 *Harvard International Law Journal* 239 at 241-2.

15 Smit, "International Control of International Litigation: Who Benefits?" (1994) 57(3) *Law and Contemporary Problems* 25 at 27.

16 Takeshi Kojima, "Cooperation in International Procedural Conflicts: Prospects and Benefits" (1994) 57(3) *Law and Contemporary Problems* 59 at 64.

17 Kojima, "Cooperation in International Procedural Conflicts: Prospects and Benefits" (1994) 57(3) *Law and Contemporary Problems* 59 at 65.

18 See also: *Protection of Trading Interests Act 1980* (UK) ss 5-7 to the same effect.

19 (1882) 10 QBD 295. Broadly speaking the rule in *Abouloff v Oppenheimer* dictates that the enforcing court may refuse to enforce the foreign judgment on the ground that it was obtained by fraud, regardless of whether that fraud was known to the judgment debtor at the time of the foreign proceedings or raised as an issue in the foreign proceedings. In contrast, English and Australian common law dictates that a domestic judgment can only be set aside on the ground of fraud when the party asserting the fraud has discovered fresh facts indicating the wrong, subsequent to the judgment said to be tainted by fraud. For further detail on the nature and operation of the rule, see part one of this paper.

20 Council Regulation 44/2001, 2001 OJ (L 12) 1.

21 Danford, "The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?" (2004) 23 *Review of Litigation* 381 at 391.

22 Caffrey, International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region, page 77.

23 "The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales" (2004) 4 *Unif. L. Rev.* 815.

24 Arthur T. von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?" (1994) 57(3) *Law and Contemporary Problems* 271 at 283.

25 Georges A.L. Droz, "A Comment on the Role of the Hague Conference on Private International Law" (1994) 57(3) *Law and Contemporary Problems* 3 at 3. The enforcement of foreign judgments was, however, omitted from the final draft of the 1904 Civil Procedure Convention.

26 *Australian Law Reform Commission*, Legal Risk in International Transactions, Report No 80, 1996, page 98.

27 See generally: von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?" (1994) 57(3) *Law and Contemporary Problems* 271 at 283.

28 Danford, "The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?" (2004) 23 *Review of Litigation* 381 at 403-404.

29 Masato Dogauchi and Trevor C. Hartley, Preliminary Draft Convention on Exclusive Choice of Court Agreements: *Draft Report*, Preliminary Document No 25 of March 2004, Hague Conference on Private International Law, page 4. (www.hcch.net)

30 Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, "Draft on Exclusive Choice of Court Agreements", Working Document No 110 E, Hague Conference on Private International Law, May 2004. (www.hcch.net)

31 Commission on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, "Interim Text: Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001", Hague Conference on Private International Law, 2001. (www.hcch.net)

32 Where jurisdiction is seized on the basis of commercial activity carried out by the defendant in the forum, regardless of presence, residence or whether such activity was related to the dispute in question.

33 Danford, "The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?" (2004) 23 *Review of Litigation* 381 at 406-7.

34 For more detail on these bases of jurisdiction, see the authors paper: "The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales" (2004) 4 *Unif. L. Rev.* 815

35 *Australian Law Reform Commission*, Legal Risk in International Transactions, Report No 80, 1996, page 15.

36 The sole exception being where the foreign plaintiff has in a presence in Australia so as to be susceptible in personam

to an anti-suit injunction issued by an Australian court. See generally: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

37 *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Australian Treaty Series 1994 No 27.

38 [1990] 3 SCR 1077.

39 [1990] 3 SCR 1077 at 1095.

40 [1990] 3 SCR 1077 at 1096.

41 [1990] 3 SCR 1077 at 1098.

42 [1994] 109 DLR 4th 16 at 41-2.

43 [2002] 213 DLR 4th 577 at 585 [15].

44 [2002] 213 DLR 4th 577 at 591 [36].

45 [2003] SCC 72.

46 [2003] SCC 72 at [82] and [88].

47 [2003] SCC 72 at [28].

48 [2003] SCC 72 at [32].

49 [2003] SCC 72 at [37].

50 [2003] SCC 72 at [50]. See part one of this paper for further detail on the application of the rule in Canada

51 [2003] SCC 72 at [64].

52 [2003] SCC 72 at [68].

53 [2003] SCC 72 at [75].

54 [2003] SCC 72 at [134] and [171].

55 [2003] SCC 72 at [176].

56 [2003] SCC 72 at [196].

57 [2003] SCC 72 at [132].

58 [2003] SCC 72 at [136].

59 [2003] SCC 72 at [213].

60 [2003] SCC 72 at [234].

61 [2003] SCC 72 at [236].

62 [2003] SCC 72 at [221].

63 [2003] SCC 72 at [223] - [229].

64 This appears to have been a sentiment shared by some authors: *Antonin I. Pribetic*, "Strangers in a Strange Land"- Transnational Litigation, Foreign Judgment Recognition and Enforcement in Ontario" (2004) 13 *Journal of Transnational Law and Policy* 347.

65 Unreported, Supreme Court of New South Wales, Graham AJ, 21 November 1997, BC9706194. See part one of this paper for detail of the facts of this case.

66 *Bonython v The Commonwealth* (1950) 81 CLR 486; *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Aust) Pty Ltd* (1989) 18 NSWLR 172; *Reese Bros Plastics Ltd v Hamon-Sobelco Aust Pty Ltd* (1988) 5 BPR 11, 106.

67 *The American Law Institute/UNIDROIT*, Principles and Rules of Transnational Civil Protection Procedure, Final Draft, November 2004, Principle 2 and Rule 4.

Trends in International Commercial Litigation Part I – The Present State of Foreign Judgment Enforcement Law

Trends in International Commercial Litigation Part I*- The Present State of Foreign Judgment Enforcement Law
THE HON JUSTICE C.R. EINSTEIN** and ALEXANDER PHIPPS***

*Unfortunately for many parties the expense and complexity of international commercial litigation does not stop at the point of final judgment. Although, as detailed by the authors in "The Application of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure to New South Wales" (2004) 4 Unif. L. Rev. 815, recent attempts have been made to bring about a harmonisation of civil procedure rules in the international commercial context, it remains the fact that enforcing a judgment out of the forum can in many respects prove almost as difficult as obtaining it. Accordingly, part one of this two-part paper examines the present state of Australian conflicts rules with respect to the enforcement of foreign judgments, both at common law and under the Foreign Judgments Act 1991 (Cth). With particular focus on the defence to enforcement of fraud on the foreign court laid down in *Abouloff v Oppenheimer* (1882) 10 QBD 295, the paper concludes that there is a strong case for reform in this area at the international level.*

I. Introduction: The provenance of foreign judgment enforcement

The capacity under English and Australian conflict of law rules for the recognition and enforcement of foreign judgments is far from a recent phenomena; as asserted by the editors of *Dicey and Morris*, "English courts have recognised and enforced foreign judgments from the seventeenth century onwards." [1] Originally the rationale for such capacity was founded on notions of international and inter-colonial judicial comity and, as a corollary of the same, the desire to have judgments of the forum accorded equal treatment overseas. Thus in *Wright v Simpson* [2], a case concerning certain bonds entered into in the former American colony of Georgia, Lord Eldon recognised as a principle binding on him that "natural law requires the Courts of this country to give credit to those of another for the inclination and power to do justice"; and this notwithstanding the rather scandalous fact, in view of the date of this authority, that the American party "was well affected to this country; though not very distinctly". [3] Similarly in *Alves v Bunbury* [4], Lord Ellenborough, in the distinctly more savoury context of an action founded on a judgment emanating from Her Majesty's loyal colony of St Vincent, declared that "[b]y the *comitas gentium*, the courts of different countries will recognize and enforce the judgments of each other."

Authorities from the mid-nineteenth century onward, however, began to displace this reasoning in favour of an approach which emphasised the duty of the enforcing court to give effect to the obligation placed upon the foreign judgment debtor by reason of the judgment being sought to be enforced. In what later evolved into a definite rule of the conflict of laws, in *Williams v Jones* [5], Parke B said:

"where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action for debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced."

Thus in *Schibsby v Westenholz* [6], Blackburn J held that the "judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce." In the contemporary context, while the English Court of Appeal (Slade, Mustill and Ralph Gibson LJJ) in *Adams v Cape Industries Plc* [7] - a massive litigation involving the attempted enforcement of a Texas judgment against an English company whose subsidiaries were involved in asbestos mining in South Africa- was prepared to recognise the 'obligation' doctrine as constituting the basal principle in accordance with which foreign judgments would be enforced [8], it noted [9] the complexities of the issues left unresolved by such an approach. Exactly what is a court of 'competent jurisdiction' for the purposes of recognition and enforcement? When will the exercise by the foreign court of jurisdiction over a particular defendant be justifiable according to the conflict of law rules of the forum? [10]. Are there some judgments the very nature of which will preclude their enforcement? These and other difficulties ensure that the enforcement of judgments in Australia remains an area mired in legal niceties, cured only in part by the emergence of statutory enforcement machinery.

II. Reform and its discontents

In light of both the various reforms effected to Australian procedural law in recent decades and the increasing emphasis on the harmonisation of procedural law at the international level, the atavistic state of Australian law relating to the enforcement of foreign judgments is especially surprising. As discussed elsewhere by the authors, [11] civil procedure in Australia generally and the State of New South Wales specifically is substantially commensurate with that contained in the Principles and Rules of Transnational Civil Procedure recently formulated by the International Institute for the Unification of Private Law (UNIDROIT) and the American Law Institute (ALI). [12] While the move towards international procedural harmonisation - as epitomised by the ALI/UNIDROIT Principles and Rules - is predicated on the assumption that procedural idiosyncrasies at the national level present a significant impediment to the freer flow of international

commerce, their value is set at naught unless complemented by equally streamlined enforcement mechanisms. However, as indicated by the fact that the ALI/UNIDROIT Principles and Rules make no substantial provision as to the enforcement of judgments, the international harmonisation of this area has itself proven difficult in the face of myriad national and regional legal traditions all of which, to varying degrees, seek to protect their residents against oppressive foreign judgments. Thus while the imperative of reform in the context of a globalised economy is axiomatic, as attempted by the ALI/UNIDROIT Principles and Rules, the means by which such change may be effectively and (so far as possible) universally achieved is a matter of fundamental contention.

1. *The Present Situation*

a) *Procedural requirements of enforcement*

In Australia, the enforcement of foreign judgments is possible either at common law or pursuant to the *Foreign Judgments Act 1991* (Cth) (the FJA). In procedural terms, the following points are of importance:

aa) *Common Law Enforcement Procedures*

The foreign judgment creditor seeking to enforce at common law has two options; first, to commence fresh *in personam* proceedings in the Australian court with the unsatisfied judgment being the cause of action in the manner of an ordinary debt [13] or, second, to commence fresh proceedings on the original cause of action wherein the defendant will be estopped from raising any defence which was, or could have been, raised in the foreign proceedings.[14]

bb) *Statutory Enforcement Procedures*

Part 2 of the FJA applies to money judgments of superior courts in countries with whom Australia has concluded a bilateral arrangement as to reciprocity of enforcement; thus s 5(1) permits the making of regulations extending the operation of the FJA to the courts of a country in which "substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts." Following such recognition, judgments to which the FJA applies may be registered upon an *ex parte* application in the Federal Court of Australia or the State and Territory Supreme Courts at any time within 6 years after the final disposal of the proceedings (s 6(1)), and the effect of such registration is that the judgment may be enforced in the ordinary manner of a judgment of the court in which it has been registered (s 6(7)). In addition, it should be noted that:

- (i) s 5(3) provides for the extension of the FJA to judgments of inferior courts of specified countries on the condition that 'substantial reciprocity of treatment' will be assured in that country in respect of the enforcement of Australian inferior court judgments;
- (ii) s 5(6) provides for the extension of the FJA to non-money judgments, although at present no such recognition has been prologued;
- (iii) s 10(1) provides that the FJA is a code in respect of the enforcement in Australia of judgments to which the FJA applies.

The courts of the countries in respect of which regulations have been made pursuant to s 5(1) are listed in the Schedule to the Foreign Judgments Regulations 1992, and are: New Zealand (including inferior courts); the Canadian Province of Alberta (including inferior courts); The Bahamas; the Canadian Province of British Columbia (including inferior courts); British Virgin Islands; Cayman Islands; Dominica; Falkland Islands; Fiji; France; Germany; Gibraltar; Grenada; Hong Kong Special Administrative Region; Israel; Italy; Japan; Korea; Malawi; the Canadian Province of Manitoba (including inferior courts); Montserrat; Papua New Guinea; Poland (including inferior courts); St Helena; St Kitts and Nevis; St Vincent and the Grenadines; Seychelles; Singapore; Solomon Islands; Sri Lanka; Switzerland (including inferior courts); Taiwan; Tonga; Tuvalu; the United Kingdom (including inferior courts); Western Samoa.

b) *Problems with the existing procedural requirements*

Observation of the scope of this list reveals a multitude of drawbacks with a judgment recognition system founded on bilateral recognition. First, agreement has not yet been reached with any federal or state jurisdictions of the United States, a quite remarkable situation in light of the fact that the US is Australia's second largest export market - worth AUD\$ 9.5 billion in 2003 [15] - and the anticipated coming into effect of a free trade agreement with that country. Second, no agreement has been concluded with rapidly developing export markets such as China or India, Australian exports to which in 2003 totalled AUD\$ 9.1 billion and AUD \$ 3.3 billion respectively and to which in the same year, merchandise exports increased by 8.4 percent and 34 percent respectively. Third, in some federations, such as Canada, it is necessary to conclude separate agreements with each sub-national jurisdiction, given that s 3(1) of the FJA defines 'country' to include any region "which is part of a foreign country"; thus while judgments from the superior and inferior courts of the Provinces of Alberta, British Columbia and Manitoba are covered by the FJA, those from Provinces such as Ontario, Quebec or Nova Scotia are not. While it of course remains open to enforce judgments from non-FJA 'countries' at common law, to do so encounters myriad technical and jurisdictional difficulties (detailed below) the existence of which it was the FJA's very purpose to circumvent.

c) *Judgments unenforceable per se*

It is critical to note at this stage that there remain some species of foreign judgments which are unenforceable in Australia either at common law or under statute. These are:

aa) Judgments Unenforceable At Common Law

Australian courts will not entertain proceedings which have the effect of enforcing the penal [16], revenue [17], appropriation [18] or other public laws [19] of a foreign country, nor laws giving effect to the public policy of another state. [20] Moreover, enforcement will be declined in respect of judgments founded on laws contrary to the public policy of the enforcing court, such as those manifestly in breach of clearly established rules of international law. [21]

bb) Judgments Unenforceable Under the FJA

The FJA contains a number of similar restrictions on the type of judgments enforceable pursuant to Part 2 in addition to the basic position, as discussed above, that at present it extends only to money judgments. Viz, s 3(1) defines "enforceable money judgment" to mean a judgment which is payable in "an amount of money, other than [...] taxes or other charges of a similar nature; or a fine or other penalty" [22], with s 7(2)(a)(ix) further providing that the registration of a judgment may be set aside on the basis that its enforcement "would be contrary to public policy."

d) Substantive requirements of enforcement

In substantive terms, for a foreign judgment to be enforceable in Australia either at common law or under the FJA, the following requirements must be met:

aa) Substantive requirement one: jurisdiction of the enforcing court

At common law, given that the primary means of enforcement is to commence a fresh action on the judgment, the judgment debtor must be present in the jurisdiction (or anywhere in Australia by virtue of s 15 of the *Service and Execution of Process Act 1992* (Cth)) at the time of service for the Australian court to acquire jurisdiction. Alternatively, under Supreme Court Rules Pt 10 r 1A(1)(v) it is permissible in New South Wales to serve the judgment debtor outside Australia.

Under the FJA, the registration process set out in s 6 dispenses for the need for the Australian court to establish jurisdiction over the person against whom the judgment is to be enforced, given that it involves merely an *ex parte* application rather than the commencement of adversarial proceedings. As stated by Stephen, Mason and Wilson JJ in *Hunt v BP Exploration Co (Libya) Ltd*, [23] the creation of such a simplified procedure was the very purpose of the FJA and its state predecessors:

"It is the purpose of the Act, as it was with its statutory predecessors in the United Kingdom, to replace the common law with a simpler and more effective system of enforcement of foreign judgments, the essence of which is that the foreign judgment, provided that it satisfies the necessary qualifications, is registered and enforced as if it were a judgment of the local court. The Act dispenses altogether with the old procedure whereby the judgment creditor sues on the foreign judgment so as to obtain a new judgment in the Supreme Court which is then enforced against the local assets of the judgment debtor. Instead the foreign judgment is registered and once registered, subject to certain qualifications, execution may be effected against local assets. The application for registration does not involve an action in personam requiring service of the Supreme Court's process in or outside the jurisdiction."

bb) Substantive requirement two: jurisdiction of the foreign court

At common law, the jurisdiction of the foreign court to have heard and determined the proceedings the subject of the judgment may be established by the residence or presence of the judgment debtor in the forum at the time of the commencement of the proceedings, [24] the express contractual submission by the judgment debtor to the jurisdiction of the foreign court [25] or voluntary submission by unconditional appearance (provided that appearance was not merely for the purpose of contesting jurisdiction, challenging the exercise of jurisdiction or protecting property: FJA s 11).

Similar rules apply in respect of judgments enforced under the FJA, with s 7(2)(a)(iv) allowing for the setting aside of the registration of a judgment on the basis that "the courts of the country of the original court had no jurisdiction in the circumstances of the case." In turn, s 7(3)(a) deems the foreign court to have had jurisdiction when the judgment debtor voluntarily submitted to the jurisdiction [26], agreed prior to the proceedings to be subject to the jurisdiction, or either resided in, or had its principal place of business in (in the case of a corporation), the jurisdiction at the time of the commencement of proceedings.

cc) Substantive requirement three: final and conclusive judgment

At both common law and under the FJA, a foreign judgment cannot be registered unless it finally and conclusively determines the controversy between the parties that led to the proceedings.[27] It is immaterial whether a right of appeal lies against the determination, or the ability to apply to have it set aside in the case of default judgments, provided that a *res judicata* is set up until such appeal or application is made.²⁸

dd) *Substantive requirement four: that none of the defences to enforcement apply*

The foremost defences, both at common law and under the FJA, to the enforcement of a foreign judgement are, first, that there was a fraud on the foreign court, second, that the judgment debtor (being the defendant in the foreign proceedings) was denied natural justice in those proceedings and, third, that the enforcement of the foreign judgment would be contrary to the public policy of the forum.

cc) *Defence to enforcement one: fraud*

It is trite law that a judgment, wherever given, is liable to be set aside on the ground that it was obtained by a fraud upon the court. In *Wentworth v Rogers (No 5)*, [29] Kirby P (with whom Hope and Samuels JJA agreed) set out the principles germane to such an application, the most fundamental of which is that:

"it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment."

Alternatively expressed, and considering that rendering nugatory a judgment is a "drastic step" that is prima facie at odds with the "public interest in the finality of litigation" [30], it is not permissible for a party to know of the fraud at the time of the hearing only to raise the matter on appeal or at a subsequent application to set aside the judgment; there will be no fraud in the relevant sense merely if the supposedly defrauded party "move[s] on nothing more than the evidence upon which they have previously failed". [31]

However, and notwithstanding the stringency of the test in the domestic context, since the decision of the English Court of Appeal in *Abouloff v Oppenheimer & Co*[32] a line of authority has developed, as explained by the editors of Dicey and Morris, to the effect that a foreign judgment "can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been, and was, alleged in the foreign proceedings." [33] The incongruence between these two positions is puzzling, has been universally condemned by the commentators and, as suggested by Kirby P in *Wentworth*, "might be no more than a reflection of the attitudes of the English judiciary at the apogee of the British Empire." [34] For present purposes, given the importance of the finality of litigation in the commercial context, it need only be said that the so-called '*Abouloff* rule' demonstrates the inappropriateness of an enforcement system that remains saturated in conflictual rules over a century old.

In *Abouloff* itself, the defendants in the English proceedings were sued in Russia by the plaintiffs for detention of goods, the former setting up the defence in the foreign proceedings that the goods were in fact in the plaintiff's possession. This argument failed, and judgment was entered for the plaintiffs. In subsequent recognition and enforcement proceedings in England, the defendants again sought to raise the defence of fraud, a defence which the Court of Appeal found good. Per Lord Coleridge CJ:

"where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country, when he seeks to enforce the judgment so obtained." [35]

For the Lord Chief Justice, this approach would not result in the enforcing court re-enquiring into matters already settled by the foreign court or, by the forensic election of the allegedly defrauded party, not placed before it, on the basis of a rather curious distinction between the issue of whether a party has acted fraudulently per se and that of whether the foreign court specifically was defrauded. His Lordship said:

"We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled, never could have been in issue before them, and therefore never could have been decided by them. The English courts are not either re-trying or even re-discussing any question which was or could have been submitted to the determination of the Russian courts." [36]

However, in circumstances when the grounds upon which fraud is alleged are no different from those placed before the foreign court, it is difficult to disagree with Nygh and Davies when they state that "this piece of sophistry cannot disguise the fact that the real issue, namely the truth or falsity of certain evidence, is the same in both proceedings." [37] Indeed, all sophistry aside, that the *Abouloff* rule permits the enforcing court to re-litigate certain aspects of the foreign proceedings was candidly detailed by Lindley LJ in *Vadala v Lawes* [38] when his Lordship said:

"that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign

Court."

In *Jet Holdings Inc v Patel*[39], the plaintiff company sought enforcement of a judgment obtained by default against the defendant, a former employee, in the Superior Court of California. While the defendant entered an appearance in the Californian proceedings such as to voluntarily submit to its jurisdiction, he refused to attend for oral discovery on the basis that he feared for his physical safety; his position was that he owed no money to the plaintiffs but, rather, that they had been attempting to extort and threaten money from him. The reasons for the defendant's failure to attend were considered by the Californian court- to the extent even that a bodyguard was offered- but ultimately dismissed, and default judgment entered accordingly. In allowing the defendant to re-litigate the matter upon the plaintiff company commencing enforcement proceedings in England, however, Staughton LJ (with whom Nicholls LJ agreed) dismissed the latter's submissions that the question was *res judicata*:

"If the rule is that a foreign judgment obtained by fraud is not enforceable, it cannot matter that in the view of the foreign court there was no fraud. But this doctrine makes a great inroad into the objective, which is generally desirable, of enforcing judgments where in the eyes of English law the foreign court had jurisdiction ... If he asserts that the plaintiff's claim and evidence were fraudulent that issue must be tried all over again in enforcement proceedings. The lesson for the plaintiff is that he should in the first place bring his action where he expects to be able to enforce a judgment." [40]

Moreover, in *Owens Bank Ltd v Bracco*[41], Lord Bridge of Harwich (with whom Lord Griffiths, Lord Goff of Chieveley and Lord Browne-Wilkinson agreed) held that the *Aboulouff* meaning of the expression 'fraud' applied *mutatis mutandis* to the identical, but undefined, term in the Foreign Judgments (Reciprocal Enforcements) Act 1933 (UK) on the basis that such was Parliament's intention. Having reached this conclusion his Lordship then refused to entertain the invitation extended to him to overrule *Aboulouff* in light of the present, dramatically changed, international legal context, for fear that to do so result in a chasm opening up between the common law and statutory tests. His Lordship said in this respect that:

"I recognise that, as a matter of policy, there may be a very strong case to be made in the 1990s in favour of according to overseas judgments the same finality as the courts accord to English judgments. But enforcement of overseas judgments is now primarily governed by the statutory codes of 1920 and 1933. Since these cannot be altered except by further legislation, it seems to be out of the question to alter the common law rule by overruling *Aboulouff v Oppenheimer & Co* and *Vadala v Lawes*. To do so would produce the absurd result that an overseas judgment creditor, denied statutory enforcement on the ground that he had obtained his judgment by fraud, could succeed in a common law action to enforce his judgment because the evidence on which the judgment debtor relied did not satisfy the English rule. Accordingly the whole field is effectively governed by statute and, if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it." [42]

While his Lordship's concern regarding a potential disparity between the common law and statutory tests is *pro tanto* valid, again it is difficult to argue with Nygh and Davies when they submit that "[t]he statutory provision to which his Lordship referred does not define the word 'fraud.' It can be given any meaning the court chooses. It is clear that it should have the same meaning as at common law, and if the House had reversed the previous decisions of the Court of Appeal, the very basis for giving the statutory provision the wider meaning would have gone." [43] Nonetheless, on the strength of this authority it is likely that a similar process of reasoning would apply to s 7(2)(a)(v) of the FJA, which dictates that registration of a foreign judgment may be set aside on the basis that "the judgment was obtained by fraud."

Interestingly, however, Parker LJ in the Court of Appeal below in *Owens Bank* clarified somewhat the jurisprudential foundation of the rule by rejecting [44] as "unconvincing" the reasoning in *Aboulouff* to the effect that the findings of the foreign court were not being re-opened. Rather, his Lordship proffered the view that, with the shift in the mid-nineteenth century from judicial comity to the "doctrine of obligation" as the rationale of enforcement, "[i]t followed that anything which may properly be held to negative that obligation was a defence to the action upon the judgment." [45] While attractive to a certain degree, his Lordship did acknowledge the persuasive submission to the contrary, namely that if the foreign court is deemed capable of deciding every other issue of fact or law raised in the proceedings then why is the same deference not shown in respect of questions of fraud?

However it must be noted that one exception to the *Aboulouff* rule has developed in England, being where the judgment debtor has already moved to have the foreign court set aside its judgment on the basis of fraud by making a fresh application to that effect. In *House of Spring Gardens Ltd v Waite & Ors*[46], the plaintiffs obtained judgment in the Republic of Ireland in a matter relating to breach of copyright and the failure to pay royalties in respect of the manufacture and sale of bullet-proof vests. Subsequently the defendants commenced fresh proceedings in that jurisdiction seeking to avoid the judgment on the ground that it had been obtained by fraud, a claim that was dismissed after a protracted hearing. Subsequently again the plaintiffs commenced the subject enforcement proceedings in the High Court, to which the defendants set up the defence of fraud on the basis that the *Aboulouff* rule permitted the English court to examine the matter *de novo*. While regarding himself bound by that line of authority, despite it having been "decided at a time when our courts paid scant regard to the jurisprudence of other countries", Stuart-Smith LJ was prepared to distinguish it and declare that the defendants were estopped from alleging fraud in the Irish proceedings as a defence to enforcement. His Lordship said:

"in my judgment the scope of these decisions should not be extended, and they are clearly distinguishable. In none of these cases was the question, whether the judgment sued upon here was obtained by fraud, litigated in a separate and second action in the foreign jurisdiction. Unless Egan J's decision is itself impeached for fraud, it is conclusive of the matter thereby adjudicated upon, namely, whether Costello J's judgment was obtained by fraud." [47]

It is submitted that in reaching this conclusion Stuart-Smith LJ was, with respect, entirely correct. As discussed above, the jurisprudential rationale of the *Abouloff* rule is that the enforcing court is not re-hearing matters already put to the foreign court but is, rather, entertaining an entirely new claim; namely, whether the foreign court was defrauded. In the Waite context, however, such logic is deprived of whatever logic it was initially seized, as the question of whether the foreign court was defrauded has been subject to subsequent consideration.

In other common law jurisdictions the rule has received a mixed reception; whereas it has been applied in New Zealand, [48] the Canadian courts have long treated fraud in overseas proceedings consistently with that in domestic. [49] Specifically in Australia, however, a conflict of authority exists and the matter still awaits, some 120 years after the decision in *Abouloff*, determination at appellate level.

In *Keele & Anor v Findlay & Anor* [50], the plaintiffs sued in the Superior Court of Arizona for the recovery of moneys due under a promissory note made by the defendants in respect of the assignment of rights under an agricultural lease. Judgment was obtained by the plaintiffs, who then commenced the subject enforcement proceedings in New South Wales; in reply, the defendants asserted that the Arizona judgment was tainted by fraud in the form of perjured evidence, with the *Abouloff* rule permitting them to advance this submission in the absence of fresh evidence. Rogers CJ Comm D began by citing the principles outlined by Kirby P in *Wentworth v Rogers* (No 5) respecting the setting aside of local judgments on the basis of fraud and noted that: "If I may say so, the considerations which informed the principles relating to domestic judgments ... should, on the face of it, have equal application to foreign judgments. Yet that is certainly not the law in England today." [51] Noting the long line of Canadian authority at divergence from *Abouloff*, the lack of binding Australian authority, the preponderance of academic opinion and the need to avoid legal "error" being "transplanted into this country in a matter of such importance in the administration of justice", his Honour thereby refused to follow the English authorities. His Honour said:

"I can do no better than to say that all the considerations enumerated by Kirby P in *Wentworth v Rogers* (No 5) as justifying the law's approach to local judgments, cry out for the same approach to be taken in relation to foreign judgments. With very great respect, it seems to me, odd to say the least, that on the one hand, local courts should grant a stay of proceedings in their courts, and send the litigants to a foreign court, and at the same time, arrogate to themselves the right to re-try an issue determined by the foreign judge, simply on the basis that the local court may be more skilful in detecting perjury than was the foreign judge. It is accepted, on all hands, that, whatever errors of fact, or law, the foreign court may commit, its judgment is conclusive. I can detect no difference in principle between a grossly erroneous finding of fact and an incorrect conclusion that a person is telling the truth. Yet under the law of England, the resultant foreign judgment cannot be challenged in the first case, but grounds a permissible argument of fraud in the latter. The principle of enforcement of foreign judgments calls for self denial in those circumstances." [52]

It is submitted that, with respect, the judgment of Rogers CJ Comm D was entirely correct in both law and principle, commensurate with the public interest in both the finality of litigation and the reciprocal enforcement of foreign judgments, and at variance with no authority binding upon his Honour. Moreover, it is perhaps unsurprising that a commercial judge proved so willing to depart from such a weighty line of English precedent in this regard, given the detriment that the *Abouloff* rule has the potential to wreak in the modern international commercial context.

Unfortunately, however, subsequent decisions in this country have not proved so willing to diverge from the English approach. In *Close v Arnot*, [53] the defendant, an Australian resident, was served with process while on a brief holiday to New York and failed to appear on the basis that he could not afford to pay for representation in that jurisdiction. Accordingly, the defendant obtained judgment by default and then commenced enforcement proceedings in New South Wales, which the defendant sought to resist on the ground that the New York judgment was obtained by perjured evidence. While Graham AJ did not find it necessary to directly consider the status of *Abouloff* in Australia as fresh evidence of fraud sufficient to meet the domestic threshold was presented, his Honour said:

"If it were necessary for me to do so I would distinguish *Keele v Findley* and find that the English rule continued to apply in New South Wales in respect of actions to enforce judgments obtained in undefended proceedings in a foreign court where the defendant has, for good reason, been unable to meet the plaintiff's case in that court. In such circumstances, it does not seem to me that one can say that a defendant has colluded in the deception of the foreign court by refraining from taking exception to the evidence presented against him and later attacked by him as being fraudulent. He could not be said to have improperly "kept his complaint in reserve". [54]

With respect, it is not immediately apparent what his Honour meant by stating that the English rule "continued" to apply in Australia, given that no authority has directly adopted it and Australian courts are not bound by the decisions of their English counterparts.

Next, Dunford J in *Yoon v Song*[55] expressed similar sentiments to Graham AJ in *Close v Arnot*, although again finding it unnecessary to decide the matter for the same reason as in that latter case. His Honour said:

"Notwithstanding the various criticisms that have been made of the *Abouloff* rule, I am satisfied that it correctly states the law in relation to foreign judgments and that if such law is to be changed, it should be by parliament and not by the courts. Consequently I am not satisfied that *Keele v Findley* was correctly decided. Indeed the facts of this case demonstrate in my mind good reason for applying a different test of fraud in respect of foreign judgments to that applied in respect of domestic judgments; although for reasons which appear hereunder I am also satisfied that even if the domestic judgment test were applied, the defendant would satisfy that test in the present case." [56]

It is perhaps instructive to note that this case, like *Close v Arnot*, involved an Australian resident sued in an overseas jurisdiction at great cost and expense.

In conclusion, it must be said to be beyond doubt that the *Abouloff* rule should not be considered to have the status of law in Australia. Decisions of English courts, while persuasive, do not have binding effect on Australian courts unless adopted at appellate level; moreover, the only local authority in which the question has formed part of the ratio of the decision is *Keele v Findley*. As a matter of principle, therefore, it is submitted that the rule should be resoundingly rejected as being of no utility or intellectual validity in contemporary Australian jurisprudence. Certainly, as manifested in *Close v Arnot* and *Yoon v Song*, there is scope for concern that applying the domestic rule to the foreign judgment context might lead to unjust results if a local defendant is unable to mount a defence, or a sufficient defence, in foreign proceedings due to considerations of cost and expense. However, this approach is somewhat incongruous when it is considered that all other questions of fact and law- such as rights and obligations under a contract or whether a civil wrong was committed- are considered to be the sole preserve of the foreign court. What is the distinction, for instance, between a foreign court erroneously holding that a certain misrepresentation had been made because the defendant was inadequately represented and an erroneous decision that a certain witness was telling the truth? On the same reasoning but in the obverse, moreover, there is the issue of the injustice to a foreign judgment creditor forced to re-litigate factual questions in Australia potentially without the benefit of full representation in view of its cost. And, finally, the rule is manifestly at variance with the need for finality of litigation in the modern commercial context, potentially forcing parties to go to the time and expense of litigating the same factual questions twice and standing as an incentive for defendants to strategically 'reserve' questions of fraud for airing in subsequent enforcement proceedings.

ff) Defence to enforcement two: denial of natural justice

At both common law and under the FJA it is a defence to enforcement that the foreign judgment was obtained in circumstances which involved a denial of natural justice, arising where no opportunity was afforded the defendant to present his or her case to an impartial tribunal or where sufficient notice of the proceedings was not provided.⁵⁷

gg) Defence to enforcement three: contrary to public policy

As opposed to the defence of denial of natural justice, which relates to questions of the procedural fairness of the foreign court, the defence that the enforcement of a foreign judgment would be contrary to the public policy of the forum turns on the repugnancy of the foreign substantive law rather than the facts of a particular matter. As a result this defence has been subject to little consideration in the authorities, with the sole recent decision involving the House of Lords refusing to give effect to an Iraqi law "wholly alien to fundamental requirements of justice as administered by an English court" in its effect of dissolving by decree a Kuwaiti government agency and divesting it of all its property.^[58]

2. Observations on the Present System

In light of the above discussion, the following observations can be made.

First, while the very purpose of the FJA was to cover the field of foreign judgment enforcement and thereby streamline the existing common law procedure, judgments from only a fraction of jurisdictions worldwide fall under its aegis. Although, of course, while the failure to take a multilateral approach in this area is not entirely the responsibility of Australian legislators, the fact that judgments from some of Australia's most important trading partners are not encompassed by the FJA is in urgent need of reform. Effective international commerce depends upon the swift and final resolution of disputes.

Second, enforcement at common law- which, due to the short compass of the FJA, would be the typical avenue of enforcement in Australia- entangles the foreign judgment creditor in the cost and time expense of commencing fresh proceedings in a second jurisdiction. Moreover, given the uncertain status of the *Abouloff* rule in this country, it is by no means certain that the result of such enforcement proceedings would be a *fait accompli*, involving potentially the re-litigation of questions of fact already traversed in the foreign suit.

Third, the lack of any substantial international, multilateral convention relating to the enforcement of judgments stands in dramatic contrast to the status of foreign arbitral awards. Given effect in Australia by virtue of Part II of the *International Arbitration Act 1974* (Cth), the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, to which

some 120 states are currently parties, provides for a straightforward mechanism for the enforcement of arbitral awards from Convention countries in Australia by deeming them to have the same effect as a domestic arbitral determination.

III. Conclusion

It is thus trite to suggest that the enforcement of foreign judgments is an area in critical need of reform. Clearly, to have a statutory registration mechanism so restricted in scope as to leave common law rules emanating from late eighteenth and early nineteenth century English jurisprudence as the primary basis of enforcement is not an acceptable situation, either at present or in the future. To be sure, Australia is by no means the only country in which enforcement can prove a protracted and costly exercise for foreign plaintiffs; Australian judgment creditors abroad must equally take the enforcing court as they find it, with some jurisdictions going so far as to either refuse recognition altogether (thus necessitating the relitigation of the merits) or permit substantial re-examination so as to ensure that enforcement would not be contrary to the public policy of the forum.[59] For instance in Japan, the national Code of Civil Procedure proscribes the enforcement of judgments whose content is contrary to the "public order or good morals of Japan", being a requirement which although analogous in form to s 7(2)(a)(xi) of the FJA, is in substance much broader in that it "furnishes the defendant to with a mechanism with which to force the court to re-examine many of the substantive issues" already determined in the foreign proceedings.[60] Necessarily, therefore, while the process of law reform in this area must start at the national level initially, it can by no means finish there; as was the case with the enforcement of arbitral awards and the 1958 Convention, it is not until multilateral agreement at the international level - in a manner akin to that adopted by the ALI and UNIDROIT in the formulation of their Principles and Rules of Transnational Civil Procedure - can be reached that a satisfactorily efficacious enforcement regime will be in place.

Thus from this observation, part two of this paper [61] will shift away from the existing situation to examine proposals for reform at both the municipal and international level.

END NOTES

* *Teil II folgt in Heft 4/2005 [The published version of this paper is to be found in Praxis des Internationalen Privat – und Verfahrensrechts (IPRax), issue 3, May/June 2005, s189-292, at page 273]*

** A Judge of the Supreme Court of New South Wales

*** BA (Hons), LLB (Hons). Commercial List Researcher, Supreme Court of New South Wales

1 Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws*, Thirteenth Edition, Sweet & Maxwell, London, 2000, page 469.

2 (1802) 6 Ves 714.

3 (1802) 6 Ves 714 at 730.

4 (1814) 4 Camp 28 at 30.

5 (1845) 13 M & W 628 at 633.

6 (1870) LR 6 QB 155 at 159.

7 [1990] 1 Ch 433.

8 [1990] 1 Ch 433 at 513.

9 [1990] 1 Ch 433 at 515.

10 It is settled that in determining these questions the court is to apply the conflicts rules of the forum: *Pemberton v Hughes* [1899] 1 Ch 781 at 791, per Lindley MR.

11 "The Application of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure to New South Wales" (2004) 4 Unif.L. Rev.815.

12 *The American Law Institute/UNIDROIT, The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales, Final Draft, November 2004.*

13 *Hong Kong and Macao Glass Co v Gritton* (1886) 12 VLR 128.

14 *Blair & Perpetual Trustee Co Ltd v Curran* (1939) 62 CLR 464; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

15 www.dfat.gov.au/trade/

16 *Huntington v Attrill* [1893] AC 150. This proposition has recently been confirmed and elaborated upon by the New South Wales Court of Appeal. In *European Bank Ltd v Citibank Ltd* [2004] NSWCA 76 a debt owed by the respondent to the appellant, effected by the deposit of funds between the parties' corresponding banks in New York, was governed by

the law of New South Wales and subject to a force majeure clause. Upon the attachment of the deposit monies in New York by order of the US District Court, the respondent sought to resist enforcement proceedings in New South Wales by invoking that clause. Inter alia, the Court of Appeal rejected this defence on the basis that to do so- in the absence of express contractual stipulation that the debt was to be satisfied by repayment of the New York funds specifically- would be to enforce a warrant issued under a foreign penal law.

17 *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] 1 All ER 292.

18 *Oppenheimer v Cattermole* [1976] AC 249.

19 *Huntington v Attrill* [1893] AC 150. The question of what constitutes a foreign 'public law' for these purposes was recently considered by the New South Wales Court of Appeal in *Evans v European Bank Ltd* [2004] NSWCA 82. In that case, the Court discarded the previous rule, derived from *Huntington v Attrill*, that a public law in this context is one enacted to serve interests peculiar to government and enforced at the suit of the state. Rather, it held that whether a statute serves a governmental interest such as to be unenforceable in a foreign court turns on the 'scope, nature and purpose of the particular provisions being enforced and the facts of the case.' The mere fact that a foreign law serves a public interest and is enforceable by the state as moving party does not, without more, bring it within the scope of this exclusionary rule. Thus in this case the Court was prepared to entertain proceedings commenced by a company receiver appointed pursuant to an order of the US District Court, at the suit of the US Federal Trade Commission, for the disgorgement of fraudulently obtained funds deposited with the respondent bank. While the US law effectively being enforced certainly served a public interest- consumer protection- it was not a 'public law' protecting governmental interests as such, given that the funds disgorged were principally to be applied to the repayment of defrauded consumers.

20 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd (No 2) (the 'Spycatcher Case')* (1988) 165 CLR 30.

21 *Oppenheimer v Cattermole; Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 3 All ER 209. See *Government of the USA v Montgomery (No 2)* [2004] 1 WLR 2241 for a recent consideration by the House of Lords of the interaction between the enforcement of foreign confiscation orders in the United Kingdom, pursuant to the *Criminal Justice Act 1988* (UK), and that country's obligations under the *Human Rights Act 1998* (UK).

22 With the exception of judgments in respect of New Zealand or Papua New Guinea income tax.

23 (1980) 144 CLR 565 at 572-573.

24 *Herman v Meallin* (1891) 8 WN (NSW) 38 (natural persons); *Adams v Cape Industries Plc* [1990] Ch 433 (corporations).

25 *Vogel v R & A Kohnstamm Ltd* [1973] QB 133.

26 Note, however, that s 7(5) is in similar terms to s 11 in dictating that a voluntary appearance will be insufficient unless unconditional.

27 *Castrique v Imrie* (1870) LR 4 HL 429; FJA s 5(4)(a).

28 *Schnabel v Lui* [2002] NSWSC 15; FJA s 5(5).

29 (1986) 6 NSWLR 534 at 538.

30 (1986) 6 NSWLR 534 at 539.

31 (1986) 6 NSWLR 534 at 538.

32 (1882) 10 QBD 295.

33 Collins (ed), *Dicey and Morris on the Conflict of Laws*, page 519.

34 (1986) 6 NSWLR 534 at 541.

35 (1882) 10 QBD 295 at 300.

36 (1882) 10 QBD 295 at 302.

37 *P.E. Nygh and Martin Davies*, *Conflict of Laws in Australia*, Seventh Edition, LexisNexis Butterworths, Sydney, 2002, page 190.

38 (1890) 25 QBD 310 at 316-7.

39 [1990] 1 QB 335.

40 [1990] 1 QB 335 at 344.

41 [1992] 2 AC 443.

42 [1992] 2 AC 443 at 489.

43 *Nygh and Davies*, Conflict of Laws in Australia, page 191.

44 [1992] 2 AC 443 at 466.

45 [1992] 2 AC 443 at 457.

46 [1991] 1 QB 241.

47 [1991] 1 QB 241 at 251.

48 *Svirkis v Gibson* [1977] 2 NZLR 4 at 10, per Cooke J.

49 *Jacobs v Beaver* (1908) 17 OLR 496 at 506, per Garrow J.

50 (1990) 21 NSWLR 444.

51 (1990) 21 NSWLR 444 at 449.

52 (1990) 21 NSWLR 444 at 458.

53 Unreported, Supreme Court of New South Wales, Graham AJ, 21 November 1997, BC9706194.

54 BC9706197 at 22.

55 (2000) 158 FLR 295.

56 (2000) 158 FLR 295 at 300 [22].

57 *Adams v Cape Industries plc* [1990] Ch 433; FJA s 7(2)(a)(v).

58 *Kuwait Airways Corp v Iraqi Airways Corp & Anor* [2002] UKHL 19 at [16], per Lord Nicholls. See also FJA s 7(2)(a)(xi).

59 See generally: Australian Law Reform Commission, *Legal Risk in International Transactions*, Report No 80, 1996, pages 157-8.

60 See: Leif Gamertsfelder, "Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Money Judgments in Japan" (1998) 17 *Australian Bar Review* 161.

61 *Einstein/Phipps*, IPRax 2005, Heft 4.

The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales

The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales*

Clifford R. Einstein** / Alexander Phipps***

While recent decades have witnessed a burgeoning interdependence of national and regional economies, international commercial litigation remains fraught with legal risk. In contrast to the situation concerning the international harmonisation of substantive law, rules of civil procedure in many jurisdictions remain characterised by idiosyncrasies that, while understandably reflecting local legal cultures, present significant obstacles to the unwary foreign litigant. This paper will examine the recent adoption and promulgation by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) of model *Principles of Transnational Civil Procedure* to apply to international commercial litigations, accompanied by *Rules of Transnational Civil Procedure*, reproduced in a Reporters' Study,[1] and their congruence with the existing procedures of the New South Wales Supreme Court. It concludes that, given the extent of the similarities with the ALI / UNIDROIT *Principles*, as well as with the *Rules*, the procedural law of that State is already at the forefront of the shift towards greater international uniformity.

I. - INTRODUCTION : ALI AND UNIDROIT - A JOINT VENTURE

The American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) *Principles of Transnational Civil Procedure* (November 2004) (hereinafter: the *Principles*) and the *Rules* contained in the Reporters' Study seek to correct the imbalance that has emerged in recent decades between the harmonisation of the *substantive* private law applicable to manifold international commercial transactions as compared to *procedural* law in the same area. [2] More specifically:

The *Rules*' purpose is primarily to provide an efficient and fair procedure for transnational cases. The authors' intent is for the draft *Rules* to apply in ordinary national courts, replacing domestic procedural rules whenever the plaintiff and defendant are nationals of different States or whenever property in one State is subject to claims (ownership or security interests) asserted by a party from another State. In such transnational cases today, one of the hardships - and hence one of the risks of international commerce - occurs when a party is forced to prosecute or defend its interests under a foreign procedural system containing elements that seem arbitrary or unfair.[3]

The legal basis for this dilemma is the axiom of the conflict of laws that, while contractual parties are at liberty to choose the substantive "governing" or "proper" law of their agreements,[4] "litigants who resort to a court to obtain relief must take the court as they find it" [5] in the sense that the procedural rules of the *lex fori* will always be applicable regardless of the transnational nature of the dispute. Further, and travelling beyond mere legal considerations, the drafters have suggested that the sluggish harmonisation of procedural law might be due to the "assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems." [6] Support for this hypothesis is readily available in practice, epitomised by the current state of foreign judgment enforcement law.[7] Notwithstanding rigorous attempts over the last decade to conclude a comprehensive, truly international treaty concerning the enforcement of foreign judgments, entrenched national and regional traditions concerning, principally, the acquisition and exercise of jurisdiction have ensured that the project remains incomplete. Mired in what might be deemed 'arbitrary' or 'unfair' procedural idiosyncrasies, the law in this area stands as a perfect illustration of the imperative of international procedural harmonisation such as that attempted by the new ALI / UNIDROIT instrument.

Whatever the cause, it is evident that the legal risk posed by foreign litigation governed by unfamiliar foreign procedure represents a major contributing factor to the popularity of arbitration - on 'neutral' territory and in accordance with procedures chosen by the parties - as an alternative means of settling international commercial disputes. For Alan REDFERN and Martin HUNTER, a fundamental advantage held by international arbitration over litigation is that:

Procedures can be adapted to fit the dispute, rather than the dispute being made to fit the available procedures, like a guest in some Procrustean Inn. Different disputes call for different approaches. For instance, in a dispute over intellectual property rights, the arbitral tribunal might find it appropriate to order fairly extensive disclosure of documents (under an appropriate protective order) and to administer interrogatories - an approach which would almost certainly be out of place in, say, a dispute over a failure to make payments under a joint venture agreement.[8]

Similarly expressed by Professor Herbert KRONKE, Secretary-General of UNIDROIT:

All bodies of rules of civil procedure, codified and judge-made alike, are based on the implicit assumption that both parties are residents of the forum State and familiar with its courts' ways of

handling disputes. Increasingly, this is not the case as either one or even both parties are foreigners. This may result in an efficiency gap and a fairness gap. International arbitrators are used to this situation and ... routinely remedy undesirable consequences by modifying and adapting existing rules of procedure or by designing new rules with a view to accommodating the peculiar needs of transnational dispute resolution. Judges do not have the freedom to react creatively to this type of peculiarity of a case brought before them.[9]

Indeed, it is critical to note that ALI and UNIDROIT, with cognisance of the drawbacks of litigation in the international commercial context, do not envisage that even the extensive acceptance and adoption of the *Principles* or of the *Rules* will usurp the present fact that "arbitration has become the dispute-settlement mechanism of choice in international transactions." [10] Rather, "some cases will always find their way into the courtroom, and the authors' design provides greater procedural fairness in these situations." [11]

II. - BEYOND THE CIVIL/Common LAW DICHOTOMY : FUNDAMENTAL PROCEDURAL PRINCIPLES

Accordingly, the *Principles* seek to combine features of both the civil and common law arms of the Western legal tradition commensurate with this harmonising function. As such, given that United States civil procedure, while falling within the general aegis of the common law tradition, is unique in having (inter alia) broad oral and documentary discovery, 'notice' rather than 'fact' pleading and jury trial, [12] the idiosyncrasies of that procedure have been jettisoned so as to maximise the potential for the *Principles* to be accepted throughout disparate national legal systems. With these aspects of the US system aside, the "fundamental similarities among procedural systems" [13] discerned by the authors and with which the *Principles* deal cover areas including jurisdiction, commencement, pleadings, interlocutory orders and privilege.

As regards the *Rules*, it is important to note that their level of prescription must be read in conjunction with the *Principles*, with the relationship between the two instruments being that the "*Rules* as currently drafted are one example of how the *Principles* may be translated into the language of and made operational in one specific legal environment." [14] Given that, as recently identified by Professor KRONKE, that environment is a common law jurisdiction such as the United States [15] (and, by extension, Australia), it is submitted that the *Rules* rather than the *Principles* provide a substantially more certain and quantifiable basis upon which the feasibility of Australian participation in the ALI / UNIDROIT initiative can be analysed. Moreover, the presentation of abstract principles in addition to definite rules is consistent with the ALI and UNIDROIT's 'soft-law approach' [16] to harmonisation, involving the formulation of aspirational standards at the global level so as to avoid tension or direct conflict with more prescriptive regional provisions (such as those formulated by the EU or NAFTA). As Australia does not appear at present to be a member of any such comparable regional organisation, debate therefore need not remain in the abstract. A more comprehensive summary of the *Rules*, in tabular form, is attached as an appendix to this paper.

III. - A NEW SOUTH WALES PERSPECTIVE

In a 2001 paper addressing the potential incorporation of the *Rules* into Australian procedural law, Justice Bryan BEAUMONT of the Federal Court of Australia suggested that an "exploration of the relativities" demonstrates that "relevant Australian jurisdictions should have no real difficulty in accommodating the Draft *Principles* [upon which the *Rules* are based]." [17] With his Honour referring the reader to relevant provisions of the *Federal Court Rules* as an example of Australian domestic practice, the basis of this conclusion is the general similarity between the procedures required by the *Rules* and those already prescribed in most domestic superior court jurisdictions.

Indeed, with one exception in respect of the acquisition and exercise of jurisdiction (as discussed below), it is submitted that this conclusion particularly follows in respect of the existing procedures of the Supreme Court of New South Wales (hereinafter: the SCRs) and those dictated by the *Rules*.

Definition of 'commercial' for the purposes of the *Rules*

Rule 2.1 dictates that "these *Rules* apply to disputes arising from transnational commercial transactions", with the 'transnationality' of the dispute determined by reference to the habitual residence of the parties, the location of property within the forum or the submission to arbitration in the forum. However, the expression 'commercial' is not subject to further definition, notwithstanding the fact that the commentary to the *Principles* states that the "adaptive document may include a more specific definition of 'commercial'." [18] In the New South Wales context, no difficulty would be posed in formulating such a definition so as to restrict proceedings to which the *Rules* apply to genuinely commercial matters, given that the New South Wales Supreme Court has, since the passage of the Commercial Causes Act 1903, been seised of a specialist commercial jurisdiction as a "direct progenitor" of the Commercial Court established in London eight years earlier.[19] Now, pursuant to SCR Pt 14 r 1(1), entry into the present Commercial List is conditional upon the relevant proceeding "arising out of trade or commerce" or being one "in which there is an issue that has importance in trade or commerce", in the sense that it "can be recognized as something which forms part of, or is an essential incident of, the commercial activities of the community." [20] In addition, Practice Note 100, which governs all proceedings commenced in or transferred to the List, contains procedural rules tailored specifically to the commercial context so as to further ensure the "just, quick and cheap resolution" of disputes arising therein (SCR Pt 1 r 3(1)). As stated in the commentary to the *Rules*:

Typically it would be convenient that a specialized court or division of court be established in a principal commercial city, such as Milan in Italy or London in the United Kingdom. Committing disputes under these rules to specialized courts would facilitate development of a more uniform procedural jurisprudence.[21]

In the Commercial List of the New South Wales Supreme Court, therefore, one has precisely such a specialised court in precisely such a regional commercial centre, whose existing procedures have long recognised the practical need to manage and dispose of commercial proceedings in a manner sensitive to the particular needs of litigants in that context.

Acquisition and exercise of jurisdiction : the problem of 'exorbitant' jurisdiction

On their face, the manner in which the jurisdiction of the court may be established in international disputes varies markedly between that set out in Rule 4 and that in Pt 10 r 1A of the SCRs. The starting point of Rule 4 is that a "substantial connection" must be established between the defendant and the forum before jurisdiction is *acquired*, on the reasoning that subjecting defendants to the coercive powers of the court on the basis of mere presence (or 'tag jurisdiction' as it is known in the United States) represents a denial of procedural fairness to litigants conducting the majority of their business elsewhere. Moreover, that substantial connection must relate to the transaction the subject-matter of the dispute specifically rather than to the forum at large. As stated by the commentary to the *Rules*:

The standard of "substantial connection" has been generally accepted for international legal disputes. Administration of this standard necessarily involves elements of practical judgment and self-restraint. That standard excludes mere physical presence, which within the United States is colloquially called "tag jurisdiction." Mere physical presence as a basis of jurisdiction within the American federation has historical justification that is inapposite in modern international disputes. The concept of "substantial connection" may be specified and elaborated in international conventions and in national laws. The scope of this expression might not be the same in all systems. However, the concept does not support general jurisdiction on the basis of "doing business" not related to the transaction or occurrence in dispute.[22]

Most prominent among the international instruments adopting the 'substantial connection' approach to the acquisition of jurisdiction are the European Union's *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* 1968 (hereinafter: the *Brussels Convention*) and the substantially similar *Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* 1988, which "lay down a very elaborate system of jurisdictional rules, to which the court in which the original action is brought must adhere." [23] Taking the Brussels Convention as an example, in civil and commercial matters (Article 1) the basic principle is that persons "domiciled" in one Contracting State may be sued in the courts of that State, regardless of nationality (Article 2). Persons domiciled in a Contracting State may, however, only be sued in personam in the courts of another Contracting State when a connection exists between that defendant and that forum in the manner of (*inter alia*):

- (a) Where a contract the subject of the dispute is or was to be performed in the forum (Article 5(1)).
- (b) When a harmful event the subject of an action in tort or delict occurred in the forum (Article 5(5)).
- (c) Where there are multiple defendants, when one of those defendants is domiciled in the forum (Article 6(1)).

In addition, special provision is made for the acquisition of jurisdiction in matters relating to insurance (Articles 7-12a), consumer contracts (Articles 13-15) and in rem jurisdiction when immovable property is located within the forum (Article 16).

It is thus from a similar conception of the permissible reach of the 'long arm' (or 'exorbitant') jurisdiction of the courts of the forum that Rule 4 provides for the acquisition of in personam jurisdiction over defendants who are not "habitual residents" (Rule 4.2.2) of that place in situations where (*inter alia*):

- (a) the defendant consents to the acquisition of jurisdiction (by, for example, voluntary appearance) (Rule 4.2.1);
- (b) the defendant is a company or other jural entity that is incorporated or has its "principal place of business or administrative headquarters" in the forum (Rule 4.2.3);
- (c) the defendant has or has agreed to provide goods and services in the forum and the dispute concerns that transaction (Rule 4.2.4.1); and
- (d) the defendant has committed "tortious conduct" in the forum, or conduct having "direct effect in the forum" (Rule 4.2.4.2).

Indeed, the acquisition of in personam jurisdiction based upon the mere presence of the person is permissible only when "no other forum is reasonably available" (Rule 4.4). Like the Brussels Convention, however, in rem jurisdiction is enlivened when the proceedings concern claims for an interest in property located in the forum (Rule 4.3).

In contrast, the fundamental means of enlivening the jurisdiction of Australian superior courts remains that of service within the forum, notwithstanding the existence or otherwise of any further relevant connection other than the fact of that presence. As stated by DIXON CJ, WILLIAMS and WEBB JJ in *Laurie v Carroll*:^[24]

In the case of personal service within the jurisdiction of a writ of summons in an action in personam the view seems to be accepted that it is enough that the defendant is present in ... [the forum] at the time of service. It does not matter why, so long as he has not been enticed there fraudulently for the purpose. It does not matter whether he is a foreigner or a subject of the Crown. It does not matter how temporary may be his presence, how fleeting may be his visit.

Indeed, in one famous case, service on a defendant present in England for a weekend at the Ascot races was held to be effective regardless of the lack of any other connection between the forum and either the defendant personally or the transaction the subject of the dispute.²⁵ Accordingly, it is only when it becomes necessary for service to be effected overseas that any consideration of a 'substantial connection' between the defendant, the dispute and the forum is raised. Pursuant to SCR Pt 10 r 1A, service of originating process out of the New South Wales Supreme Court may take place outside Australia when the proceedings are founded on or in respect of (*inter alia*):

- (a) a "cause of action arising in the State", such as promissory estoppel or misleading and deceptive conduct under the Trade Practices Act 1974 (Cth) (r 1A(1)(a));
- (b) a contract made, governed by the law of or breached in the State (r 1A(1)(c)(i), (iii) and (iv));
- (c) a tort committed in the State (r 1A(1)(d));
- (d) damage suffered in the State in respect of a tortious act or omission, wherever occurring (r 1A(1)(e));
- (e) a defendant who is domiciled or ordinarily resident in the State (r 1A(1)(g)); or
- (f) a defendant who has agreed to submit to the jurisdiction of the court (r 1A(1)(h)).

Moreover, there is no requirement in the SCRs for leave to be obtained prior to process being served overseas, although of course the defendant may apply (without appearing such as to constitute voluntary submission) to have the service set aside on the ground of want of jurisdiction: SCR Pt 10 r 6A(1). In such applications, the onus remains on the plaintiff to demonstrate that there are jurisdictional grounds upon which the service can be said to be effective.^[26]

In terms of foreign legal persons, such entities will be 'present' within the jurisdiction for the purposes of service when they have either registered under the *Corporations Act 2001* (Cth) as a foreign corporation and have a registered office within the forum (*Corporations Act* s 601CX), or when they have been 'carrying on business' within the jurisdiction, either directly or via an agent, at a fixed address and for a sufficiently substantial period of time.^[27] Critically, the carrying on of business sufficient to establish the presence of a foreign corporation need not be in relation to the particular transaction the subject of the proceedings, contrary to the intent of the *Rules*.

The doctrine of forum non conveniens

Thus there exist significant and quite essential differences between the approach to the acquisition of jurisdiction in international disputes under the *Rules* and the SCRs respectively. With mere presence sufficient and an expansive long arm jurisdiction in place, the New South Wales Supreme Court is potentially seised of territorial jurisdiction over persons or companies with only the remotest factual nexus with the forum, leading to potential litigation in an alien procedural environment in precisely such a manner as the *Rules* are intended to avoid. Certainly, the conflict of laws doctrine of *forum non conveniens* applies in Australia in an almost identical manner as to that specified in Rule 4.6.2, being that the court should refuse to exercise jurisdiction when it determines that it is a "manifestly inappropriate forum relative to another forum that could exercise jurisdiction." As dictated by the *High Court in Voth v. Manildra Flour Mills*, an Australian court will refuse to exercise jurisdiction over a foreign defendant when it is a "clearly inappropriate forum" for the resolution of the dispute, in the sense that the continuation of the proceedings would be "vexatious or oppressive" to the defendant having regard to the factual nexus between him, her or it and the forum (such as the location of witnesses, the parties' usual place of business, the expense of the proceedings, and so forth). Importantly in the interests of unification, this test appears on its face to reflect far more closely the 'manifestly inappropriate' formulation of the *Rules* when compared to the test presently applicable in the United Kingdom, being that a court will refuse to exercise jurisdiction when there is a "clearly or distinctly *more* appropriate forum" available for the resolution of the dispute.^[28]

However, it must be recalled that were proceedings to be conducted pursuant to the *Rules*, the doctrine of forum non conveniens would be of no relevance to a foreign defendant until a connection with the forum substantial enough to acquire jurisdiction as per the dictates of Rule 4 had been established. That is to say, whereas under the *Rules* the appropriateness of the forum as a venue for the resolution of the dispute is a consideration in respect of both the acquisition and exercise of jurisdiction, under present New South Wales procedures the appropriateness of the forum is applicable only to the latter question. Bearing in mind that the *Rules* apply exclusively to international commercial proceedings, a situation wherein entities with even the slightest of presences within the forum must expend time and money contesting jurisdiction, does not appear to be consistent with the goals of reducing the occurrence of disputes governed by unfamiliar procedures and making litigation a less onerous financial burden when compared to arbitration. As such, even if the adoption of the *Rules* (or procedures to the same effect) is perceived as a longer term project, the question of jurisdiction deserves attention as an issue in itself.

Formalised settlement machinery

Rule 16 sets out a formal mechanism for the exchange of offers and counter-offers of settlement between the parties before the final hearing of a matter, aimed at "encouraging compromises and settlements" and deterring parties from "pursuing or defending a case that does not deserve a full and complete proceeding." [29] The salient aspects of this procedure allow for either party to deliver an offer of settlement that must remain open for 60 days (Rule 16.1), within which the offeree may accept, reject or proffer a counter-offer that must itself remain open for 30 days (Rule 16.2). Such communications are on a strictly without prejudice basis (Rule 16.4) save as to the imposition of cost sanctions if the offeree fails to obtain a final judgment more advantageous than the relevant proposed settlement; Rule 16.5 provides that "[n]ot later than [30] days after notice of entry of judgment, a party may file with the court a declaration that such an offer was made but rejected."

Similarly, in 1989 Division 1 of Part 22 of the SCRs was amended to provide for a very similar mechanism to that envisaged by Rule 16, replacing the old 'payment into court' practice whose utility suffered from the fact that, inter alia, offers of settlement were available only to defendants (contra the present r 2), payment of moneys or security was required immediately upon the making of the offer (contra r 4) and the acceptance of the offer led only to a stay of proceedings rather than the opportunity to enter judgment accordingly (contra r 3(9)). As noted by the commentary to the *Rules*, procedures in the nature of Rule 16 and Part 22 of the SCRs are at variance with normal practice "in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party." [30] In a commercial context characterised by a need for speed and cost efficiency in the disposal of litigation, however, such a 'carrot' and 'stick' [31] approach to the settlement of proceedings is particularly apt.

The reception of expert evidence

Rule 26, dealing with the manner in which expert evidence is to be received by the court, is significantly at variance with established practice in the common law world in deploying the civil law's preference for court rather than party-appointed experts. Moreover, the appointment of such an expert may be of the court's own motion in addition to that of the parties'. *Rules* 26.1 and 26.2, the operative provisions in this respect, are expressed in the following terms:

26.1 The court must appoint a neutral expert or panel of experts when required by law and may do so when it considers that expert evidence may be helpful. If the parties agree upon an expert the court ordinarily should appoint that expert.

26.2 The court must specify the issues to be addressed by the expert and may give directions concerning tests, evaluations, or other procedures to be employed by the expert, and the form in which the report is to be rendered. The court may issue orders necessary to facilitate the inquiry and report by the expert. The parties have the right to comment upon statements by an expert, whether appointed by the court or designated by a party.

In deference to what the commentary to the *Rules* designates an "intermediate position", [32] however, Rule 26.3 facilitates the adducing by a party of expert evidence regardless of whether the court considers such evidence to be necessary.

While Part 39 of the SCRs contains a recently implemented procedure for the appointment of expert witnesses upon the Court's own motion, the anterior practice in the New South Wales Supreme Court adhered to the common law tradition of party-appointed experts. In the specific context of protracted commercial litigation concerning very technical issues of fact, however, such a procedure is replete with difficulties from both a time and cost perspective, an example of which is proffered by the commentators FRECKELTON and SELBY:

In a dispute about whether or not a computer installation is working to "as ordered" requirements, several experts may be retained by the disputing parties to report upon the components and performance of the installation. But how is the judge to choose among them? A solution is to seek the court appointment of an independent expert referee who can hear the conflicting views and then report back to the court.[33]

Indeed, such a solution is precisely what is contemplated by Part 72 of the SCRs, which provides for the reference out of any question or questions of fact and law arising in a proceeding to a referee for inquiry and report. Admittedly such procedures are far from novel in Anglo-Australian procedural law, with the *Common Law Procedure Act 1854* (UK) - an instrument whose terms were subsequently replicated in many Australian colonial jurisdictions - and the Judicature Acts of 1873 and 1875, both empowering the relevant courts to refer questions regarding (in particular) technical matters of science, local knowledge or mere account to a referee for independent determination. Introduced in 1986, however, Part 72 is unique amongst Australian jurisdictions in terms of the breadth of the power conferred upon the trial judge to appoint a referee, allowing for the reference out on a party's or the court's own motion of the whole or part of the proceedings for inquiry and report (r 2(1)). It is the trial judge's responsibility to give directions in respect of the conduct of the reference (r 8(1)), a supervisory jurisdiction is retained during the currency of the proceedings (r 9) and, once submitted, the court holds a discretion to (inter alia) adopt, vary or reject the referee's determination (r 13(1)). Accordingly, the benefits of Part 72 in commercial litigation are self-evident, avoiding in suitable proceedings the time

and expense incurred as a result of a battle between parochial, party-appointed experts and the inevitable time required by the non-expert trial judge to digest the mass of information presented. Reflecting this pragmatic utility, Practice Note 100 dictates both that the plaintiff must list on the summons any questions thought appropriate for reference (paragraph 6 [34]), a consideration which is further incumbent upon both parties during the course of the proceedings as a whole (paragraph 15).

Observations on the present state of New South Wales procedure

In summary, therefore, the reception of the *Rules of Transnational Civil Procedure* into the existing procedures of the New South Wales Supreme Court would not appear to pose any particular difficulties when compared with existing procedures. The overriding obligation of the Court in the application of its own rules, particularly in respect of matters in the Commercial List, is to "facilitate the just, quick and cheap resolution of the real issues" (SCR Pt 1 r 3), an object which is plainly on all fours with that of the *Principles and Rules* and aided by the existence of the above procedures - which are in many respects unique amongst Australian jurisdictions.

IV. - CONCLUSION

The purpose of the above conspectus has been to demonstrate that for the last two decades Australia generally and New South Wales specifically have been at the forefront of international legislative reforms designed to simplify the process of cross-border commercial dispute resolution. In the litigation context, the similarity between the ALI / UNIDROIT *Principles* and the accompanying *Rules*, and the existing procedures of the New South Wales Supreme Court, with the possible exception of the breadth of the latter's long-arm jurisdiction, is illustrative of the extent to which the latter is already cognisant of the imperative of cost and time efficiency in commercial proceedings. In addition, given this similarity and the fact that the ALI/UNIDROIT *Principles* represent a synthesis of the procedural traditions of disparate legal cultures, there is little in the practice of the New South Wales Supreme Court of such idiosyncrasy as to present to foreign litigants the procedural unfairness which this instrument seeks to minimise.

Appendix

Summary of the Rules of Transnational Civil Procedure

Rule(s)	Subject-Matter	Comment
4	Jurisdiction	Provides for the acquisition and exercise of jurisdiction over foreign defendants when there is a sufficient connection between the forum and either the transaction or the parties to it, and the exercise of same when not "manifestly inappropriate" to do so.
5 and 6	Joinder/Addition, Cross Claim/Third Party Procedure and <i>Amicus Curiae</i> Intervention	Provides for the joinder or addition of, or the commencement of cross-claim proceedings against, any person amenable to jurisdiction and 'substantially connected' to the subject-matter of the proceedings. Provision for <i>amicus curiae</i> intervention is made in anticipation of proceedings giving rise to questions of international trade custom.
7	Service of Process	Provides for the defending party to be given notice of the proceedings either by act of the moving party (as in common law systems) or the Court (as in civil law systems). The originating document must specifically advise that the <i>Rules</i> are being invoked.
9	Composition of the Court	It is left to forum law to determine the composition of the Court, thus accommodating procedural idiosyncrasies such as the civil law's preference for collegiate courts at first instance and jury trial in common law systems.
10	Impartiality of the Court	The decisional authority (judge, referee, arbitrator, and so forth) must not hear a case if there are "reasonable grounds to doubt" his or her impartiality. Parties have the right to challenge the decisional authority's ability to sit.
11, 12 and 13	Pleadings	Provides for the commencement of proceedings by statement of claim, in which the moving party must plead specifically to all material facts and (in a departure from the traditional common law position) outline both the evidence supporting those factual assertions and the conclusions of law which flow from them. Claims not traversed

		in the Statement of Defence are deemed admitted.
14	Amendments	Allows for parties to amend their pleadings when to do so "does not unreasonably delay the proceeding or otherwise result in injustice."
15	Default Judgment and Dismissal	Provides for the entry of judgment against a defending party in default of appearance or defence, or the dismissal of proceedings upon the moving party failing to prosecute with "reasonable efficiency." The entry of default judgment upon the former ground is conditional upon the court first being satisfied that it has jurisdiction over the defending party.
16	Settlement	Provides for a formalised, without prejudice offer and counter-offer procedure.
17 and 20	Coercive Interlocutory Orders	Provides for the Court, by the granting of "provisional relief", to "restrain or require conduct of a party or other person when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo."
18	Case Management	Provides for the close case management of proceedings via a series of pre-trial conferences similar to the Federal Court of Australia's 'individual docket system.' Interestingly from a common law perspective, provision is made for the Court to "[s]uggest amendment" of the pleadings and the claims therein.
21, 22 and 23	Discovery, Exchange of Evidence and Affidavits	Provides for documentary discovery, the exchange of witness proofs and the giving of evidence in chief on affidavit. Given that civil law systems have a very restricted concept of discovery, only those records that are "relevant" to the proceedings must be produced.
25 and 26	Admissibility of Evidence	Provides that relevance is to be the fundamental touchstone of admissibility, and adopts the civil law practice of Court rather than party-appointed experts.
27	Privilege	Prescribes client-legal and without prejudice privileges as of right, leaving forum law to determine the extent of any further confidentiality (for example, doctor-patient or accountant-client).
28	Burden of Proof	Provides that "[a] party has the burden to prove all the material facts that are the basis of that party's case."
29	Final Hearing	Provides for a concentrated, plenary final hearing and a right of cross-examination in the manner of common law systems. Following the civil law tradition, however, the Court as well as the parties may examine witnesses.
32	Costs	Provides that the successful party will ordinarily be entitled to an award of "all or a substantial portion" of its "reasonable costs." This is in contrast to the usual United States practice of each party bearing its own costs.
33	Appellate Review	Provides for a right of appeal against both final judgments and, with leave, interlocutory orders.
35	Domestic Enforcement	Provides that a final judgment is enforceable immediately and prescribes mechanisms by which the successful party may obtain satisfaction.
36	International Enforcement	Provides merely that "[a] final judgment in a proceeding conducted in another forum in substantial compliance with these <i>Rules</i> must be

recognized and enforced unless substantive public policy requires otherwise."

END NOTES

* The published version of this paper is to be found in *Uniform Law Review NS - Vol. IX, 2004-4*, at page 815

** A Justice of the Supreme Court of New South Wales (Australia).

*** Commercial List Researcher, Supreme Court of New South Wales (Australia).

1 The ALI / UNIDROIT Principles of Transnational Civil Procedure are reproduced in this issue of *Uniform Law Review* at 758; the Rules of Transnational Civil Procedure are reproduced as a Reporters' Study and appear in an Appendix to ALI / UNIDROIT Principles of Transnational Civil Procedure, Cambridge University Press (2005).

2 See, for example, the United Nations Convention on Contracts for the International Sale of Goods 1980, or the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary 2002.

3 Geoffrey C. HAZARD, et al, "Transnational Rules of Civil Procedure: Rules and Commentary", 30 *Cornell International Law Journal* (1997), 493 at 493-494.

4 *Vita Foods Products Incorporated v. Unus Shipping Company Ltd (in liq)* [1939] AC 277.

5 *John Pfeiffer Pty Ltd v. Rogerson* (2000) 203 CLR 503 at 543 [99], per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

6 "Introduction" in: ALI / UNIDROIT Principles of Transnational Civil Procedure, Cambridge University Press, supra note 1.

7 As recently detailed by the authors in a two-part article: "Trends in International Commercial Litigation" - Part I "The Present State of Foreign Judgment Enforcement Law"; Part II "The Future of Foreign Judgment Enforcement Law", to appear in *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, issues 3 and 4 respectively (2005).

8 Alan REDFERN / Martin HUNTER, *Law and Practice of International Arbitration*, Sweet & Maxwell, London (2003), 23.

9 Herbert KRONKE, "Efficiency, Fairness and Macro-Economic Functions: Challenges for the Harmonisation of Transnational Civil Procedure", *Unif. L. Rev. / Rev. dr. unif.*, 2001, 740 at 742.

10 HAZARD, et al, supra note 3, 493 at 494.

11 *Ibidem*.

12 "Introduction", supra note 6.

13 *Ibidem*.

14 KRONKE, supra note 9, 740 at 748.

15 *Ibidem*.

16 Herbert KRONKE, "UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions", *Unif. L. Rev. / Rev. dr. unif.*, 2003, 110 at 16.

17 Justice Bryan BEAUMONT, "The Proposed ALI / UNIDROIT Principles of Transnational Civil Procedure and their Relationship to Australian Jurisdictions", *Unif. L. Rev. / Rev. dr. unif.*, 2001, 951 at 969.

18 ALI / UNIDROIT Principles of Transnational Civil Procedure, supra note 1, paragraph P-B.

19 *Challenge Bank Ltd v Raine & Horne Commercial Pty Ltd* (1989) 17 NSWLR 297 at 299, per Rogers CJ Comm D.

20 *NRMA Insurance Ltd v Flanagan* [1982] 1 NSWLR 585 at 591, per Hunt J.

21 ALI / UNIDROIT Principles of Transnational Civil Procedure, supra note 1, paragraph R-3B.

22 *Ibidem*, paragraph P-2B.

23 Lawrence Collins (Ed.), Dicey and Morris on The Conflict of Laws, Thirteenth Edition, Volume 1, Sweet & Maxwell, London (2000), 266.

24 (1958) 98 CLR, 310 at 331.

25 Maharanee of Baroda v. Wildenstein [1972] 2 QB 283.

26 Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR, 538 at 564, per Mason CJ, Deane, Dawson and Gaudron JJ.

27 BHP Petroleum Pty Ltd v. Oil Basins Ltd [1985] VR, 756.

28 Spiliada Maritime Corp v. Cansulex Ltd [1987] AC, 460 at 477-478 [emphasis added].

29 ALI / UNIDROIT Principles of Transnational Civil Procedure, supra note 1, paragraph R-16A.

30 Ibidem.

31 Maitland Hospital v. Fisher (No 2) (1992) 27 NSWLR, 721 at 724, per Kirby P, Mahoney JA and Samuels AJA.

32 ALI / UNIDROIT Principles of Transnational Civil Procedure, supra note 1, paragraph R-26D.

33 I. FRECKELTON / H. SELBY, Expert Evidence, Looseleaf Service, The LawBook Co (2003), paragraph 1.110.

34 The same rule applies, as per paragraph 7, to the statement of defence.

Judicial Ethics [In Court perspective] - Paper 1

JUDICIAL ETHICS [PAPER 1]*

The Honourable Justice Clifford Einstein**

[The prime role of the courts is "in protecting the weak and controlling the rapacious"]^[1]

[Judging is a profession. Like any other profession, service of the community is the chief purpose of the profession but the service is of a special kind. Judging serves the community in two ways: by doing justice according to law in each case and by maintaining the rule of law in the community at large. Judging is a complex function calling for legal competence, experience of the human condition, a capacity to hear, a humanity to learn and the firmness of mind to reach and to adhere to a just conclusion. These are demanding qualifications and they can be satisfied only by judges who adhere to high standards of professional practice]^[2]

Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially"^[3]

Overview

1 The subject of judicial ethics concerns an examination of the high standards of judicial conduct necessary to the rule of law. A failure to uphold those standards will inexorably undermine the confidence of the community.

2 The Code of Judicial Ethics for Judges of the Peoples Republic of China ["the Chinese Code"] promulgated by the Judicial Committee of the Supreme People's Court of China on 18 October 2001 sets out a code in fifty carefully worded articles with the express aim of "[regulating] and [improving] the standard of judicial ethics for judges, to enhance the professional quality of judges and maintain the good image of judges and the people's court". This paper seeks to identify the principles which underlie like codes of judicial conduct in countries where the rule of law has been taken as a given for centuries. ^[4]

Power

3 A convenient starting point is to look at the matter from the perspective of power.

4 Judges exercise great power.

5 Relatively unique in all human relationships is the privilege to exercise power which will recognise or dismiss claims to rights and in dismissing such claims will often cause much suffering. The matter has been expressed as follows:

"[The judges] are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effect upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not someday depend upon a judgment. They will not wish such power to be reposed in any one whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations..."^[5]

6 Hence the study of judicial ethics is an examination of the appropriate or proper behaviour of the judges who possess this power.

7 This paper seeks:

* to examine the subject of judicial ethics from the perspective of the framework of concern;

* to travel into certain particular areas of sensitivity with the aim of giving some practical guidance as well as enlivening discussion.

8 A second paper "Judges and the people" will endeavour to more particularly focus less upon what occurs in the courtroom and more upon the parameters of concern when viewing the conduct of the Judge in his or her private capacity. For obvious reasons the topics meld seamlessly into one another so that a certain overlap cannot be avoided.

9 At the outset it is necessary to clearly and firmly make the point that there is considerable room for argument in terms of what is or is not acceptable judicial behaviour, particularly where, as is the case with any other area of human endeavour, eccentric or idiosyncratic approaches to carrying out one's task are to be expected. The richness of the law is in large part attributable to the different backgrounds and ways of thinking of judges. Professor Julius Stone wrote of the need to recognise that "any Judge's performance depends not only on his legal knowledge or skills, but also on the

adequacy of his own life experience and social knowledge." ['Social Dimensions of Law and Justice', 1996 Maitlan Publications at 686]

10 In many ways a judge must stand apart from those who are judged. However it would be wrong to suggest that judges are not entitled to enjoy the fundamental freedoms of other citizens:

"[It is appropriate that judicial officers] live, breathe, think and partake of opinions" in the real world and "continue to draw knowledge and to gain insight from extra judicial activities that would enhance their capacity to perform the judicial function"[6]

11 Hence nothing in what follows should be interpreted as suggesting that these activities should be curtailed absent a very particular situation.[7]

Procedural differences between the administration of justice in China and Australia/other common-law countries

12 Before going any further it is of course necessary to take into account procedural differences between the way in which justice is administered in Australia and other common-law countries, and the way in which justice is administered in China. Those differences may reflect in a number of ways upon any discussion of appropriate judicial behaviour.

13 Hence there will be special circumstances which may permit a particularly small court or a court which sits in an isolated location or a court such as the High Court of Australia [where members have a constitutional responsibility to sit] to act in a particular way in certain situations which otherwise could not be tolerated. In other words it may be necessary to tailor certain comments on appropriate judicial ethics to the particular situation faced at the time.

Natural Justice

14 I should also provide a brief explanation of the concept 'natural justice'. The essential underpinning of the concept of natural justice requires that there be fundamental procedural fairness afforded to each party by a judicial tribunal. In other words each party has a fundamental entitlement:

* to be informed of the nature of the case which it has to meet;

* to a fair hearing in the sense that it must be given the opportunity of meeting the case which is put against it;

* to have the decision of the tribunal based upon the evidence called before the tribunal.

The adversarial system

Courtroom hearings

15 The administration of justice in Australia and other common-law countries involves the hearing of court cases in a courtroom.[8] It should be noted however that in certain instances the facilities available in the Supreme Court of New South Wales [indeed in the "Technology Courtroom" in which I sit and in limited number of other courtrooms in the same building] will permit evidence to be taken by video link into the courtroom. That form of technology permits evidence from overseas or from within Australia to be conveniently given by a witness who may be thousands or tens of thousands of kilometres away from the courtroom.[9] It may be possible at some stage during question time to discuss the very great benefits which video link evidence can provide, particularly in countries such as China which, like Australia, covers such a vast territory, with great distances to be travelled by witnesses if required to attend in a courtroom.[10]

Presentation of evidence by the parties

16 The adversarial system relies upon the parties to present their respective cases to an independent impartial tribunal [be it a Court or other body having jurisdiction to determine a relevant dispute] for determination. The theory which underlies this system is that the tribunal is likely to be best placed in a position to ascertain the truth as to what occurred if the parties are given a proper opportunity to call evidence and to test one another's witnesses and cases.

17 In adversarial proceedings the functions of the trial judge are to decide the issues of fact and law propounded and to regulate and control the proceeding so that those issues may be investigated fully and fairly and as speedily and efficiently as the circumstances of the case permit.

18 In theory the tribunal stands back from the arena and adopts a passive stance by way of being the recipient of the oral and documentary evidence put forward by the parties. The tribunal's task is to weigh the totality of that evidence and to come to a reasoned decision as to the respective rights of the parties.

19 I return to judicial ethics.

Intellectual honesty

20 There is no particular best starting point in an examination of judicial ethics. However the requirements of intellectual honesty have a signal claim to priority.

21 Intellectual honesty is critical in the exercise of the function of a judge. What this means is very simple. The judge is the decision maker. The decision to be made will involve the determination of issues of fact and law.

Issues of fact

22 Issues of fact will usually involve a decision as to which witnesses to accept as having given reliable evidence and which witnesses to reject as having given unreliable evidence. This is not a question of which witnesses the judge likes the look of. Nor is it a question of which witnesses are more articulate. It is raw question of which witnesses evidence appears best to best fit with the probabilities when one takes into account all of the evidence before the court.

23 The decision as to the facts involves many many factors. The judge is in the unique position of hearing all of the evidence before having to make the decision as to what on the balance of probabilities likely happened.

24 As we all know, in ninety percent of the cases which come before us the first and critical decision is as to what actually happened. That must be proven on the evidence. Usually once one has come to the decision as to what actually happened the landscape clears and the rest of the judgment will simply flow forward without too much difficulty.

25 In my own experience fact-finding can be terribly difficult and one often has to search the evidence again and again for clues in making the decision as to what the parties have proven and whom to believe on particular matters.

26 A judge cannot approach this task of making findings as to what on the balance of probabilities is shown to have actually happened by adopting the process of unfairly giving inappropriate or undue weight to certain particular facts and by inappropriately giving too little weight to other facts. This is not a situation in which the judge can act as if he or she was entitled to move the cards around the card table selecting whatever pattern the judge might find the easiest to select without any form of constraint. The task is rather one of a principled approach using reason to reach the finding.

Issues of law

27 What then is the proper approach to be taken in dealing with the legal principles applicable to the facts?

28 There will sometimes be situations which are very squarely covered by the relevant Code [or in common law countries by the relevant statute or by established precedents to be found in the case law]. These situations should hopefully not pose any particular problems.

29 However it is a very common experience to find ambiguity or nuances in interpretation. Problems of application of the known legal principles are commonly thrown up where the particular facts seem on one view to almost fit the principle [or Code provision] but on another view are perhaps outside that principle or provision. On such occasions the proper course for the Judge is to approach the matter using the very same intellectual honesty to which I have already referred. Having carefully examined the suggested relevant principle or provision and the particular facts proven on the evidence to have taken place, the Judge reaches a decision giving full reasons explaining why that principle or provision requires to be applied or alternatively explaining why the facts proven take the particular matter outside of the established principle or provision [in which case the Judge must identify some other principle or provision in order to be in a position to hand down a proper principled decision for the parties].

30 In common law countries the Judge will be guided by a number of materials including textbooks, statutes and past decisions. Depending upon the level of the particular court, the Judge will also have received carefully prepared submissions from the parties legal advisers. The tradition is for the Judge to make up his or her own mind in deciding any case.

31 Hence after handing down the judgment it will also be necessary for the Judge to be in a position to be entirely satisfied that he or she has a clear conscience having been intellectually honest in endeavouring to locate the correct principle or provision which is to be applied to the facts.

Can the law 'run out'

32 Some very recent decisions in Australia have raised questions where some have expressed the view that the existing legal materials provide no conclusive answer to the question. This has arguably meant that the court required to have recourse to ethical principles.

33 In *Harriton v Stephens* [2004] NSWCA 93 the issue was whether a disabled child could recover damages from a medical practitioner without whose negligence the child would not have been born. A majority of the New South Wales Court of Appeal decided against the plaintiff. Ipp JA argued that this decision was required by the application of established legal principles. On the other hand Spigelman CJ expressed the view that the existing legal materials provided no conclusive answer to the question confronting the court. In his view, deciding the case required recourse to

ethical principles. He observed that the relevant principles were 'highly contestable and strenuously contested', and that there was no widely accepted ethical principle that would have resolve the dispute before the court. The Chief Justice concluded that, for this reason, the court should decide against the plaintiff.

34 With respect my own view is not to accept this proposition that the law can 'run out', as it were. I would agree with Professor Peter Cane [11] who put the matter [at 12] as follows:

"[o]nce it is accepted that the law can 'run out' as it were, there is no escape from the conclusion that the judicial obligation, to resolve disputes properly brought before the courts, requires judges to develop the existing body of legal materials by adding the normative propositions to it." [emphasis added]

35 The High Court of Australia decided by a 4-3 majority that damages were recoverable for the cost of bringing up an unplanned child born as a result of a doctor's negligence [Cattanach v Melchior (2003) 77 ALJR 1312]. Professor Julius Stone (supra) [at 369] reminds us that "throughout the law, there may be found provisions aimed directly to protect accepted standards of morality; as for example the laws of contract and property in relation to which 'public policy' may 'operate flexibly to withhold legal protection from...promises or dispositions tending to dishonesty, corruption, sexual immorality, crime and the like"

A matter of conscience [Their pages 282.5]

36 I cannot put the matter in a clearer fashion than to quote the words of Sir Gerard Brennan[12].

"Judging is a lonely life. When the evidence is heard and the argument is over, when the books have been read, we come to the point of judgment. No conscience other than the judge's own can be the guide. No pen but the judge's own can write the reasons for decision or sketch the summing up. No expression of satisfaction can satisfy the judge unless the judge's own standards be satisfied."

Professor Stone (supra at 678) writes of 'the agony of decision' of the judgment seat itself.

37 In short it is convenient to consider the judge's own state of mind as it should be after the handing down of the judgment. A judgment which will include the reasons for believing one witness and disbelieving another witness. A judgment which will give findings as to what occurred on the balance of probabilities.

38 In my view having given such a judgment often knowing that your decision may very well cause the losing party to become bankrupt or which will have other dreadful legal consequences for that party, you must be able to look into the mirror and to say to yourself:

"I have done my utmost to examine all of the evidence extremely carefully and to work out for myself what has been properly proven to have occurred. I am entirely satisfied with my judgment as having been given with entire intellectual honesty. I have not overstated the case for one party nor understated the case for another party. I have been fair. I have been entirely impartial. I have not been unfairly favourable to any witness or party for any reason otherwise than by the touchstone of a full examination of all of the evidence called before the court."

39 In short you will be able to honestly say to yourself:

"I know that what I have done in the lonely hall of my conscience 'comprises justice according to law'[13]."

The principles of open justice

40 It is convenient to next treat with the principles of open justice which also have immense significance in any consideration of judicial ethics.

41 The general rule, which is subject to extremely limited exceptions, requires that proceedings be heard in open court with the right in the public to attend. The matter was put as follows by Lord Shaw in 1913:

"It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." [14]

42 This paper does not seek to deal with the position which may obtain where a particular inquisitorial system may permit a judge [whether personally or together with or through the medium of court appointed experts] to travel extensively in an attempt to obtain evidence.

43 My limited understanding is that, at least some years ago if not presently, the courts in China experienced very great difficulty in their endeavours to arrange for witnesses to attend the courtroom. Naturally without witnesses the obtaining of reliable evidence could likely be an impossible task or at least a task of monumental difficulty. [15]

44 In most, probably all, common law countries, the procedure by which the parties may force witnesses, often unwilling witnesses, to attend the courtroom is by the issue by the court of subpoenas. A subpoena is an order of the court which requires a named witness to attend the courtroom either for the purpose of giving oral evidence or for the purpose of producing documents to the Court. The sanction for failure to comply with a subpoena may include a penalty or even imprisonment. This procedure is of critical significance to the routine operation of the adversarial system as we know it.

Exposure to public scrutiny and criticism

45 A corollary to open justice requires that the Courts be subject to public scrutiny and criticism. The following comment is pervasive:

"As few members of the public have the time or even the inclination to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them "

46 As has been recently pointed out this can result in the court being subjected to criticisms which tend to undermine public confidence particularly when such criticisms betray a lack of understanding of the Court's functions. However these difficulties are simply a concomitant of the administration of justice in a democracy. The matter has been expressed as follows:

"There are no intrinsically closed areas in an open and democratic society ".[16]

For "[t]he operation of the Courts and the judicial conduct of judges are matters of utmost public concern".[17]

Why write judgments?

47 The judge has sworn to do right by all manner of persons without fear or favour, affection or ill will. In that regard it is the judgment by which the judge complies with that oath.

48 Sir Frank Kitto [a former Judge of the High Court of Australia] when he delivered his classic paper on "Why Write Judgments?" to an Australian Supreme Court Judges' Conference, said at 22:

"The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance."

49 These reasons appear to be reflected in Chapter 1 of the Chinese Code.[18]

Impartiality

50 There are a number of well established principles which require mention in relation to the obligation to act impartially. One of the most fundamental principles which underpin the administration of justice is the requirement that justice should not only be done but should manifestly and undoubtedly be seen to be done. Both the parties to the litigation and the general public must have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased." If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision.

[R v Sussex Justices; ex parte McCarthy [1924] 1 KB 256 at 259 per Lord Hewart CJ; Webb v R (1994) 181 CLR 41 at 61; R v Watson; ex parte Armstrong (1976) 136 CLR 248 at 263; R v Gough [1993] AC 646 at 659 per Lord Goff of Chieveley]

51 It is equally well established that the content of the requirements of procedural fairness may vary according to the particular circumstances of a case, including the nature and general function of the entity required to observe them and the relationship between that entity and the person to whom the procedural fairness must be accorded. Such variations may occur in the content of the requirement that a tribunal, required to observe procedural fairness, be not tainted by either the actuality or the appearance of disqualifying bias.[19]

52 The judicial oath taken by a judge of the New South Wales Supreme Court upon being sworn in is as follows:

I ...do swear that I will well and truly serve our Sovereign Lady Queen [Elizabeth II] in the office of [a justice of the Supreme Court of New South Wales], and I will do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will. So help me God.[20]

53 The words "without fear or favour, affection or ill-will "give express recognition to the crucial requirement that a judge act impartially.[21] With respect it would seem that precisely the same requirement is to be found in Article 1 of the

Chinese Code:

"A judge should strive to achieve substantial impartiality and procedural impartiality in performing his duties. A judge should appear to be impartial through his words and conduct so as to avoid any reasonable doubt from the public upon judicial impartiality."

54 It has been recently pointed out[22]:

"that the protections given to a judge in Australia-of salary level, tenure and immunity from suit are designed in part to remove inhibitions and fears from the judicial mind... [and] designed to protect the ideal described [by] Lord Bowen in the following terms:

There is no human being whose smile or frown; there is no Government, Tory or Mineral, whose favour or disfavour can start the pulse of an English judge on the bench, or move by one hair's breadth the even equipoise of the scales of justice"[23]

55 This obligation requires that the judge be in a position to determine the case fairly and impartially on the evidence, hence bringing an entirely unprejudiced mind to the resolution of the dispute.

56 Before going further into this subject it is important to appreciate that there is a danger if judicial officers accede too readily to suggestions of appearance of bias. The danger is that this may encourage parties to believe that by seeking the disqualification of a judge they may be able to influence the composition of the Court. The matter is of particular sensitivity and for this reason is dealt with reasonably fully in what follows.

57 The common law distinguishes between actual bias and ostensible or apprehended bias. It is very rare to find cases where actual bias has been proven.

Actual Bias

58 Actual bias falls into two categories, being first conscious bias, and secondly unconscious actual bias.

59 Actual bias, like any other conclusion of fact, may be established as an inference from circumstances.[24]

60 The principle was explained in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* by North J:

"Actual bias exists where the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant: *Wannakuwattewa v Minister for Immigration and Ethnic Affairs* (Fed C of A , North J, 24 June 1996, unreported) and *Singh v Minister for Immigration and Ethnic Affairs* (Fed C of A, Lockhart J, 18 October 1996, unreported). The courts have rarely found actual bias to exist. That is principally because, at common law, a reasonable apprehension of bias suffices to disqualify a judicial officer. Where actual bias exists, reasonable apprehension of bias will also exist and, consequently, courts concerned with supervising the application of the requirements of natural justice have not had to go so far as to find actual bias. Another reason is that actual bias is difficult to prove. Rarely will a judicial officer expressly reveal actual bias." [25]

61 North J also explained the circumstances in which unconscious actual bias may exist:

"A decision-maker may not be open to persuasion and, at the same time, not recognise that limitation. Indeed, a characteristic of prejudice is the lack of recognition by the holder. ... actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision maker believes, and say, that they have not prejudged the case." [26]

62 Lockhart J in *Singh v Minister for Immigration and Ethnic Affairs*[27] stated that "it is only a rare case where actual bias has been established". The reason for this, His Honour observed, was as follows:

"It is always difficult to explore the actual state of mind of a person said to be biased. Evidence to establish actual bias may consist of actual statements made by the person said to be biased, and of objective facts and circumstances from which an inference of bias may be properly drawn." [28]

63 Lockhart J considered a situation in which actual bias was said to exist because it was alleged that the decision-maker had prejudged a matter before the conclusion of a hearing. His Honour held that:

"Even where a decision-maker is shown to have expressed or otherwise formed strong views about an issue involved in an inquiry prior to the giving of evidence, actual bias will be established only where the evidence shows that these views were incapable of being altered because the decision-maker had unfairly and irrevocably prejudged the case." [29]

Ostensible or apprehended bias

The test to be applied

64 The most recent authoritative Australian formulation of the test for 'apprehended bias' is contained in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd & Ors v Australia and New Zealand Banking Group Ltd*[30]. In that case, the majority held[31] that a judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide" (emphasis added). With respect to the precise test to be applied in ascertaining whether such a reasonable apprehension exists, their Honours propounded the following[32]:

"[t]he apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. "

65 Of critical importance is the construction of 'might', a term derived from the judgment of Mason, Murphy, Brennan, Deane and Dawson JJ in *Livesey v New South Wales Bar Association*[33] and utilised in deliberate contrast to previous dicta requiring a "real" apprehension of bias, in the sense that there exists a "high probability" of the same: *R v Australian Stevedoring Industry Board; Ex Parte Melbourne Stevedoring Co Ltd*[34], per Dixon CJ, Williams, Webb and Fullagar JJ. The majority in *Ebner* held[35] that:

"[d]eciding whether a judicial officer...might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge ... will in fact approach the matter. The question is one of possibility (real and not remote), not probability. "[36]

66 The above tests notwithstanding, it must nonetheless be borne in mind that the application of the 'principle of apprehension' aspect of the rule is necessarily predicated upon what Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*[37] deemed a "real world" understanding of legal proceedings. Specifically, their Honours stated that the "requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation." [38] Alternatively expressed, the application of the relevant rule is thereby entirely contingent, within the parameters of the impartial administration of justice, on the circumstances of the case and the content of the matters said to give rise to an apprehension of bias.

Attributes of the "fair-minded lay observer"

67 The test for apprehension of bias such as to disqualify a judge is objective. It is a reasonable and not a fanciful or fantastic apprehension that must be established[39]. Accordingly, the fictional observer, by reference to whom the test is formulated, is taken to be reasonable[40].

68 The observer is not assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge[41]. The context connotes knowledge of "ordinary judicial practice" and the actual circumstances of the case[42].

Prejudgment as bias

69 A party alleging apprehension of bias in the form of prejudgment must show a reasonable apprehension on the part of the fictitious observer that "the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented"[43].

70 The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration; whatever evidence or arguments may be presented[44]. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion[45].

71 Saying that a decision-maker has prejudged or will prejudice an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots[46].

"First, there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to that matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case." [47]

72 Most importantly:

"There is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case." [48]

"The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion"[49].

73 Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion[50].

74 Article 10 of the Chinese Code is in the following terms:

"A judge should treat all parties and participants of the proceeding equally in performing his duties. The judge should not by words or conduct and test any discrimination. The judge has the responsibility to stop and correct any discriminatory words or conduct by any participants or other people."

75 Article 11 reads:

"A judge should be neutral during the trial.

Before the judgment is rendered, a judge should not express his views or attitude towards the judgment in words, expiration or conduct.

A judge should adjudicate according to law and be careful with his words and conduct during the proceedings so as to avoid any reasonable doubt upon his neutrality from the parties and other participants."

76 The matter has been put as follows:

"We take this opportunity to remind ourselves as judges that tyranny is nothing more than ill-used power. We recognise that it is easy... to lose one's judicial temper, but judges must recognise the gross unfairness of becoming a combatant with a party. A litigant, already nervous, emotionally charged, and perhaps fearful, not only risks losing the case, but also contempt and a jail sentence by responding to a judge's rudeness in kind. The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience and understanding. Conduct reminiscent of the playground bully of our childhood is improper and unnecessary."[51]

Conclusion

77 This paper has sought to identify and examine the framework of concern in which the subject of judicial ethics arises and to travel into some particular areas of special focus. The paper centrally seeks to treat with problems arising in the courtroom. It may be appropriate to conclude by referring to a case before the English Court of Appeal in 1957[52] where an appeal was taken against the actions of a trial judge who had continuously intervened into counsels' examination of witnesses, asked a substantial number of questions himself and warned witnesses against questions which he considered misleading.

78 In a unanimous decision, the Court of Appeal held that the trial judge had fallen into error on the basis that:

"No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made ... and to see whether they were well founded or not. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored...

Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."[53]

79 Regardless of whether the trial judge's questions had assisted in drawing out the truth of the matter, prevented witnesses from being misled or shortened the length of the hearing (thereby saving valuable court time), he had travelled further than his status as an adversarial judge had permitted.

* Paper delivered 11-13 October 2004 to the National Judicial College, Beijing

** Justice of the Supreme Court of New South Wales

1 Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter" in Lectures on legal topics, 1926, P 105.

2 Sir Gerard Brennan foreword to Judicial Ethics in Australia by Justice J B Thomas, The Law Book Company Limited, 2nd ed 1996.

3 Attributed to Socrates

4 In 2002 The Council of Chief Justices of Australia approved of the publication of a document entitled "Guide to Judicial Conduct" ["the Australian Code"] which is a comprehensive publication intended to give practical guidance to members of the Australian Judiciary at all levels and which expressly seeks to be positive and constructive and to indicate how particular situations might best be handled. I acknowledge the assistance given by this publication in relation to a number of the areas treated with by my own paper. I note also that The American Bar Association Model Code of

Judicial Conduct ["The ABA Code"] was adopted by the House of Delegates of the American Bar Association on August 7, 1990, and amended in 1997, 1999 and 2003.

5 Thomas above, n 2 p 9.

6 McKay "The Judiciary and Non-Judicial Activities" (1970) 35 Contemporary Legal Problems p 9, 12, cited by Wood, "Judicial Ethics a Discussion Paper" (1996), [Australian Institute of Judicial Administration Report, pp 3-4]

7 As for example would prevent a judge who was hearing a case about an environmental issue from attending a demonstration organised in relation to that issue by a party to the proceedings or their sympathisers [indeed organised by anyone]

8 Only in extremely rare cases will the Court take evidence outside of the courtroom. An example might be if a witness was hospitalised and therefore unable to give evidence in the courtroom. Another example might be if it is necessary to take a view of a particular place where events occurred-in which circumstance the parties and their legal advisers will usually be present and a transcript will be taken if explanations of given to the Judge of what is being seen.

9 The question of whether the judge should grant leave to permit evidence to be taken by video link raises its own special issues. Much will depend upon the particular reasons for the application for evidence to be taken in this manner. My own practice is to be extremely careful before permitting video link evidence if the material witness is of extreme importance to the issues the subject of the litigation and particularly if the credit [by which I mean reliability/truthfulness] of the witness is to be attacked or may be attacked. Whilst every application for video link evidence is determined on its merits it may well be the case it is far preferable to have the witness in the courtroom only a few metres away from the judge in order to be in the best position to determine whether the witness is giving reliable or truthful evidence.

10 Where evidence is to be taken from an expert who works in a forensics laboratory and whose reliability will often not be under attack, a video link examination may be extremely useful and practicable because the expert will not be inconvenienced by having to leave his or her laboratory to attend the courtroom. This is particularly beneficial where the forensics laboratory may be a considerable distance from the courtroom.

11 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Court Law' Paper presented to the Supreme Court of New South Wales Annual Conference 20-22 August 2004.

12 "Why be a Judge"? Paper delivered to New Zealand High Court and Court of Appeal Judges' Conference, Dunedin 12-13 April 1996

13cf Sir Gerard Brennan, Occasional Address, Law Graduation Ceremony, University of Queensland, 4 June 1996.

14 Scott v Scott [1913] AC 417 at 477

15 In fairly rare circumstances a court may be asked to determine a case by reference only to documentary evidence. I exclude this situation from the above comments

16 State v Mamabolo, CCT44/00 (11 April 2001), 2001 (3) S.A. 409 (CC) per Sachs J at [77]

17 Landmark Communications Inc. v Commonwealth of Virginia 435 U.S. 829,839 (1978) per Burger J.

18 Article 6 provides "A judge should make all the judgments openly and objectively and accept the supervision from the public. This proscription does not extend to the cases [which] cannot be opened or cannot have an open trial according to law."

Article 12 provides: "A judge should specify the reasons for the measures and judgment relating to the substantial rights and litigating right of the parties. A judge should not make a conclusion or take any measures subjectively and unilaterally"

19 Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 at 90 per Deane J

20 Oaths Act 1900 (NSW), fourth schedule

21 The same words embrace a number of concepts including those of independence and integrity [as is pointed out in chapter 2 of the Australian Code]

22 The Hon Justice JD Heydon, "Practical Impediments to the Fulfilment of Judicial Duties" (2004) 6 (4) The Judicial Review 429 at p 435

23 Quoted in Fingleton v Christian Ivanoff Pty Ltd (1976) 14 SASR 530 at 548

24 Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 151 ALR 505 at 555 per Burchett J.

25 Id, et 562-563

26 Ibid.

27 (Unreported, Federal Court of Australia, 18 October 1996

28 Id, at [6]

29 Id, at [9]

30 (2000) 205 CLR 337

31 Id, at 344

32 Id, at 345

33 (1983) 151 CLR 288

34 (1953) 88 CLR 100 at 116

35 Above, n 31 at 345

36 See further: Bainton v Rajski (1992) 29 NSWLR 539 at 540, per Mahoney JA; Gas & Fuel Corporation Superannuation Fund and Ors v Saunders and Anor (1994) 123 ALR 323 (FCFCA) at 338, per Gummow and Heery JJ (with whom Davies J agreed); Hagan v Independent Commission Against Corruption [2003] NSWCA 93 at [16], per Mason P (with whom Hodgson JA and Davies AJA agreed).

37 (1989) 167 CLR 568 at 570

38 Ibid.

39 Gascor v Ellicott [1997] 1 VR 332 at 342 per Tadgell JA, approved by the NSW Court of Appeal in Dovade Pty Ltd v Westpac Banking Group & Anor (1999) 46 NSWLR 168 at 188 [92]; see also Barbosa v Di Meglio [1999] NSWCA 307 at [8] per Mason P

40 Johnson at 493 [12]

41 Webb & Hay v R (1994) 181 CLR 41 at 73 per Deane J, cited with approval in Johnson, id at 493 [13]

42 Johnson, Ibid and Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 at 87 per Mason CJ and Brennan J

43 Laws at 100 per Gaudron and McHugh JJ; see also JRL, Re; Ex parte CJL (1986) 161 CLR 342, id at 352 per

Mason J; Kwan v Kang [2003] NSWCA 336 at [83] per Sheller, Ipp and Tobias JJA

44 Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507 at 531-532 [71]-[72] per Gleeson CJ and Gummow J and at 564 [185]-[186] per Hayne J

45 Id, at 531 [71] per Gleeson CJ and Gummow J

46 Id, at 564 [185] per Hayne J

47 Ibid.

48 Ibid.

49 Id, at 531 [71] per Gleeson CJ and Gummow J

50 Ibid; see also Vakauta above, n 38 at 570-571 per Brennan, Deane and Gaudron JJ and at 575-576 per Dawson J

51 In re Eastmore, 504 So. 2d 756,758(Fla.1987) cited in Shaman, Lubet and Alfini, Judicial Conduct and Ethics, The Michie Company, Virginia, 1990, at p 32.

52 Jones v National Coal Board [1957] 2 QB 55

53 [1957] 2 QB 55 at 63, per Denning LJ.

Judicial Ethics [Out of Court perspective] - Paper 2

JUDICIAL ETHICS [PAPER 2]*

The Honourable Justice Clifford Einstein**

[Judges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust.[1] This heightened standard of conduct extends beyond the limits of the judges court, for "[a judge's] duty does not stop at the robing room door"[2].

Judges and the people

1 There are a number of possible approaches to an examination of the necessary inter-relationship of the judges and the people. These include the high level truism that the administration of justice in accordance with the rule of law is an essential bastion underpinning democratic rights. Having a strong and independent judiciary accepted by the community as of the highest integrity is the only way in which to ensure that the judicial institution will endure. A code of ethics for Judges is of immense significance in pointing the way towards correct judicial behaviour. But the critical and indispensable need is to ensure that the people accept the Judges as persons to be entrusted with the proper administration of justice.

2 There is an ongoing need to keep steadfastly in mind that the law, in its content and in its everyday application, is firmly founded on the ethical values which lie at the heart of the traditions of civilized societies.

3 Retaining community acceptance requires an understanding of how the judge should behave both in the courtroom as well as in a private capacity. What is regarded as proper or improper behaviour in each of these capacities is often a matter of great sensitivity. An earlier paper sought to place a particular focus upon what occurs in the courtroom. This paper seeks more particularly:

- * to examine the parameters of concern when viewing the conduct of the Judge in his or her private capacity;
- * to treat with some of the areas of sensitivity;
- * to place the whole issue into proper perspective.

The judge does not lose his/her identity as a person

4 When one is appointed as a judge one does not lose one's identity as a person. It is still necessary to remain a part of one's community. It is still necessary to think about the major and some of the very minor topical issues of the day. It is still necessary to regard yourself as nothing particularly special. You are not particularly special[3]. You are privileged because you have been given the signal honour of being able to exercise judicial power without fear or favour. But being a judge is only part of what you are. Above all else you are an individual and a citizen and you have the same legal rights as any other individual and citizen, Your rights extend both to judicial as well as personal independence

The balancing exercise

5 But there are areas in respect of which the judicial office requires that the judge exercise extreme caution and sensitivity lest he or she may compromise their judicial position. Any such compromise will threaten the integrity not only of the particular judge but also of the judiciary regarded as an institution. Maintaining the community's trust is therefore integral to the exercise of one's judicial obligations.

6 In short there is a balancing exercise necessary.

7 What then maybe observed in relation to the balancing exercise?

Speaking out

8 There is considerable room for differences of opinion in relation to this matter. One finds observations such as:

"Judicial reticence has much to commend it; it preserves the neutrality of the judge, it shields him or her from controversy, and it deters the more loquacious members of the judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations."[4]

9 Perhaps the attraction of silence is derived from the attempt to make oneself as small a target as possible:

"Even a fool, if he holdeth his peace, is deemed a man of understanding."[5]

10 The more robust approach has been expressed as follows:

"...I believe that [judges] should be allowed to decide for themselves what they should do.... Judges should be free to speak to the press, or television, subject to being able to do so without in any way prejudicing their performing of their judicial work. ...It is not the business of the Government to tell the judges what to do."[6]

11 Mason P [7] has made the point that:

"Significant contributions to the marketplace of ideas have been made in recent years by serving judges speaking or writing in their private capacities on a range of topics of current political controversy, including an Australian republic, a Bill of Rights, sentencing, drug control and aspects of environmental law. Other judges have done controversial things within broad subsets of society, involving for example churches, environmental matters and the national trust."

12 My own view is that as a judge one has to be circumspect in speaking out but should not regard one's position as encroaching upon the fundamental democratic right to comment. Ipp J who had extensive experience in South Africa during the apartheid era has commented:

"The informed view in South Africa today is that experience has taught that judges are the guardians and custodians of the administration of justice and of human rights generally. They are duty bound to protect and warn society against laws which are fundamentally inimical to a democratic society. In this task, mild inroads into those laws are as important as frontal assaults. It is usually through the mild inroads that an executive conditions the people and gains sufficient strength to make the frontal assaults."[8]

13 There are of course particular so-called obvious "no go areas" which require to be kept carefully in mind:

"The judge may find himself or herself unable to sit in judgment in a matter touching that cause. But it does not follow that the judge who feels passionately about some cause and keeps his or her opinions to himself will avoid the duty of recusal. A secretly biased judge is still a biased judge, if one defines bias as a mind that is or appears incapable of alteration."[9]

The significance of understanding community behaviour and standards

14 It is of course clear that judges need to have a realistic understanding of community behaviour and standards. Judges "are human beings with individual values and mental processes which have a bearing on judgments."[10] There are some who consider that judges should become more involved in the public arena and who counsel a high-profile so that judges may be seen by the public to be active, able people[11]. No one would argue against the proposition that "a judge is likely to be a better dispenser of justice if he is aware of the currency and passions of the time, the development of technology and the sweep of events"[12]. The matter has been put as follows:

"It is not enough to say that a judge is enriched by knowledge of the real world; rather, the nature of modern law absolutely requires that judges 'live, breathe, think and partake of opinions in that world". It is probable that a majority of legal tests and rules which a judge is called upon to apply call for judgments which involve common experience."[13]

The need for dialogue

15 Because there are so many situations where particular questions arise it seems to me very important that there be dialogue between judges as to what is perceived to be appropriate judicial behaviour in relation to a specific concern.

The six factors

16 The following six factors have been put forward as assisting the identification of possible or marginal areas of impropriety[14]

- (1) the public or private nature of the act when done;
- (2) the extent to which the conduct is protected as an individual right;
- (3) the degree of discretion exercised by the judge;
- (4) whether the conduct was harmful or offensive to others;
- (5) the degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates; and

(6) the degree to which the conduct is indicative of bias, prejudice, or improper influence.

17 It would appear that:

* Under the first factor conduct occurring entirely in the home will be judged differently from public conduct[15];

* Under the second factor there is recognition that although there is a general right to free speech, offensive remarks may be improper conduct for a judge especially if they reveal unhealthy attitudes[16];

* The third factor asks whether the judge's activity has been as discrete as possible under the circumstances;

* The fourth factor "conjures up images of judges who engage in vulgar abuse, physical violence or sexual harassment"[17]:

"In a democracy, the judicial office exists to protect the citizenry both from government over-reaching and individual self-help. When a person who holds this office is found to be violent or abusive, the very concept of judging suffers. Even where the conduct involved falls short of being criminal, it may diminish not only the particular judge's dignity, but also the public's respect for the judiciary. There is also the fear that private abusiveness may be indicative of a potential for abuse from the bench. Can we trust to judge the fate of another who has shown, in his or her private life, a lack of self-control or any inclination to inflict harm on individuals?"[18]

* The fifth factor is self-explanatory:

"Frequent use of racial... or ethnic or gender stereotypes demonstrates disrespect for the public in its starkest form. Although not directly harmful to any specified person, such comments exemplify, at least, an ungenerous attitude toward the targeted group."[19]

* The sixth factor "could be relevant in considering comments made by a judge upon pending litigation, or a new association with criminals or other unsavoury characters."[20]

Litigants who do not wish a particular judge to hear their case

18 There are some litigants who for whatever reason decide that for a particular judge to hear their case is undesirable. That may be for example because that judge is known to have already dealt with the very same question of legal principle in one or more other cases so that the judge's "form" is believed to be known. Or it may simply be a perception that the judge before whom the case has been fixed is a difficult judge or has a reputation for handing down decisions which may not favour the litigant in question. But whatever the reason it is critical to the administration of justice that judges exercise extreme care not to stand aside from hearing particular case unless there is proper reason to do so. Unless this extreme care is taken there would be a risk that the litigant can dictate which judge is to hear his or her case.

19 To give some actual examples may be of assistance.

20 Take the litigant who in an attempt to cause the judge to stand aside [recuse] from hearing the case, embarks upon a conscious and concerted campaign to swear at the judge in the courtroom or to make outrageous and totally unfounded allegations against the judge in the courtroom. On the one hand, if the judge was to over-react as by immediately charging the litigant with contempt of court and proceeding to deal with that charge [by in effect swallowing the bait], the litigant may win. On the other hand, the dignity of the court is at stake and the judge requires to be careful in taking appropriate steps to avoid the courtroom becoming a laughing spectacle.

21 The judge must take a reasonably robust attitude where a challenge to his or her sitting on the case comes forward. There are very obvious circumstances in which it is appropriate for the judge to recuse. This would be necessary where one of the witnesses was a friend of the judge or where the judge had a personal interest in the outcome of the case. This would also be necessary if in an earlier case decided by the judge, he or she had had occasion to deal with the credit of a person who had been a witness in the earlier case and whose credit would again fall for determination in the later case.

22 But there are also circumstances in which it is tolerably clear that the judge should reject any application that he or she not sit. Caution is always the touchstone.[21]

No comments after judgment

23 The Canadian Judicial Council, Commentaries on Judicial Conduct (1991) at 86 has put the matter as follows:

"A judge speaks but once on a given case and that is in the reasons for judgment. Thereafter the judge is not free to explain, or defend, or comment upon the judgment or even to clarify that which critics have perceived to be ambiguous."

24 This is the approach advocated in the common law world. And for very good reason. The judge has exercised his or her jurisdiction. The litigant's are left to their rights on appeal. The newspapers and academics are left to their commentaries.

Where to begin?

25 The list of topics covered by some of the literature on judicial conduct and ethics is somewhat daunting. Outside altogether of bias and prejudice and particular in-courtroom practices it includes:

* Social conduct

[clubs and societies; hotel bars and public places; behaviour of a Judge's spouse; contact with the legal profession and business persons]

* Family relationships - a relative as a party; Judge or relative as a witness; Judge as a party

* Finance

[fundraising; gifts and benefits; business and financial activity; interest in a party; interest in the subject matter in controversy,]

* Morality associated matters

[sexual misconduct; driving offences; alcohol related conduct; crime; prejudice; epithets and slurs]

* Political activity and participation in commissions of inquiry or government agencies and executive bodies

* Misuse of the prestige of office

[character references; giving evidence; use of official letterheads; collateral misuse of office; obtaining personal benefits; misuse of office to benefit friends]

* Misuse of court staff and facilities

Judge Anonymous

26 The major United States text covers 600 closely typed pages. Opening that text at almost any page will give the reader suggestions as to what is and what is not appropriate and a plethora of authorities. One will find little that is hidden from the public gaze. In numerous instances the Judge who has come under attention is named as "In re Judge Anonymous, 590 P.2d 1181 (Okla.1978)". As I understand the purpose of the general examination of judicial ethics taking place during this Conference it is to give the judges present the optimal chance of never having to be 'Judge Anonymous' in any legal textbook and of avoiding disciplinary censure or worse.

27 In New South Wales the procedure for reporting judicial misconduct is fairly streamlined. By statute a Judicial Commission of New South Wales has been established consisting of ten members of whom six are official members being the judicial heads of the six different courts in New South Wales. The Chief Justice of New South Wales is the President of the Commission. The statute requires the Commission to dismiss complaints in a number of specified circumstances: including where there is a right of appeal, where the complaint is frivolous or trivial, or where further consideration is unnecessary or unjustifiable Matters that are classed as serious, in the sense that they could justify the removal of the judicial officer, must be referred to a Conduct Division which is a panel of three persons, all being judicial officers (one of which may be a retired judicial officer). A Conduct Division does not have the power to punish. Its power is directed to the presentation of a report as to whether or not the matter complained of could justify parliamentary consideration of removal of the judicial officer. Where a report making such a finding is presented, the head of jurisdiction has a statutory power to suspend an officer from duty.

28 The only method by which the holder of a judicial office can be removed from the office by the Governor is following an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity[22].

29 How then may one encapsulate the manifold matters which may confront a Judge anxious to still be able to live a fullsome life but cognisant of the need for very great caution in what he or she may sometimes be called upon to do?

30 Here again my own answer is a simple one: "Step back. Think twice. Perhaps consult a senior colleague. Above all else be aware."

31 This is all about having your antennae working. They should be programmed to pick up signals warning you of possible trouble ahead. Of course a drunken spree will mean that you will completely lose all possible communication with your antennae.

32 One golden rule sometimes put forward when one has a real question as to whether or not it is appropriate for you to be the judge in a circumstance where you may have had some type of past association with a witness or the litigant is: "If in doubt do not hear the case".

33 It is difficult to avoid reverting to some further examples of inappropriate behaviour in the courtroom.

34 As the Canadian Judicial Council has observed:

"It is difficult to define the lifestyle which is or is not suitable for a Judge. No one doubts that a flamboyant lifestyle is not suitable. Short of that, definition is not possible and probably not even desirable," (cited by Wood 'Judicial Ethics - Discussion Paper, 1966, published by the Australian Institute of Judicial Administration' incorporated [at 24])

Eccentricities

35 Thomas makes the point that eccentricity can rescue a whole era from dullness and conformity. The following is found in his book:

"Some eccentricities must be distracting to counsel and parties, and give concern as to whether the judge's mind is on the job. Lord Thankerton is reported to have been a knitter. That may have settled his nerves, but it seems that the habit did not catch on. Lord Thankerton has left us with a legacy of useful judgments." [23]

"In 19th century Scotland, it is reported that judges would sometimes consume biscuits and port on the Bench. In more modern times a judge in Kent saw fit to have a tea-tray brought to him in court, but on a later occasion was startled to see a juror getting out a thermos and sandwiches.

Moral: Take care! Little eyes are watching whatever you do.

I have seen some judges open their mail and even read newspapers in open court in the course of a trial. Usually this is an affectation intended to demonstrate that the judge is so far ahead of counsel that only half the judge's mind is needed to follow the case. Whatever the purpose it is insulting to counsel and the parties and evinces a lack of interest in the evidence and argument." [24]

Absence, inefficiency and incompetence

36 Thomas makes the following points:

"Competence is not an ethical issue, but it touches ethics in two ways. First, there is a duty to attempt to perform competently, and this probably includes a continuing duty to improve competence in areas where weakness is detected. That may raise some moral obligation to participate in suitable forms of judicial education. Secondly, once a judge realises that he or she is incurably incompetent, there is a duty to resign. The problem is that incompetent judges are nearly always the last to identify their failure.

Inefficiency is not misconduct; it is a human weakness from which all suffer in varying degrees from time to time. The same quality or quantity of judgments cannot be expected from all judges. The fast judge is not always the best judge. It is important to get it right than to do it quickly. Some of the slower, less brilliant judges have been regarded on the whole better judges than a virtuoso such as Lord Ellenborough who was described by a contemporary as "rushing through the cause list at the Guild Hall like a rhinoceros through a sugar plantation". He often spent 16 or 17 hours a day in court, and perhaps his exertions hastened his death.

But there are limits. Litigants do not want their fortunes to ride on the backs of judicial tortoises. It must be acknowledged that some judges reserve their decisions for a ridiculously long time. Reserving too long and too often can reach the level of a public disgrace." [25]

37

Thomas also refers to the problem of sleeping on the job:

"Avoidance of long lunches was perhaps implied by Sir Matthew Hale in his resolution: "to be short and sparing at meals that I may be fitter for business". Nodding off by persons who are expected to sit and listen to others for five hours in a day is at least understandable, though it is never excusable. Counsel have the duty to do whatever is necessary to bring such a judge back to the land of the living rather than stand by and store the point for appeal if the client loses. A propensity to fall asleep during cases is a serious weakness and should induce the judge seriously to question his or her capacity for the job.

Failure to turn up for duty does not seem to have been much of a problem in the United Kingdom or in this country. In 1706 it was held that non-attendance by a recorder (a public officer relating to justice) afforded good cause for forfeiture of the office. The tenure of recorders (and of judges) was "quamdiu se bene gesserint" (while they conduct matters well). That tenure, now transposed into the "during good behaviour" formula in the statutory successors to the Act of Settlement, still applies to our Supreme Court judges. In another case in 1767, the court held that the absence of a recorder from one session was not sufficient cause for forfeiture of office for non-feasance. These cases are examples of the ancient remedy of the writ of scire facias to remove certain officers upon proof of absence of good behaviour, upon which the office was automatically forfeited." [26]

The point in time when the judges conduct is most likely to be under attack

38 It is perhaps appropriate to conclude with an observation as to timing.

39 It is important to remember that after the case has been heard and after you have handed down a judgment the losing party is likely to be extremely unhappy with you to say the least. The effect of your judgment may be catastrophic in relation to his or her financial circumstances and may have a dramatic effect upon his or her standing in the community and/or upon his or her family relationships. The Judge can confidently expect that in some cases the losing party will cast about to find any possible way of challenging the judgment. This can include collateral attempts to challenge the judgment as by a suggestion of apparent bias arising from anything which even vaguely may be suggested as improper. This is another particular reason why a Judge requires to be so very very careful to avoid conduct which could be questionable in terms of suggesting a lack of impartiality or some other inappropriate behaviour.

* Paper delivered 11-13 October 2004 to the National Judicial College, Beijing

**Justice of the Supreme Court of New South Wales

1 In re Piper, 534 P 2d 159 (or.1975); Hayes v Alabama Ct of the Judiciary, 437 So.2d 1276,1278 (Ala.1983): cited by Shaman, Lubet and Alfini, Judicial Conduct and Ethics, The Michie Company, Virginia, 1990, at p1.

2 In re Lonschein, Unreported Order (NY Comm'n Dec.28, 1979) at 7: cited by Shaman *ibid*.

3 Justice Thomas of the Supreme Court of Queensland has expressed the difference between the judge in chambers/the Courtroom and the judge at home as follows:

"You lot, says my wife, are surrounded by people who jump when you say. You are used to people who bow and scrape and tell you how clever you are. You get so that you can't take it when you don't get your own way. You don't know how pampered you really are:" 'Get Up Off The Ground' (1997) 71 Australian Law Journal 785.

4 Sir Anthony Mason: cited by Justice Keith Mason, "Should Judges Speak Out?" Paper delivered to the Judicial Conference of Australia Colloquium, Uluru, 9 April 2001 at p6.

5 Book of Proverbs (17:28, KJV)

6 Lord Mackay of Clashfern: cited by Mason, above, n 4 at p5.

7Mason *id*, at p3.

8 Notes appended to Mason, *id* at p8.

9 Mason *id*, at pp4-5 citing Re JRL; Ex parte CJL (1986) 161 CLR 342 at 352

10 Justice JB Thomas, "Guide to Judicial Conduct": A new handbook for judges", (2003) 77 Australian Law Journal 240

11 Cf Kirby, The Judges (1983), pp 29, 66, 78; Sopinka, "Must a Judge be a Monk-Revisited" (1996) 45 University of New Brunswick Law Journal 167: cited by Justice JB Thomas, Judicial Ethics in Australia, The Law Book Company Limited, 2nd ed 1996, at p95.

12 McKay, "The Judiciary and Non-judicial Activities" (1970) 35 Law and Contemporary Problems 9 at 12; Cf Lubet, "Judicial Ethics and Private Lives" (1984-1985) 79 Northwestern University Law Review 93 at 99: cited by Thomas *ibid*.

13 McKay *ibid*.

14 Shaman, above, n 1 at p303: cited by Justice JB Thomas, Judicial Officers Bulletin, November 1993, Vol. 5 No.10 at 79.

15 Shaman *id*, at p304.

16 Thomas above, n 14.

17 *Ibid*.

18 Shaman above, n 1 at p306.

19 *Id*, at p307.

20 Thomas above, n 14.

21 A common practice I adopt as soon as I may be invited to a small party or to a luncheon is to politely inquire as to who are to be the other guests. I would not wish to unwittingly find that I was attending a luncheon where there was present at the table one of the legal advisers for a party in a case due to commence on the following day or week before me. I would not want to unwittingly find that there was present at the table a person whom I had held to have lied on oath on some occasion.

22 Constitution Act 1902 (NSW), section 53(2); cf Hamilton, Judicial Independence and Impartiality: Old Principles, New Developments, 28 June 1999

23 Thomas above, n 11 at p25.

24 *Id*, at p26 (footnotes omitted).

25 *Id*, at p44 (footnotes omitted).

26 *Id*, at p46 (footnotes omitted).

An Examination of the Application of the General Principles of the Rule of Law to the Court Structure and Judiciary of the State of New South Wales

AN EXAMINATION OF THE APPLICATION OF THE GENERAL PRINCIPLES OF THE RULE OF LAW TO THE COURT STRUCTURE AND JUDICIARY OF THE STATE OF NEW SOUTH WALES*

The Honourable Justice Clifford Einstein**

[Responsible for the conduct of the vast bulk of civil and criminal litigation commenced each year, lower court judges are daily confronted with massive case lists, intensely crowded courtrooms and unrepresented parties often unsure of their rights, ignorant of court procedure and overawed in unfamiliar, decidedly intimidating surroundings]

Introduction - The judiciary and the rule of law

1 The majestic concept of the 'rule of law'- part legal, part social and part governmental- is subject to no easy definition. Of all those who have attempted this rather thankless task, perhaps the most celebrated is that of the late Professor A.V. Dicey in his seminal work *An Introduction to the Study of the Law of the Constitution*. First published in 1885 and in nine subsequent editions up to 1959, for Dicey any society governed by the rule of law necessarily manifests the following three characteristics:

1. That "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." [1] This proposition is fundamental; while legal rights can be granted, and legal obligations imposed, by individuals in the form of (predominantly) legislators or judges, such actions can only be legitimately undertaken when those individuals are themselves acting within the constraints of the legal process.

2. That "every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals." Alternatively expressed by Dicey, "every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." [2]

3. That individual liberties are "the result of judicial decisions determining the rights of private persons in particular cases brought before the courts" rather than from "the general principles of the constitution." [3] Of course, this statement is subject to a degree of modification in those jurisdictions, such as Australia and China, with written Constitutions which contain precisely such general principles. But Dicey's proposition nonetheless remains valid given that, first, such principles are ultimately applied to individual circumstances and transformed into actual rights by the decisions of courts and, second, it is only through the process of judicial interpretation that such principles are given substantive meaning.

2 Analysed from an objective perspective, however, it is apparent that these three basal characteristics of a society governed by the rule of law are subject to one essential pre-condition, namely that the interpretation, application and enforcement of legal rules be undertaken by a judiciary that is beholden to none but the law itself.

3 As recently stated by Justice DeBelle of the Supreme Court of South Australia:

"Shortly stated, if the rule of law is to be effective, it is necessary that there be an independent judiciary and an independent legal profession. It requires but a moment's reflection to realise that, if the ordinary citizen is not able to seek redress from a court comprising an independent judge free from any kind of influence or pressure, be it influence or pressure from government, big business, or any other institution capable of influence, he or she has no real safeguard against arbitrary executive action and is seriously handicapped, if not prevented, from challenging any bureaucratic act affecting property, employment, income or any other aspect of daily life. The judiciary is in truth the last bastion between citizen and government or between citizen and any other powerful litigant." [4]

4 At the most pragmatic of levels, the critical elements of such an independent judiciary relate to matters such as reasonable security of tenure, fixed and unchangeable rates of remuneration while a judge holds office and a degree of administrative independence from other branches of government. In a more procedural sense (and as detailed in an earlier paper, "Judicial Ethics [Paper 1]"), in the common law system the independence of the judiciary is reflected in the primary obligation of the judge to determine disputes only on the basis of the propositions of fact and law placed before him or her by the disputants. It is no part of the function of the judge, for example, to inform him or herself of the facts in issue, call witnesses on his or her motion or play an active role in the examination and cross-examination of those called by the parties. For stronger reason, lest the question of actual or perceived bias be raised, it would be manifestly inappropriate for a judge to advise a party as to the strength of their case or the optimal means of conducting it.

5 It is with the above general principles of the rule of law in the common law system in mind that this paper sets out to examine their application to the court structure and judiciary of the State of New South Wales. Beginning with the practical aspects, examined will be:

(a) the constitution, jurisdiction and business of the various courts which together comprise the judicial branch of the New South Wales government; and

(b) the manner, conditions of appointment and responsibilities of the judicial officers of these courts, including the phenomena and status of 'acting judges.'

6 Moving onto a more topical issue, however, the focus of this paper will be on the application of the principles of the rule of law and judicial independence to the realities of the lower court experience in New South Wales. Such inferior courts, or courts of 'limited jurisdiction' as they are sometimes designated, are faced with phenomenal challenges in the discharge of their business that are simply not present in the superior courts (or present to a far lesser extent). Responsible for the conduct of the vast bulk of civil and criminal litigation commenced each year, lower court judges are daily confronted with massive case lists, intensely crowded courtrooms and unrepresented parties often unsure of their rights, ignorant of court procedure and overawed in unfamiliar, decidedly intimidating surroundings.

7 The question then becomes this; to what extent can, or indeed should, lower court judicial officers strive to conform to the epitome of the detached, purely adversarial common law judge when struggling to dispense justice in an environment far removed from the dispassionate reflection of legal theory? How can a judge maintain the strict non-interventionist role demanded by authorities such as *Jones v National Coal Board* when he or she must hear, say, 10 civil or 20 criminal matters in a sitting day of 5 hours? The flippant answer is, of course, 'with great difficulty', but this paper will seek to argue that the underlying task of lower court judges, one that is of critical importance to the rule of law, is to effectively balance this tension between, on the one hand, the need to maintain the degree of independence required of a judicial officer and, on the other, the equal imperative of managing cases in a manner commensurate with the realities of the lower court experience.

The court structure of New South Wales

8 The court structure of New South Wales is based upon a distribution of business between three courts of generic jurisdiction, an ultimate court of appeal known as the High Court of Australia and a variety of limited jurisdiction courts established to deal with specific subject-matter.[5]

The Local Court of New South Wales

9 A court of record constituted by the Local Courts Act 1982 (NSW), the Local Court sits at the base of the New South Wales court structure and is presided over by judicial officers known traditionally as 'magistrates'. [6] Overwhelmingly the busiest of all the State's curial entities, the Court sits at 158 metropolitan and regional locations so as to ensure that "the justice system is accessible not only to city dwellers, but also to people living in the most remote areas of the State." [7]

10 Civil proceedings commenced in the Court are entered into either the General Division or the Small Claims Division [8] in accordance with the following limitations:

(a) General Division: The Court sitting in the General Division has jurisdiction to hear and determine actions for the recovery of any debt, demand or damage in which the amount claimed does not exceed \$60,000. An identical jurisdictional limit is applied in respect of actions for the recovery of detained goods or the assessed value thereof. [9]

(b) Small Claims Division: The Court sitting in its Small Claims Division has jurisdiction to hear and determine actions for the recovery of any debt, demand or damage in which the amount claimed does not exceed \$10,000. An identical jurisdictional limit is applied in respect of actions for the recovery of detained goods or the assessed value thereof. [10]

11 A Judge of the Court sitting in either Division has the power, provided that the parties consent, to refer proceedings to mediation if he or she thinks such a referral to be appropriate. [11] Appeals against a point of law may be taken to the Supreme Court as of right, although in the case of the Small Claims Division proceedings such an appeal lies only on the grounds of lack of jurisdiction or denial of natural justice. [12] A party may bring an appeal in respect of a mixed question of fact and law, but only with the leave of the Supreme Court. [13]

12 The criminal business of the Court falls predominantly into three categories:

(a) the disposal of 'summary offences', which are in general terms offences in the lower range of seriousness attracting a penalty of less than 2 years imprisonment [14];

(b) the hearing of more serious charges ordinarily tried in higher courts, known as 'indictable offences', if the prosecution or the defence consent [15]; and

(c) the holding of 'committal hearings' in respect of such indictable offences, [16] in which the prosecution is obliged to

satisfy the Court that there is a "reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence." [17] If this burden is satisfied, the accused person is committed for trial in either the District or Supreme Courts; if not, he or she is discharged in relation to the offence. [18]

13 Appeals as of right may be taken against conviction and/or sentence to the District Court [19], against conviction and/or sentence on a point of law alone to the Supreme Court [20] or against conviction and/or sentence in respect of an environmental offence to the Land and Environment Court. [21]

14 The Court may punish for contempt of court in the face or within the hearing of the court, and may refer other questions of contempt to the Supreme Court for determination. [22]

The District Court of New South Wales

15 Constituted as a court of record by the District Court Act 1973 (NSW), the District Court occupies the intermediate position in the New South Wales court structure. The Court is vested with both civil and criminal original jurisdiction, exercised by a single judge sitting alone [23] (as the tribunal of both fact and law) save for cases tried before a jury. [24] While the jurisdiction of the District Court is far broader than that of the Local Court- encompassing, for instance, the power to grant equitable relief such as an injunction or the specific performance of a contract in addition to the power to award damages for the breach of common law rights- it has no jurisdiction beyond that granted it by statute. [25]

16 Parties to a civil claim before the Court can, if the subject-matter of the proceedings so permits, elect to enter the matter into one of the Court's specialist 'lists', including the Construction List, the Commercial List or the Motor Accidents List. Mirroring the practice of the Supreme Court (as discussed below), the rationale of dividing the Court's civil business in this manner is to provide for the more expeditious pre-trial management of proceedings on the assumption that actions with like subject-matters will often present like procedural needs. Construction litigation, for example, often involves lengthy lists of alleged structural and other building or design defects, and thus the District Court Rules make specific provision for the preparation and service of such documents (known as 'Scott Schedules') in a prescribed, readily understandable form. [26]

17 In broad terms, the civil jurisdiction of the Court includes the following:

- (a) any common law claim for debt or damages (such as in negligence or for breach of contract) where the amount claimed does not exceed \$750,000; [27]
- (b) any motor accident or work injury damages action, irrespective of the amount claimed; [28]
- (c) the power to grant and enforce any injunction in relation to any proceedings within its jurisdiction; [29]
- (d) actions for possession of land the value of which does not exceed \$20,000; [30]
- (e) any proceedings for the specific performance, rectification, delivery up or cancellation of any agreement for the sale or purchase of any property of a value not exceeding \$20,000; [31] and
- (f) proceedings for the execution or declaration of subsistence of a trust where the property said to be impressed is of a value not exceeding \$20,000. [32]

18 An appeal as of right lies to the Supreme Court against any judgment or order, although leave must be obtained in order to appeal against (amongst other things) interlocutory orders or summary or costs judgments. [33]

19 In respect of its criminal jurisdiction, the Court is responsible for dealing with the vast majority of prosecutions for all non-summary offences brought in New South Wales, and to this end is vested with jurisdiction in relation to all indictable offences with the exception of murder and the various offences [34] falling under the descriptive rubric of 'treason'. [35] A person convicted of an indictable offence may appeal to the Court of Criminal Appeal of the Supreme Court:

- (a) as of right as against the conviction or sentence when the appeal is on a question of law alone;
- (b) with leave as against the conviction or sentence is on a question of fact alone, or a mixed question of fact or law; or
- (c) with leave as against the sentence alone. [36]

20 As with the Local Court, the District Court has the power to punish for contempt in the face or in the hearing of the Court, and may refer other allegations of contempt to the Supreme Court for determination. [37]

The Supreme Court of New South Wales

21 The Supreme Court is the superior court of record for the State of New South Wales, vested by virtue of s 23 of the Supreme Court Act 1970 with "all jurisdiction which may be necessary for the administration of justice" in that State. Since 1970 this jurisdiction has been administered concurrently in law and equity [38], and includes full powers to:

- (a) grant forms of equitable relief including injunctions, specific performance or the appointment of a receiver;^[39]
- (b) make orders in the nature of prerogative writs,^[40] which variously quash administrative actions on grounds including denial of natural justice or want of jurisdiction (the old writ of certiorari), compel or forbid the exercise of a public duty (the old writs of mandamus and prohibition) or order the release of a person from imprisonment (the writ of habeas corpus);
- (c) make binding declarations of right;^[41]
- (d) punish for contempt, whether in the face of the court or otherwise;^[42] and
- (e) dispose of prosecutions for all indictable^[43] and certain summary^[44] offences, although in practice only the most serious of criminal matters come before the Court for determination.

22 Additionally, by virtue of its status as a superior court, the Court has the inherent power to, amongst other things, stay proceedings constituting an abuse of process, ensure that a criminal trial is conducted fairly, remedy breaches of natural justice or exercise control over parties or their legal representatives.

23 Under the Supreme Court Act, the Court is divided for convenience into three separate divisions, being the Court of Appeal, the Equity Division and the Common Law Division. Separate legislation creates an additional division known as the Court of Criminal Appeal.^[45] Generally speaking, the business of the Court is assigned as follows:

- (a) Common Law Division: The Common Law Division is responsible for the exercise of the Court's criminal jurisdiction, and handles much of the Court's caseload in respect of administrative law matters or claims for debt or damages in tort, contract or property. To this end, the Common Law Division is broken down into lists including the Administrative Law List, the Defamation List, the Property List and the Professional Negligence List.
- (b) Equity Division: The work of the Equity Division is a hybrid of traditional, 'general equity' matters such as probate, trusts, adoptions and protections, and highly specialist commercial and corporate litigations. To this end, the Equity Division is broken down into lists including the Adoptions List, the Protective List, the Probate List, the Commercial List, the Technology and Construction List and the Corporations List.
- (c) Court of Appeal: The Court of Appeal, constituted by the sitting of 3 or more judges^[46], hears appeals from the Court's two trial divisions,^[47] plus those from certain other lower courts (such as the District Court as described above).
- (d) Court of Criminal Appeal: The Court of Criminal Appeal, constituted in the manner of the Court of Appeal by 3 or more judges sitting together,^[48] hears criminal appeals from the Common Law Division,^[49] plus appeals in respect of prosecutions for indictable offences from certain other courts (such as the District Court as described above).

24 Finally, it is a function of the Supreme Court to hear applications for the admission of individuals as legal practitioners in New South Wales.^[50] Once so admitted, practitioners become subject to the inherent jurisdiction of the court to control its own officers, being a status which all practitioners attain upon admission.^[51]

The High Court of Australia

25 At the apex of the New South Wales and Australian court structure sits the High Court, created by Chapter III of the Australian Constitution as the entity in which the judicial power of the Commonwealth ultimately vests. In addition to its original and appellate jurisdiction in respect of federal matters- concerning for instance the interpretation of the Constitution, Commonwealth laws or cases in which the Commonwealth is a party- the High Court has jurisdiction to hear and determine appeals from the Supreme Courts of any Australian State or Territory.^[52] The effect of this latter jurisdiction is that the Court, unlike in other federations such as the United States^[53], is the ultimate arbiter of a single Australian common law.

26 However, the Court is now mandated by legislation to only hear and determine appeals from State and Territory Supreme Courts when 'special leave' to do so has been granted to the parties by the Court.^[54] When hearing applications for such leave, the Court must consider:^[55]

- (a) whether the appeal involves a question of law that is of "public importance";
- (b) whether a resolution of the appeal would resolve differences between courts, or within one court, as to the state of the law;
- (c) whether the "interests of the administration of justice" require the resolution of the appeal; and

(d) any other matter that the Court considers relevant.

Courts of Specialist Jurisdiction

27 Integrated into the basic three-court structure are a number of specialist courts whose jurisdiction is limited to specifically enumerated subject-matters. These courts are:

Land and Environment Court of New South Wales

28 The Land and Environment Court is a superior court of record constituted by and under the Land and Environment Court Act 1979 (NSW). The Court has such appellate and original jurisdiction as vested in it by that Act, relating to matters such as environmental planning and protection laws, local government legislation, land development regulation and environmental offences.[56]

The Industrial Relations Commission of New South Wales in Court Session

29 The Industrial Relations Commission of New South Wales, constituted by the Industrial Relations Act 1996 (NSW), is an administrative tribunal which exercises a range of non-judicial functions such as the setting of uniform terms and conditions of employment at an industry level, conciliating and arbitrating industrial disputes between employee and employer unions and overseeing processes of enterprise bargaining. Nonetheless a subsidiary entity is the Commission in Court Session, which is constituted as a superior court of record with jurisdiction in respect of more judicial matters such as the fairness of employment contracts or occupational health and safety prosecutions.[57]

The Drug Court

30 Constituted by the Drug Court Act 1998 (NSW), the function of the Drug Court is to assign drug dependent offenders, referred to it by other courts, to rehabilitation programs participation in which suspends the imposition of the offender's final sentence.

Court of Coal Mines Regulation

31 The Court of Coal Mines Regulation is constituted by a District Court judge appointed to that position pursuant to s 150 of the Coal Mines Regulation Act 1982 (NSW), and has jurisdiction to hear matters concerning breaches of coal mining safety legislation.

Licensing Court

32 The Licensing Court is a court of record with the responsibility of hearing and determining applications for, and objections to the granting or maintenance of, licenses to sell liquor.[58]

Children's Court

33 The Children's Court is a court of record[59] vested with jurisdiction under various statutes to deal with matters concerning both the care and protection of children, and criminal prosecutions concerning children.

The Appointment, Tenure and responsibilities of Judicial Officers

New South Wales Judges Generally

34 As detailed at the beginning of this paper, the maintenance of an independent judiciary absolutely free from political or other control on the part of the executive or other bases of social power is a critical feature of a society governed by the rule of law. In an individual sense (and as detailed in a previous paper, "Judicial Ethics [Paper 1]"), such independence is ultimately guaranteed by the personal dedication and intellectual honesty of each judge; such qualities, however, cannot be enshrined in legislation. However, more practical measures designed to minimise the possibilities of interference with the judicial function can, and thus legislation in all Australian States and Territories (and the Commonwealth Constitution at the federal level) makes provision for the formal appointment of judges to office, security of tenure and stability of remuneration.

35 Thus in New South Wales, all persons from the Supreme Court down to the Local Courts are appointed into judicial office by commission under the public seal of the State,[60] and are required as part of this process to swear or affirm the State oath of allegiance and the judicial oath.[61] During a judge's term in office, he or she enjoys:

(a) a fixed level of remuneration that cannot be reduced or derogated from during the term of the office;[62] and

(b) an immunity from suit in respect of acts done in the performance of judicial duties or in the performance of administrative duties intimately associated with those judicial duties.[63]

36 Similarly, while subject to a statutory retirement age of 72,[64] until such time judicial officers can only be removed by the New South Wales Governor (being the entity in which the executive power of the New South Wales Government is vested) on address from both houses of Parliament (this issue is discussed in further detail below). To like effect, while Parliament retains the power to abolish a judicial office by legislation- as would occur, for example, when a court is disbanded in favour of a new court structure- the person who held such office is entitled, without loss of remuneration, to be appointed to another judicial office of equivalent or higher status.[65]

Judicial accountability

37 While the proposition that the enjoyment of rights attracts the acceptance of responsibilities may appear in most respects to be self-evident, its application to the obligations undertaken by judges upon entry into office is far from straightforward. Certainly, security of tenure and remuneration are essential to ensure that judges are free to apply the law as it stands without fear of dismissal or starvation; but this is not to say that judges do not owe a duty to the citizenry they serve to exercise such powers, and enjoy such benefits, in accordance with certain acceptable standards of behaviour and conduct. As stated by the New South Wales Chief Justice:

"Such security of tenure is designed to ensure independence of the judiciary. However, security raises problems of its own. Judges cannot be readily disciplined or removed even if their performance is, in some respects, deficient. What can be done to ensure that, notwithstanding security of tenure, judges behave with the competence and integrity that is required of them? In Australia, this issue has come to be discussed in recent years in terms of the "accountability" of those who exercise government power, including those in the judicial branch of government."[66]

38 Indeed, absent a coherent theory of judicial accountability the rule of law is positively undermined; recall Dicey's second proposition, namely that no public official is exempt from the normal processes of the law.

39 Traditionally and primarily, judges are held accountable to the public through the requirements that, first, judicial decisions must only be made on the evidence presented by the parties, second, that such evidence be presented in public, open court and, third, that first-instance decisions are susceptible to appellate review. Coupled with the obligation to provide reasons, it is therefore impossible for a judge in the common law system to discharge his or her judicial function in a manner that is not open to general scrutiny. Nonetheless, while these requirements continue to lie at the heart of judicial accountability, in recent decades in Australia and elsewhere they have become to be seen as inadequate, in and of themselves, as means of ensuring that judges remain responsive to the communities in which they work. This is as much a matter of demonstrating the presence of such accountability to the citizenry and opening up the judiciary to public inspection as it is about improving actual standards; as recently stated by Justice Michael Kirby of the High Court of Australia:

"The old belief that the judiciary was beyond criticism, both as to its work and personnel, has given way, in many countries, to a serious desire, not least from the judiciary itself, to ensure that appropriate levels of performance are reached, that continuing education outside the courtroom is accepted, that minimum standards of diligence, competence and ethical conduct are upheld and that all of this is demonstrated to the community whom the judges serve."[67]

40 Accordingly, new and more formalised mechanisms of accountability have emerged, of which this paper intends to analyse two; namely, judicial education and judicial complaints handling processes.

Judicial Education

41 As recently explained by Justice Kenny of the Federal Court of Australia, the concept of judicial education is of relatively recent origin in that:

"Traditionally, newly-appointed judges have not undertaken any special course of judicial studies to equip them for judicial life. Since they were previously practising lawyers, usually with considerable courtroom experience as advocates, it was assumed that they could assume the responsibilities of judicial office without further education."[68]

42 In this context, the focus is as much on acceptable standards of conduct in the face of the multitude of social mores and attitudes which the newly appointed judge will encounter during his or her career on the bench as it is on substantive law or court procedures- it being a virtual certainty that a judge's career as a legal practitioner would provide an ideal preparative background in this respect. It is this social and cultural sense, in addition to the legal or professional, that the newly emerged judicial education programs have great relevance to the matter of accountability. As recently stated by Justice Keith Mason, the President of the New South Wales Court of Appeal, "it is men and women enjoying judicial independence who administer justice, not automata or computers";[69] thus as men and women, judges too can suffer from what His Honour calls 'unconscious judicial prejudice' in a manner that impedes that other great characteristic of the rule of law, the impartial application of legal principles.

43 In Australia, the issue of judicial education is now squarely on both the national and State governmental agendas. In New South Wales, an organisation called the Judicial Commission has since its establishment in 1986 been responsible for, amongst other things, the organisation and supervision of schemes for the continuing education and training of judicial officers.[70] The Commission offers a range of induction and continuing education programs for new and continuing judicial officers, and publishes a series of 'Bench Books' to be used as practice and procedure manuals; thus

the 'Criminal Trial Courts Bench Book' is provided to Supreme and District Court judges hearing criminal matters, and contains suggested directions to be used in instructing juries on the law and the facts when they are retiring to consider their verdict. Additionally, more topical areas of discussion include seminar and information sessions on sentencing Indigenous offenders and relationships with Indigenous communities generally, dealing with self-represented litigants and sensitive aspects of criminal law such as sexual assault.[71]

44 Likewise at the federal level, in 2002 the National Judicial College of Australia commenced operation as a full-time educational unit, attached to the Australian National University in Canberra, with the goal of co-ordinating judicial education at the national level. A key feature of the College is its direct governance by current and former judicial officers, designed with a view to providing an opportunity for experienced judges to share their experiences and knowledge with their younger colleagues and, in turn, for such younger judges to introduce new concepts and methodologies to those more experienced. As stated by Chief Justice Doyle at the opening of the College:

"judicial officers tend to occupy judicial office for fairly lengthy periods. This is in the public interest. It takes time to develop fully the skills required of a judicial officer, and it is in the public interest that those who have fully developed those skills put them to the public benefit for as long as possible. The fact that judicial officers hold office for substantial periods of time mean that they are likely to benefit from programmes of professional development that reinvigorate, refresh and enthuse."[72]

Formalised Complaints-Handing Processes

45 Although exceptionally utilised, the procedure for removing a New South Wales judicial officer from his or her position is well settled. As dictated by s 53(2) of the Constitution Act 1902:

"The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking the removal on the ground of proved misbehaviour or incapacity."[73]

46 In more prosaic terms, this means that a judicial officer can only be removed by an executive order, prompted by a resolution of a joint sitting of both Houses of Parliament, to the effect that the officer in question has been guilty of such misbehaviour, or is of such incapacity, that the circumstances justify his or her removal from office. In the interests of judicial independence these requirements are, of course, justifiably strict.

47 The issue that has emerged in recent decades, however, is that traditionally there have been no established avenues for dealing with either, first, complaints against judicial officers of such potential seriousness as to justify removal or, second, the expression of lesser concerns which, although falling short of removal, might nonetheless justify some alternative form of sanction. The lack of such formal procedures might be said to result in great unfairness to the judicial officer in question in the first instance, and to the aggrieved member of the public in the second. Alternatively expressed, the perception was that while there may have been a form of accountability for the most grave forms of judicial misbehaviour or incapacity, there was no judicial equivalent of a 'complaints department' to which lesser (but nonetheless significant) grievances could be directed.

48 Accordingly, upon its establishment the Judicial Commission of New South Wales was accorded the additional function of receiving, assessing and classifying complaints against the State's judicial officers, both 'serious' and 'minor'. [74] The procedure which the Commission must follow in such instances, which is unique amongst the various Australian jurisdictions and in many respects the common law world more generally, is as follows:

(a) Any person is entitled to complain to the Commission about a "matter that concerns or may concern the ability or behaviour of a judicial officer." The Commission will then move to deal with the complaint if it appears that, if substantiated, it could either justify the removal of the officer or affect the performance of his or her duties.[75]

(b) A complaint will be summarily dismissed at this point if, amongst other things, it is frivolous, vexatious or trivial, it occurred at too remote a time to justify further consideration, it relates to a matter in respect of which appeal rights exist or the person complained about is no longer a judicial officer.[76]

(c) Complaints not dismissed are classified as either 'minor' or 'serious', and are referred to a Conduct Division of the Commission for further investigation.[77] Critically, the Conduct Division is comprised of either serving or former judicial officers in view of the need to keep such a process separate from external influence.[78]

(d) The Conduct Division may then hold a hearing in connection with a serious complaint- minor complaints can be referred to the relevant head of jurisdiction (such as the Chief Justice of the Supreme Court or the Chief Judge of the District Court) for internal action- which must ordinarily be in public and at which the judicial officer concerned has a right to legal representation.[79]

(e) If, following the hearing, the Conduct Division is of the opinion that the complaint is either wholly or substantially justified, then a report to the Governor in relation to the complaint must be prepared for the purpose of the Attorney-General laying it before a joint sitting of Parliament convened to decide whether the judicial officer should be removed. [80]

49 It is perhaps important to emphasise that the utilisation of this procedure is, particularly in respect of serious

complaints potentially justifying the removal of a judicial officer, exceedingly rare. Nonetheless, its existence (in combination with other means of accountability such as public hearings, the obligation to give reasons and judicial education programs) ensures that the New South Wales judiciary both is and appears to be accountable to the public which it serves. This, without simultaneously derogating from the necessary independence and security of tenure of judges, then further ensures that the modern judiciary continues to abide by the underlying dictates of the rule of law so fundamental to the survival of an open society.

The Position of Acting Judges

50 In New South Wales the capacity for 'acting' judges to be appointed to temporary judicial office is provided for by legislation applicable to the Supreme Court all the way down to the Local Courts. Taking the Supreme Court as an example, to be eligible for appointment to acting office a person must either be eligible for appointment as a permanent judge (requiring no less than 7 years experience as a legal practitioner^[81]) or be a current or former member of the Federal Court of Australia or the Supreme Court of another State or Territory.^[82] A temporary commission cannot be more than of 12 months duration, during which time the acting officer is entitled to a guaranteed judicial salary in the manner of permanent appointees.^[83] Additionally, he or she cannot be removed- other than by the natural expiration of the fixed term- other than in accordance with the constitutional procedure applicable to permanent judicial officers.^[84]

51 Currently in the Supreme Court, this procedure has been utilised to appoint 7 presently serving acting judges and acting judges of appeal, 6 of whom are retired judicial officers of either the Federal Court or the Supreme Court itself.

52 The principal rationale behind acting judicial appointments is that it provides courts with a flexible means of effectively responding to caseload fluctuations so as to keep delays and backlogs to a minimum. Thus in recent years the system has developed into a settled feature of the New South Wales judiciary, whereas traditionally it was used primarily as a means of filling short-term vacancies arising between the retirement of one permanent judge and the appointment of another. Certainly, given the preponderance of former judges amongst those appointed, the abilities and dedication of those appointed to temporary office is beyond doubt. Moreover the concept is hardly unique in the common law world, with the English Lord Chancellor long having had the power to appoint practitioners, recorders and circuit judges to sit as part time judges of the English High Court;^[85] indeed as at March 2003, some 184 practitioners were authorised to occupy such a position.^[86] Interestingly, in a consultation paper released in 2003 the United Kingdom Department for Constitutional Affairs mooted as a benefit of the temporary appointments system the ability of practitioners to experience judicial life for a short period of time as an aid to determining whether they would be inclined to later seek permanent judicial office.^[87]

53 Nonetheless, and despite the well-intentioned nature of the temporary appointments system- responding as it does to the public interest in the rapid disposal of litigation- a number of criticisms have emerged regarding the entrenchment of the system as a permanent feature of the administration of justice. First, and as expressed by Justice Kirby:

"Papering over problems of judicial administration by the use and expansion of exceptional devices such as acting appointments is no real alternative to the proper funding of a judiciary of adequate numbers and greater accountability, transparency and efficiency on the part of permanent judges."^[88]

54 The gist of this concern, in other words, is that temporary appointments are an inexpensive means for governments to be seen to be tackling the serious problem of delayed justice, without expending the time and effort required to properly equip the permanent judiciary with the resources and support staff required to be able to address the problem itself.

55 Second, and although acting judicial officers cannot be removed before the expiry of their term other than in the manner of their permanent colleagues, the system is seen as undermining the fundamental principle, discussed at length above, of the independence of the judiciary. While they cannot be readily removed during their term, it always remains open for the executive to decline to re-appoint an acting judicial officer should it be politically dissatisfied with his or her decisions during the temporary term. As stated in 1997 by the then President of the New South Wales Bar Association (and now Commonwealth Solicitor-General), Mr David Bennett QC:

"It is an essential feature of an independent judiciary that judges are appointed for life (or at least until retirement). This guarantees that they are beholden to no-one. The existence of acting judges challenges this basic principle."^[89]

56 Third, when the acting judicial officer must also maintain a career beyond the bench there exists the possibility that the quality of justice dispensed by the courts is at risk. As stated by Mr Robert Gotterson QC:

"Part-time acting judges have to juggle judicial duties with their responsibilities as practising barristers, solicitors or as academics with a lecturing workload. Practising lawyers must keep their practices running. This is a day to day distraction for part-timers on the bench. As well, they have little or no administrative support at court level. They cannot deliver the quality of justice we must expect from all our courts no matter what the jurisdiction."^[90]

57 Of course, given the tendency to appoint retired judges rather than practitioners or legal academics to the Supreme Court bench, this is a concern more applicable to the position of acting judges in inferior courts.

58 And, finally, the concept of acting judges liable to more than one temporary appointment or drawn from broader

professional ranks might be said to give rise to a reasonable apprehension of partiality; although this is, of course, not to advance any accusation of actual bias on the part of any appointee. Rather, the issue is that of the erosion of the appearance of judicial independence in an objective sense as opposed to any allegation of bias in a subjective sense. Taking the example of a barrister serving a term as an acting judge, might it be said that he or she could be potentially influenced to extend preferential treatment to a firm of solicitors from which he or she normally receives briefs- even on a subconscious level? As detailed in an earlier paper, "Judicial Ethics [Paper No. 1]", that the judiciary be free from any reasonable apprehension of bias is as important as it being free of any actual bias.

59 Accordingly, the question of the propriety of the temporary appointments system is a delicate and vigorously debated one; against the clear public interest in reducing court delays stand very legitimate concerns regarding the effect of the system on judicial independence. Nonetheless it must be recognised that until such time as the judiciary manages to secure adequate resources to deal with increasing caseloads without the need for temporary appointments, the phenomena is a practical issue that must be addressed by practical solutions. To this effect the Chief Justice of Australia, The Hon Murray Gleeson, has said:

"Having lawyers in private practice who are former judges, and having people who move back and forth between the Bench and legal practice, has presented the judiciary, and the profession, with some issues that have had to be addressed. Those issues are not peculiar to Australia. Other common law jurisdictions have had to deal with them. It will be necessary for the judiciary and the profession to develop some common rules of professional conduct. To an extent, this process is already in train but more effective cooperation may be necessary." [91]

60 One proposal for reform to the existing system might be to devise and impose some form of professional obligation upon former acting judges to not appear as counsel, for a limited period of time, before the court of which they were former temporary members. Presently the New South Wales Barristers Rules make provision to this effect in respect of former permanent members of the courts of this State, but temporary appointees are specifically excluded from these requirements. [92]

Judges in the Lower Courts

A changing magistracy

61 At present in New South Wales it is beyond doubt that the judges of the Local Courts, known for reasons of tradition as 'magistrates', are extended an official judicial status wholly equivalent to that of their colleagues in the higher courts. Specifically, the provisions of the Judicial Officers Act relating to retirement, immunity from suit and access to the Judicial Commission's complaints-handling process all apply to magistrates, as does the procedure in the Constitution Act as to the removal of judges by the Governor on address from Parliament. Equally, magistrates' remuneration is fixed and cannot be derogated from in exactly the same manner as, say, the President of the Court of Appeal or the Chief Justice of the State.

62 Such equality of treatment and position is plainly warranted; despite the matters with which they deal too often being described, inaccurately, as 'minor', lower court judges in Australia and elsewhere play a critical and undervalued role in the administration of justice. As once stated by a former Chief Justice of Australia, Sir Anthony Mason:

"Why is it that law journals, as well as newspapers, devote so much space to the High Court and so little space to the Magistrates' Courts? The High Court is predominantly a forum for the resolution of institutional conflicts to which governments, statutory authorities, corporations and trade unions are parties. The Magistrates' Courts dispense justice at the grass-roots- a function of vital importance in a democracy and one deserving the closest scrutiny." [93]

63 It is for this very reason- being the sheer proximity of the lower courts to the everyday affairs of individuals rather than institutions- that the name 'Local Courts' was devised in 1982 to replace the old 'Court of Petty Sessions.' Given the connotations of the former with what Sir Anthony calls 'grass roots' justice, the idea was to present the lower courts as an institution closely connected to, and receptive to ideas from, the local communities which they serve. [94] Moreover, by according full judicial status to magistrates and placing their courts squarely within a defined and logical court structure- Local, District and Supreme- the idea is to project to the broader community the idea that the justice dispensed in the lower courts is, far from being 'trivial', of no lesser quality than that accorded institutional litigants in the higher courts. The benefits of the rule of law and a fully independent judiciary, after all, must apply to all in a like manner.

64 Such a recognition of the pivotal role of the lower courts in New South Wales has, however, not always been the case. For the vast majority of the State's history, magistrates were not judicial officers but, rather, mere public servants employed by and drawn from the ordinary ranks of the Justice Department; indeed, symbolising this unhealthy closeness to the executive government, it was not until the 1940s that the name 'Court of Petty Sessions' replaced the previous 'Police Courts' (presided over, of course, by 'Police Magistrates'). [95] Salaries rose and fell in the same manner as the ordinary public service, and magistrates came under the direct control of senior bureaucrats subject only to a departmental convention that no directions should be given as to the conduct of, or decisions to be made in, court proceedings. Perhaps most remarkably of all, it was not until 1955 that magistrates were required to have formal legal education and training. [96]

65 In discussing the great changes that have occurred in the New South Wales magistracy in the last twenty years,

Chief Justice Gleeson has recalled his early years in practice and the status of the lower courts at that time as follows:

"In 1963, when I entered the legal profession, as today, the judicial officers with whom lawyers and the public had most contact were magistrates. There were no Federal Magistrates. State magistrates were members of the Public Service. In New South Wales, they were appointed by the Public Service Board. Most of them had entered the Public Service at an early age, were appointed to the Bench as part of a career path, and remained there until retirement, at the age of 60 or earlier ... Their remuneration and salary arrangements were the same as other public servants. Their salaries varied according to how they were graded, and they were graded by executive government. They were part of the government bureaucracy."[97]

66 Similarly, Justice Kirby has reflected upon the magistrates of his youth in terms of their apparent closeness to police prosecutors and the resultant image of the lower courts as both staffed and presided over by mere government officials whose function it was to process cases rather than administer justice:

"40 years ago the magistrates of Australia were, for the most part, recruited from amongst the clerks of petty sessions. Their career path was normally wholly within the Executive Government. Most had spent their entire lives in the Courts of Petty Sessions, working cheek-by-jowl with the police prosecutors, who were effectively part of their court team. This was a low-cost, but socially effective, system of processing big jurisdiction case loads through courts where public legal aid was virtually unknown."[98]

67 This is, of course, not to generate blanket aspersions as to the quality and abilities of New South Wales magistrates of the last century. Rather, it is to make a structural observation of the prior perception of lower courts as places where the full rigours of the rule of law and its necessary attendants- such as an independent judiciary- need not apply. When compared to the present situation, therefore, the irresistible implication is that the disputes of magistrates' court litigants were simply not considered worthy of the full and impartial judicial consideration said to be the very epitome of a society governed by the rule of law.

68 One example will, perhaps, suffice. In 1957 the lessor of an apartment building in Sydney applied to the then Fair Rents Board, constituted by a magistrate, for an order permitting an increase in the rate of rent she was permitted to charge her tenants. The lessor was represented by her husband, who was in fact a close personal friend of the magistrate constituting the Board; indeed, shortly before the first hearing of the matter, the two were seen out dining together. Accordingly, both the parties and the magistrate concerned were all in agreement that it would be inappropriate for the latter to hear the case on the very reasonable ground of apprehended bias. Upon the search for a replacement proving unsuccessful, however, the magistrate was ordered by the Under-Secretary of the Justice Department, in a manner directly contrary to established convention, to go ahead and hear the matter.

69 In response the tenant parties sought judicial review in the Supreme Court of the decision to have the magistrate sit on the ground of denial of natural justice, a submission which the Court accepted. In the course of its reasons, while the Court noted that magistrates were mere public servants whose independence from executive government was a matter of custom rather than rule, the undeniably judicial nature of their function was underscored in that:

"A stipendiary magistrate who exercises the powers of a Board sits as a judicial tribunal and may have to determine many matters of fact put forward by the parties. He is required also to have regard to the justice and merits of the case and to the circumstances and condition of the parties."[99]

70 Accordingly while the ultimate outcome of the case was that the magistrate did not sit, that it could even arise suggested to the public that, in the case of the lower courts, "administrative exigencies could over-ride judicial autonomy, which was sustained only by convention."[100]

71 The transition to the present situation finally came in 1985 with the entry into force of the Local Courts Act which, as one aspect of a wholesale review of the lower courts of New South Wales, broke the nexus between the magistracy and the public service by creating the independent statutory office of Chief Magistrate as an entity with sole administrative responsibility over the new Local Court. One year later the enactment of the Judicial Officers Act confirmed this shift by rendering magistrates 'judicial officers' for all purposes of statutory tenure and remuneration. As observed at the time by Justice Priestley of the Court of Appeal, one of the purposes of the new regime "was to make the position of magistrates and the courts in which they sat resemble more closely that of judges and courts generally";[101] Parliament, it was said, was "endeavouring to improve the standard of the magistracy."[102] Indeed it was not until April of this year, 2004, that this process was completed, with the manner of address for magistrates in court being changed from the traditional 'Your Worship' to the general 'Your Honour';[103] exactly in accordance with that of their colleagues in superior courts above.

Persistent Challenges

72 Despite victory in their hard fought battle for recognition as full judicial officers, however, it remains the case that magistrates in New South Wales- much like, it is assumed, lower court judges everywhere- face incredible difficulties on a daily basis that are simply not present in courts higher up the judicial structure. Changes in status notwithstanding, it remains the case that magistrates continue to labour under the "contradictory demands" of productivity- the imperative of pushing through a staggering caseload- and fairness- the need to afford due process to all those who come before the courts.[104]

73 The challenge facing lower court judges is, therefore, how to prevent their courts from becoming mere 'system[s] of processing big jurisdiction case loads' without creating inexorable delays and backlogs. While a failure to attend sufficiently to each individual case does not besit the judicial function, it is equally true that justice delayed is justice denied. Moreover this tension is compounded in common law jurisdictions such as Australia where, as discussed above, it is a basal element of the judicial role to remain passive, allow the parties to present their evidence and then decide the merits of the case only upon the material so presented. To adopt an active, inquiring approach as a means of hastening the enumeration of the real issues in dispute is, at least on the face of it, completely inimical to this role.

74 Thus within this framework of discussion, examined will be what are arguably the two most chronic problems confronting the maintenance of judicial independence and detachment in Australian lower courts- but, again, presumably in other jurisdictions as well- and some suggested means of overcoming such difficulties. In order of treatment, they are caseload management and unrepresented litigants.

Caseload Management

75 Authority for the oft-cited proposition that the lower courts are responsible for the vast majority of the business of the judiciary is readily found in even the most cursory glance at the statistics. The New South Wales Local Court, for instance, is by good measure the largest and busiest court in the Commonwealth of Australia, in which some 427,329 new civil, criminal, children's and family law matters were commenced in 2003 alone. At the conclusion of that same year, and despite upwardly trending disposal rates, approximately 29,000 matters remained pending before the court. [105]

76 By way of contrast, a mere 12,947 matters were commenced in the Supreme Court in 2003; and this notwithstanding the fact that the New South Wales Supreme Court is easily the largest of all the various State and Territory Supreme Courts in Australia. Moreover it is important to note that this figure, while excluding non-contentious probate matters, is inclusive of proceedings as minor as criminal bail applications. Similarly, in the same year the Court of Appeal and Court of Criminal Appeal combined heard some 1,353 appeals or applications for leave to appeal.[106]

77 To be sure, the caseload of the Supreme Court and Court of Appeal is generally of a far greater length and complexity than that faced by magistrates in the lower courts, but this is not to say that the work of the latter can in any way be dismissed as merely 'trivial.' It will be recalled, that is to say, that the Local Court has jurisdiction to hear civil claims for the recovery of any debt, demand or damage up to the value of \$60,000, or some 355, 049 Yuan Renminbi. Given that the average annual income of a full-time adult Australian worker, based on a weekly salary of \$952.50, is in the order of \$49,500, it is clear that many in the community would be hesitant to consider such a sum to be trivial or minor.[107] Equally, trying and/or sentencing an individual for an indictable offence- involving a potential sanction of anything up to life imprisonment- requires a magistrate to exercise his or her judicial discretion in the most serious of circumstances. And, finally, there is the substantial social and governmental responsibility borne by local court judges; whereas litigants in the superior courts are likely to be large, repeat legal players, those in the Local Courts will in all probability be individuals dealing with unfamiliar and intimidating surroundings. Their experiences therein, and in particular the work of the presiding magistrate and other court staff, are very likely to determine their attitude to the justice system at large

78 The response of the Local Court to its sizeable caseload has been to develop, at least in its civil jurisdiction, a number of procedural ingenuities designed to facilitate the rapid identification of the real issues in dispute between the parties.

79 As discussed above, the Local Court has divided its civil jurisdiction into two distinct groups, namely the General Division and the Small Claims Division, with the latter only handling matters in which the amount in dispute does not exceed \$10,000 (or some 59,160 Yuan Renminbi). While the procedure of the General Division is little different from that of the District and Supreme Courts above, in the Small Claims Division the image of the disinterested common law judge has been radically altered in favour of a more interventionist approach. First, the jurisdiction of the Court sitting in its Small Claims Division can be exercised by either a magistrate or an 'assessor.' [108] Appointed under legislation for a designated period (not exceeding 7 years), assessors are barristers or solicitors whose function it is to assist the magistracy with the disposal of the most minor of civil matters. While assessors have lesser security of tenure than judicial officers- they can be dismissed by the executive government for incapacity or misbehaviour- their remuneration is not bound to that of the public service generally and they are ultimately responsible to the Chief Magistrate.[109]

80 Second, before any Small Claims matter comes on for hearing the parties must attend a 'pre-trial review' before a magistrate or assessor. At the review, it is the function of the presiding officer:

- (a) to use his or her best endeavours to identify the real issues in dispute and to bring the parties to a settlement;
- (b) to consider whether the parties should be referred to a community justice centre for a non-litigious resolution of the matter; and
- (c) if settlement or referral is impossible, to consider the preparations the parties have made for trial and to "give to the parties such advice concerning those preparations as seems reasonably necessary to ensure that a fair and quick trial

of the action can be completed." [110]

81 And, third, if a Small Claims action does proceed to trial the presiding magistrate or assessor must conduct the proceedings "with as little formality and technicality as the proper consideration of the matter permits." Vitality in this respect, the very technical rules of evidence that ordinarily apply in court proceedings have no application, and the magistrate or assessor may inform him or herself on any matter or issue relating to the action as he or she thinks fit. [111] Similarly, no order or judgment can be made in the Small Claims Division unless the assessor or magistrate "has brought, or has used his best endeavours to bring, the parties to the action to a settlement acceptable to the parties." [112]

82 A further trend in Local Court case management has been to vest a number of minor judicial and quasi-judicial functions in certain court officials- known as 'registrars' or, previously, 'clerks of the court'- with the intention of freeing judicial time to deal with more complex issues. Thus a registrar may constitute a Local Court for a variety of purposes, including for the adjournment of proceedings, the issue and return of subpoenas, the making of consent orders or the fixing of dates for the service of documents. [113] In respect of case management procedures specifically, registrars may make orders as to, amongst other things, the setting down of a timetable to bring a matter to hearing, the preparation and filing of statements of agreed facts and issues, the preparation of lists of evidence and the filing of written submissions on points of law in contention. [114]

83 At first glance, the development of such procedural innovations appears incompatible with the party-driven system of civil litigation so long said to be the cornerstone of the rule of law and the independence of the judiciary in the common law world. Certainly, these procedures have inevitably led to a derogation from the classic model of the passive judge; the notion that the magistrate (or assessor) should give 'advice' to parties as to how to conduct their case at hearing is indeed completely alien to the archetypal, exclusively adjudicatory model of the judicial function. However in adopting such change the lower courts are by no means alone. In discussing the evolving role of the common law judge, Chief Justice Gleeson has said:

"The pressure of business before the courts, and the necessity to respond to demands for judicial involvement in case management, has resulted in the acceptance by judges of responsibilities of a kind their predecessors never acknowledged. Forty, and even 15, years ago, it was not regarded as part of the role of a judge to manage the progress of cases towards readiness for trial, and judges were discouraged from undue intervention in the progress of cases during trial ... Things are different now. Courts are expected to manage their lists actively, and trial judges are expected to adopt a role most of their predecessors would have regarded as inappropriately interventionist." [115]

84 For obvious reasons, the caseload pressures of lower courts such as the Local Court make such modifications to the traditional approach even more critical if such courts are to continue to effectively service the community. Rather than the strict maintenance of the 'passive judge' model, what remains essential is the independence of the judiciary from outside control or influence; especially so considering the more active role that lower court judges (in particular) now play in the management of the cases that come before them. Whereas the former is in many respects a product of history that must be adapted to fit contemporary reality, the latter is unquestionably the essential key to the maintenance of the rule of law. While concerns may be legitimately expressed that a 'managerial' or 'interventionist' approach has the potential to tarnish judicial independence by rendering the judge an active participant in litigation, the concurrent development of new and more formal means of judicial accountability, as discussed above, goes a long way to ensuring that the new style of judging will remain as impartial as the old.

85 Of course, this is not to say that lower courts judges should abandon completely the traditional approach by, for example, directing the parties as to what evidence should be presented at hearing or forcing them into a non-consensual settlement. What it does mean, however, is that in striking that perpetual balance between productivity and fairness, lower court judges must be prepared to undertake a role that is, in many respects, vastly different to that of their predecessors.

Unrepresented Litigants

86 Returning again to the model of the detached common law judge, Chief Justice Gleeson has observed that:

"The adversary system assumes, in the interests of both justice and efficiency, that cases will be presented to courts by skilled professionals. To the extent which that assumption breaks down, so does the system." [116]

87 Specifically, the common law is replete with procedural and evidentiary rules that are designed to protect the parties, in the interests of fairness, from the finder of fact having to consider material that is unduly prejudicial to a party or, alternatively, to come to a decision based on material that is incomplete. Objection may be taken, for instance, to the reception into evidence of statements or confessions allegedly made out of court on the basis that the other party does not have the opportunity to test the truthfulness of such assertions in cross-examination. Alternatively, parties may request the court to compel a person (whether a party to the proceedings or not) to attend court to give evidence or to produce documents or other physical evidence relevant to the matter.

88 The common element of all such rules and procedures is that they are not self-enforcing, arising only when one party or another moves the court for their application. The 'breaking down' of the adversary system in the absence of legal representation, therefore, arises because the unrepresented litigant is often unaware of the existence of such

procedures and is, consequentially, wholly deprived of their benefit. Thus potentially inadmissible evidence may come in due to a failure to object to it, or potentially relevant evidence may stay out due to a failure to seek orders for its production. The question then becomes; to what extent is the trial judge permitted to adopt a 'managerial' role at the hearing stage of proceedings so as to lend a 'helping hand' to unrepresented litigants? (As compared, of course, to the adoption of such an approach at the pre-trial stage to ensure the efficient disposal of heavy caseloads.)

89 Again, it is plain that the structural difficulties presented the adversarial system by unrepresented litigants are felt most acutely at the lower court level. According to a recent assessment by the Law Society of New South Wales, in excess of 46 percent of litigants coming before the Local Courts are unrepresented.[117] Moreover, this figure does not take into account the volume of litigants represented by solicitors or counsel brought in at the last moment on public funds with a relatively scant knowledge of the proceedings or the parties.

90 As a matter of course the common law has shown little sympathy for parties labouring through the court system without professional assistance; in one prominent case, the English House of Lords described a decision made on incomplete evidence as merely 'unsatisfactory' rather than 'unfair', and laid the blame squarely on the parties for the deficiencies of the case.[118] The primary concern, rather, has long been on the maintenance by the trial judge of the strict degree of detachment and passivity required of a common law judicial officer. As stated in one case:

"A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict." [119]

91 Alternatively expressed, the general rule is that even if the parties do not present a full and complete case or fail to utilise the protections available to them, it is not for the judge on his or her motion to go 'in search of justice.' [120]

92 Ideally, of course, sufficient public and private funds would be available to procure representation for all litigants, such that the judge could indeed occupy that ideal, detached role of common law theory. But the reality, and in particular the lower court reality, is much different. In all those cases in which a party or parties appear unrepresented, the lower court judge must inevitably take the necessary steps to ensure that the logical conclusion of the traditional approach does not come about; namely, that a meritorious case is lost merely because a party could not afford legal representation, or the amount in dispute was not sufficient to justify same. Such an outcome would indeed be a "high price to pay" for the maintenance of an approach whose validity rests wholly on an assumption that is far removed from the all too common lower court experience.[121]

93 The extent of the trial judge's assistance to the unrepresented litigant must at all times be tempered by the recognition that his or her intervention can never serve as a proper substitute for the role of counsel. While the judge can, and in some circumstances must, attempt to lend a "helping hand", as a complete substitute for counsel, this is "inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems." [122] As stated by the late Justice Murphy of the High Court:

"A judge's assistance to an unrepresented accused does not make up for lack of counsel. In an adversary system, it is not his function to assist one party. An attempt to do so generally serves only to gloss over procedural injustice; how can a judge assist effectively without having conferred with the accused and his witnesses in circumstances in which the accused has the protection of the confidentiality rule?" [123]

94 The propriety of any intervention must be considered in light of the paramount obligation that the judge remain independent of the parties and impartial with respect to their respective cases. As expressed by the former Justice Fox of the Federal Court:

"Not only does the fact that an accused is unrepresented resent difficulties for himself at his trial, it also does so for the court, in a number of ways. One problem is that by the time the trial judge does all that is required of him to protect the accused's position, he is in grave danger of appearing partial." [124]

95 This proposition must be read in conjunction with that above, in that the function of the trial judge is inherently (and rightly) very different to that of counsel. Accordingly, the provision of advice to an unrepresented litigant as to how to conduct his or her case would be completely unacceptable.[125]

96 Ordinarily the extent of a judge's assistance must be limited to informing unrepresented litigants of their rights, rather than assisting with the exercise of such rights. To adopt, as one judge has, the analogy of a game: "In such a case as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play." [126]

Concluding remarks

97 It has been the purpose of this paper to demonstrate, through an analysis of the New South Wales judiciary and court structure specifically, that while the maintenance of such personal qualities in judges is essential, it is only through the development of appropriate governmental structures to support the judiciary that the rule of law can be truly

maintained. The faithful and dutiful judge, while admirable, is hopelessly emasculated if the independence of the judicial branch of government is not upheld.

98 There must be a structured and clearly defined court hierarchy with rights of appeal, in appropriate circumstances, existing as of right. Judges must be fully independent from the executive government and other sources of potential influence, with security of tenure and guaranteed incomes. There must be formal and identifiable mechanisms of judicial accountability to the community, both directly through complaints-handling and removal processes and indirectly through the availability of programs of judicial education.

99

Sir Gerard Brennan, a former Chief Justice of Australia, has said:

"A judge's role is to serve the community in the pivotal role of administering justice according to law. Your office gives you that opportunity and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but the judge will not succeed and will not find satisfaction in his or her duties unless there is a continual realisation of the importance of the community service that is rendered. Freedom, peace, order and good government - the essentials of the society which we treasure- depend in the ultimate analysis on the faithful performance of judicial duty. It is only when the community has confidence in the integrity and capacity of the judiciary that the society is governed by the rule of law." [127]

* Paper delivered 11-13 October 2004 to the National Judicial College, Beijing

** Justice of the Supreme Court of New South Wales

I acknowledge the assistance of the Commercial List researcher, Mr Alexander Phipps, BA (Hons) LLB (Hons) in preparing this paper

1 A.V. Dicey, Introduction to the Study of the Law of the Constitution, Tenth Edition, MacMillan & Sons, London, 1959, page 188.

2 Ibid., 193.

3 Ibid., 195-6.

4 Justice Bruce DeBelle, "Judicial Independence and the Rule of Law" (2001) 75 Australian Law Journal 556 at 558.

5 See the attached diagram for a pictorial representation.

6 Local Courts Act 1982 Part 3.

7 Local Court of New South Wales, Annual Review 2003, page 6. (www.lawlink.nsw.gov.au/lc.nsf/pages/reps_papers)

8 Local Courts (Civil Claims) Act 1970 s 6.

9 Local Courts (Civil Claims) Act 1970 ss 12 (1) and (2).

10 Local Courts (Civil Claims) Act 1970 ss 12(3) and (4).

11 Local Courts (Civil Claims) Act 1970 s 21L.

12 Local Courts (Civil Claims) Act 1970 ss 69(2) and (2A).

13 Local Courts (Civil Claims) Act 1970 s 69(3).

14 Criminal Procedure Act 1986 (NSW) s 6(1)(c).

15 Criminal Procedure Act 1986 Chapter 5.

16 Criminal Procedure Act 1986 s 55.

17 Criminal Procedure Act 1986 s 65.

18 Criminal Procedure Act 1986 s 66.

19 Crimes (Local Courts Appeal and Review) Act 2001 (NSW) s 11.

20 Crimes (Local Courts Appeal and Review) Act 2001 (NSW) s 52.

21 Crimes (Local Courts Appeal and Review) Act 2001 (NSW) s 31.

22 Local Court Act 1982 ss 27A and 27B.

23 District Court Act 1973 s 11.

24 While the trial of indictable offences in either the District or Supreme Courts is, as a general rule, by jury, the accused has a right to waive a jury trial and have the matter thereby determined by a judge sitting alone: Criminal Procedure Act 1986 ss 131-2. Trial by jury in the District Court's civil jurisdiction is extremely rare, occurring only when the Court is of the opinion that the "interests of justice" require it or the matter is a claim for defamation: District Court Act 1973 ss 76A and 76B.

25 Palmer v Clarke (1989) 19 NSWLR 158 at 166-7, per Kirby P. That is to say, as the District Court is not a superior court of record in the manner of the Supreme Court, it has no 'inherent jurisdiction' exercisable in the absence of a statutory grant of power.

26 District Court Rules 1973 Pt 9 r 19A.

27 District Court Act 1973 s 44(1)(a).

28 District Court Act 1973 ss 44(1)(d) and (d1).

29 District Court Act 1973 s 46.

30 District Court Act 1973 s 133(2).

31 District Court Act 1973 s 134(1).

32 District Court Act 1973 s 134(1).

33 District Court Act 1973 s 127.

34 Including the attempted deposition of the sovereign or the overawing of Parliament.

35 This situation is brought about by the cumulative effect of s 46(2) of the Criminal Procedure Act 1986, s 46(2) of the Criminal Procedure Regulation 2000 (NSW) and ss 12 and 19A of the Crimes Act 1900.

36 Criminal Appeal Act 1912 s 5.

- 37 District Court Act 1973 ss 199 and 203.
- 38 Supreme Court Act 1970 s 57.
- 39 Supreme Court Act 1970 ss 66-7.
- 40 Supreme Court Act 1970 s 69.
- 41 Supreme Court Act 1970 s 75.
- 42 Supreme Court Rules 1970 O 55.
- 43 Criminal Procedure Act 1986 s 46(1).
- 44 Criminal Procedure Act 1986 s 245.
- 45 Criminal Appeal Act 1912.
- 46 Supreme Court Act 1970 s 43.
- 47 Supreme Court Act 1970 s 101.
- 48 Criminal Appeal Act 1912 s 3(1).
- 49 Criminal Appeal Act 1912 s 5.
- 50 Legal Profession Act 1987 (NSW) s 4.
- 51 Legal Profession Act 1987 s 5.
- 52 Constitution s 73(ii).
- 53 Article III, Section 2 of the United States Constitution provides the Supreme Court with jurisdiction only in respect of federal matters or matters with an interstate element. Thus it has no jurisdiction to hear appeals from State courts exercising State jurisdiction, and will not even do so in respect of a State court exercising federal jurisdiction when there is an "independent and adequate State ground" supporting the decision below.
- 54 Judiciary Act 1903 (Cth) s 35(2).
- 55 Judiciary Act 1903 (Cth) s 35A.
- 56 See generally: Land and Environment Court Act 1979 Part 3 Division 1.
- 57 Industrial Relations Act 1996 s 153.
- 58 Liquor Act 1982 s 7.
- 59 Childrens Court Act 1987 (NSW) s 4.
- 60 Supreme Court Act 1970 s 26; District Court Act 1973 s 13; Local Courts Act 1982 s 12.
- 61 Oaths Act 1900 (NSW) ss 8 - 9. For the form of the judicial oath, see the previous paper, "Judicial Ethics [Paper 1]."
- 62 Statutory and Other Offices Remuneration Act 1975 (NSW) s 21 and Schedule 1. See also: Supreme Court Act 1970 s 29; District Court Act 1973 s 15; Local Courts Act 1982 s 24. The same benefit is provided to other public officials whose duties require a similar degree of independence, such as the Director of Public Prosecutions, the Auditor General or the Ombudsman.
- 63 It is a settled proposition of the common law that superior court judges enjoy such immunity during the term of their office: *Re East*; *Ex Parte Nguyen* (1998) 196 CLR 354 at 365-6, per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. In turn, s 44B of the Judicial Officers Act 1986 applies this immunity to all New South Wales judicial officers.
- 64 Judicial Officers Act 1986 s 44.
- 65 Constitution Act 1902 s 56.
- 66 The Hon JJ Spigelman AC, "Judicial Ethics: Accountability and Education", Paper to the Judicial Ethics Training Course, National Judicial College, Beijing, October 2001.
- 67 The Hon Justice Michael Kirby, "Independence of the Judiciary- Basic Principle, New Challenges", Speech to the International Bar Association Conference, Hong Kong, June 1998.
- 68 The Hon Justice S.C. Kenny, "Judicial Education in Australia", Paper prepared for the First Australasian Judicial Educators' Forum, Philippine Judicial Academy, Manila, February 2003.
- 69 The Hon Justice Keith Mason, "Unconscious Judicial Prejudice", Paper presented to the Supreme and Federal Courts Judges' Conference, Sydney, January 2001.
- 70 Judicial Officers Act 1986 s 9.
- 71 Judicial Commission of New South Wales, Annual Report 2002-03, page 12. (www.judcom.nsw.gov.au)
- 72 National Judicial College of Australia, Annual Report 2002-03, page 3. (www.njca.com.au)
- 73 A similar procedure is set out for federal judicial officers in s 72 of the Commonwealth Constitution.
- 74 Judicial Officers Act 1986 s 10.
- 75 Judicial Officers Act 1986 s 18.
- 76 Judicial Officers Act 1986 s 20.
- 77 Judicial Officers Act 1986 s 21.
- 78 Judicial Officers Act 1986 s 22.
- 79 Judicial Officers Act 1986 s 24.
- 80 Judicial Officers Act 1986 s 29.
- 81 Supreme Court Act 1970 s 26.
- 82 Supreme Court Act 1970 s 37(2). A retired judicial officer may be appointed even though he or she has reached the ordinary retirement age of 72, provided that the temporary commission is granted before he or she reaches the age of 75: ss 37(4) and (4A).
- 83 Supreme Court Act 1970 ss 37(1) and (3B).
- 84 Constitution Act 1902 s 53(5).
- 85 Supreme Court Act 1981 (UK) s 9.
- 86 Department for Constitutional Affairs, Judicial Appointments Annual Report 2002-2003, paragraph 3.14. (www.dca.gov.au)
- 87 Department for Constitutional Affairs, "Proposals for the Reform of Recorder and Deputy High Court Judge Tenure", Consultation Paper, May 2003. (www.dca.gov.uk)
- 88 The Hon Justice Michael Kirby, ""Acting Judges- A Non-Theoretical Danger", Speech to the New South Wales Young Lawyers' Conference, Sydney, September 1998.
- 89 New South Wales Bar Association, "Bar Tells NSW Government: No More Acting Judges", Media Release, 29 June

1997. (www.nswbar.asn.au)
- 90 New South Wales Bar Association, "Proliferation of part-time acting judges contrary to principles of justice", Media Release, 30 November 1998. (www.nswbar.asn.au)
- 91 The Hon Chief Justice Murray Gleeson, "A Changing Judiciary" (2001) 75 Australian Law Journal 547 at 551.
- 92 New South Wales Barristers Rules, Rule 87(j). See also the definition of "member" of a court in Rule 15.
- 93 The Hon Sir Anthony Mason, "Foreword" (1987) 10(1) University of New South Wales Law Journal 1 at 3.
- 94 Peter Webb, "Developments in the New South Wales Local Courts", in Australian Institute of Judicial Administration, Magistrates' Courts Administration in Australia, Papers presented at the Second Biennial AIJA Magistrates' Courts Administrators' and Senior Clerks of Court Conference, Sydney, 1991. Page 2.
- 95 Hilary Golder, High and Responsible Office: A History of the NSW Magistracy, Sydney University Press, Sydney, 1991, page 174.
- 96 C.R. Briese, "Future Directions in Local Courts of New South Wales" (1987) 10(1) University of New South Wales Law Journal 127 at 129. It is interesting to note, however, that the United Kingdom retains an extremely strong tradition of 'lay magistrates' as the primary form of judicial officer in the lower courts of that country. A recent study has estimated that some 91 percent of questions of fact and sentence arising in UK magistrates' courts are decided by non-lawyers: Rod Morgan and Neil Russell, The judiciary in the magistrates' courts, The Home Office, London, 2000, page 2.
- 97 The Hon Chief Justice Murray Gleeson, "A Changing Judiciary" (2001) 75 Australian Law Journal 547 at 547-8.
- 98 The Hon Justice Michael Kirby, "The Rise and Rise of the Magistracy" (2003) 15(1) Judicial Officers' Bulletin 1 at 2.
- 99 Ex Parte Blume & Anor; Re Osborn & Ors (1958) 75 WN (NSW) 411 at 414-5, per The Court (Owen J, Roper CJ in Eq and Herron J).
- 100 Hilary Golder, High and Responsible Office: A History of the NSW Magistracy, Sydney University Press, Sydney, 1991, page 177.
- 101 Macrae & Ors v Attorney-General for New South Wales (1987) 9 NSWLR 268 at 288.
- 102 Macrae & Ors v Attorney-General for New South Wales (1987) 9 NSWLR 268 at 277, per Kirby P.
- 103 Local Court Practice Note No. 1 of 2004.
- 104 Hilary Golder, High and Responsible Office: A History of the NSW Magistracy, Sydney University Press, Sydney, 1991, page 177.
- 105 Local Court of New South Wales, Annual Review 2003, pages 3 and 6. (www.lawlink.nsw.gov.au/lc.nsf/pages/repapers)
- 106 Supreme Court of New South Wales, Annual Review 2003, pages 50-52. (www.lawlink.nsw.gov.au/sc)
- 107 Australian Bureau of Statistics, Key National Indicators. (www.abs.gov.au)
- 108 Local Courts (Civil Claims) Act 1970 s 6.
- 109 Local Courts (Civil Claims) Act 1970 Schedule 1.
- 110 Local Courts (Civil Claims) Rules 1988 r 8.
- 111 Local Courts (Civil Claims) Act 1970 s 23B.
- 112 Local Courts (Civil Claims) Act 1970 s 23A.
- 113 Local Courts Act 1982 ss 10B and 10C.
- 114 Local Court (Civil Claims) Rules 1988 r 9.
- 115 The Hon Chief Justice Murray Gleeson, "A Changing Judiciary" (2001) 75 Australian Law Journal 547 at 552-3.
- 116 The Hon Chief Justice Murray Gleeson, "Current Issues for the Australian Judiciary", Address to the Supreme Court of Japan, Tokyo, January 2000.
- 117 Law Society of New South Wales, "Self-represented litigants", Media Release, 1 July 2002. (www.lawsociety.com.au)
- 118 Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854 at 920-1, per Lord Roskill.
- 119 Yuill v Yuill [1945] P 15 at 20, per Lord Greene MR.
- 120 The Hon Justice A.J. Rogers, "Judges in Search of Justice" (1987) 10(1) University of New South Wales Law Journal 93.
- 121 The Hon Justice A.J. Rogers, "Judges in Search of Justice" (1987) 10(1) University of New South Wales Law Journal 93 at 99.
- 122 Dietrich v R (1992) 177 CLR 292 at 302, per Mason CJ and McHugh J.
- 123 McInnis v The Queen (1979) 143 CLR 575 at 592.
- 124 Foster v The Queen (1981) 6 FLR 440 at 441.
- 125 Dietrich v R (1992) 177 CLR 292 at 355, per Deane J.
- 126 Laker Airways Ltd v Department of Trade [1977] 1 QB 643 at 724, per Lawton LJ.
- 127 The Hon Sir Gerard Brennan, "Judicial Duties", in The Judicial Commission of New South Wales and the Australian Institute of Judicial Administration (eds.), The Role of the Judge, Education Monograph 3, Judicial Commission of New South Wales, Sydney, 2004, pages 9-10.

Technology in the Court Room - 2001 - [Friend or Foe?]

Technology in the Court Room - 2001 - [Friend or Foe?]

By Justice Clifford Einstein*

The commercial litigation landscape over the last 40 years

A short survey of the commercial litigation landscape over the last forty years will closely show a dimensional change in the scale of commercial litigation. Prior to the mid-1970's the number of really large commercial suits were relatively few and far between. One can call to mind in this period cases such as *Pacific Acceptance** Supreme Court of New South Wales. The author acknowledges his debt to Ms Lauren Sharp for her assistance in drafting sections of the paper.

Pacific Acceptance Corporation Ltd v Forsyth (1970) 92 WN (NSW) 29 (Moffitt J).

(2 years), the *Rheem Litigation American Flange and Manufacturing Inc v Rheem (Australia) Pty Ltd* (unreported, Myers J, 10

February 1970)), and see (1963) NSWLR 1121, (1963) 80 WN NSW 1295, [1965] NSWLR 193.

(3 years), *BP v Nabalco BP Australia Limited v Nabalco Pty Limited* (unreported, Sheppard J, 8 July 1976), and see Privy

Council Report (1978) 52 ALJR 412

and the *Bayer Litigation* The judgment of Myers J in the Bayer litigation is unreported and the subject of a suppression order.

(15 months).

From roughly the mid-1970's the number of such suits rapidly escalated. Cases such as *United States Surgical Corporation v Hospital Products International Pty Ltd* (1982) 2 NSWLR 766 (McLelland J).

(approximately 13 months), *Tradestock Trade Practices Commission v TNT Management Pty Limited* (1985) 58 ALR 423 (Franki J).

(approximately 1.5 years), *Spedley Spedley v Jones & Ors* (Supreme Court of New South Wales, Commercial Division-settled).

, *AWA AWA Ltd v Daniels t/as Deloitte Haskins & Sells* (1992) 9 ACSR 383 (Rogers CJ in Comm Div);

Daniels & Ors v Anderson & Ors (unreported, New South Wales Court of Appeal, Clarke, Sheller Powell JJA, 15 May 1995.

, *Tourang, Fairfax, Waterhouse Hagan and others v Waterhouse* (1992) 34 NSWLR 308 (Kearney J).

(approximately 12 months), *Giant Standard Chartered Bank of Australia v Antico* (1994) 35 NSWLR 588 (Hodgson J).

, *Amann Amann Aviation v Commonwealth* (1991) 100 ALR 267 (Beaumont J) and see Full Federal Court (1990) 92 ALR 601.

, *Estate Mortgage JW Murphy and PB Allen as trustees of Meridian Investment Trusts (Nos 1-6) v R A Lew & Ors* (claim for approximately \$800 million)

, *Linter Allstate Life Insurance Co v ANZ Banking Group Limited* (Lindgren J – Federal Court of Australia – March 1996)

, *State Bank State of South Australia and Sate Bank of South Australia v KPMG Peat Marwick and Touche* Ross (claim for in excess of \$1.5 billion).

, and most recently *Super League and Idoport Pty Ltd v National Australia Bank and Ors* mark the larger litigation landscape.

The increase may be due not only to the increasing complexity of commercial affairs over that period and to the proliferation of statutes regulating the conduct of such affairs, but also to such mundane factors as the vast increase in the documentation (electronic or otherwise) of transactions.

At the same time a large but less well publicised number of commercial arbitrations, have been conducted. These arbitrations conducted under the aegis of the *Commercial Arbitration Act*, 1984 are private in nature and become public knowledge usually only when some feature is litigated before the Commercial Division of the Supreme Court.

Examples of such arbitrations in recent years include *Commonwealth v Cockatoo Dockyard, IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466., *Leighton v South Australian Superannuation Board*.

The gradual shift from hard copy volume

Clearly the last forty years have seen a paradigm shift in the conduct of major litigation. The practice of handwritten briefs to counsel and of the tender of slim bundles of selected and highly relevant material has given way to 'trolley litigation'-the hallmark of which is voluminous documentation.

Much of the blame may be fairly leveled at a number of factors including the advent of the photocopier; the failure of the legal profession to focus on the substantial issues at the heart of any piece of litigation and the expansive definition of relevance to be found in section 55 of the Evidence Act (1995).

My own view is that the shift in litigation from the adducing of oral evidence in chief to the adducing of that evidence in written form whilst on the one hand of obvious assistance in certain ways, has very often led to substantial inefficiencies by greatly contributing to the volume of material deployed in civil litigation. The witness in 2001 may be expected to spend days or even weeks and in some cases months, closeted with legal advisers who will painstakingly turn up every document, e-mail, facsimile, note, diary entry or timesheet of possible relevance not only to the central issues but also to the most marginal of issues. The witness' affidavit or statement will be drawn up aided by such materials, the ultimate product being likely to represent, as one would expect, a carefully constructed reconstruction of the events in question with an eye to putting these events into an order and in language calculated to furthering the case of the party calling such witness. This is not to say for a moment that such an affidavit or statement will be otherwise than a truthful best attempt by the witness to set out his or her evidence in written form. Whether that may or may not be said of any particular witness in any set of proceedings must depend upon the cross-examination of that witness and the ultimate adjudication by the court as to the credit of the witness based upon all the evidence. The short point is that the affidavit or statement will often be found to have covered very many of the most peripheral of points which are so far from the point in issue that the prudence of including them is called into question.

This is not to say that the current practice for example in the Commercial List of requiring written statements is necessarily ripe for being revisited. However it does suggest that the court should be ever conscious of:

(1) the overriding purpose of the Rules which is to facilitate the "just, quick and cheap resolution of the real issues" in civil proceedings. The overriding purpose clause imposes an obligation on the Court to give effect to the overriding purpose when it exercises any of its powers.

(2) the general discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might cause or result in undue waste of time [Evidence Act 1995 section 135 (c)]

The Technology Courtrooms in the Supreme Court

Two courtrooms have been set up in the Supreme Court to handle cases appropriate for advanced technological administration. The courts are Court 10A and Court 12A. *Idoport v National Australia Bank Ltd* and others is currently being heard in court 12A. The Glenbrook inquiry was heard in court 10A.

The central focus of this paper is to explain some of the experiences of the court in dealing with the *Idoport* litigation, for obvious reasons, in terms only of the features and functions which use of the Technology Court has permitted. The decision to order the use of the Technology Court is now reported at 49 NSWLR 51; [2000] NSWSC 338.

Before turning to the detail of what the Technology Court comprises it is convenient perhaps to refer albeit briefly to the *Idoport* litigation simply to make the point that the volume of materials which require to be accessed has to be seen to be believed. There are three sets of proceedings being heard together. The pleadings are extensive. Discovery has been extensive. The number of statements put forward and arguably to be read and relied upon by the respective parties is in excess of 170. Up to this point in time the court has marked approximately 550 documents [in many cases being folders and in some cases being sets of folders] for identification. At present there are more than 400 folders of courtbook materials, a deal of which will no doubt be sought to be tendered as exhibits during the course of the hearing. More than 50 interlocutory judgments have been delivered up to this point in time and there are literally hundreds of notices of motion, submissions and ancillary materials related to the main proceedings or to interlocutory applications. A large number of witnesses are to be called. The case has now proceeded for more than one year in terms of the final hearing and is anticipated to continue well into 2003. There are more than 11,000 pages of final hearing transcript to this point in time. The pre-hearing transcript is also extensive.

Clearly enough the unusually large and complex nature of the proceedings, (central issues in respect of which deal with aspects of technology), required an innovative approach to management of the proceedings. Both parties, as I understand the position, have had advice in relation to the best mode in which to set up their respective camps to interface with the Technology Court and the courtbook. Conventional techniques of document management and trial coordination necessarily gave way to the high tech functionality available at the time. Looking back, in some ways it seems to me almost impossible to imagine how the case could have been conducted without use of the Court.

Prior to the commencement of the hearing the parties and their advisers had very close consultations with the Court's IT section overseeing the setting up of the Technology Court for the hearing. An outside project manager was retained and has played and continues to play an important part in assisting the parties as well as the judge on numerous aspect

ongoing hearing. The Court's IT section directly supervises every aspect of the use of the Technology Court. The head of the Court IT section has the direct responsibility of ensuring that the Technology Court functions efficiently. This has meant from time to time a special drain on the resources of the Courts IT section.

The Technology Court: what does it involve?

The Technology Court is comprised of a number of features and functions that work together in an integrated and cohesive manner. The sum of the parts is equal to less than the whole, resulting in a powerful tool which has greatly enhanced the efficiency and fluidity of the trial process.

The following section will provide an in-depth consideration of each of these parts, and the associated advantages and disadvantages that have been found to exist:

a) The Ringtail Courtbook Database

The Ringtail Database is an electronic, online database which stores the majority of documents associated with the proceedings in a centralised, easily accessible manner. The database is available to all participants in the hearing (inside and outside of the courtroom); and is password protected.

The Database contains indexed lists of the following categories of documents:

- the Courtbook;
- witness statements;
- past and current transcripts of the proceedings;
- real-time transcript of the proceedings;
- documents marked for identification;
- judgments;
- pleadings;
- calendars and so on.

The most vital category of documents is the first item mentioned in this list: the Courtbook. The Courtbook is a massive collection of materials put together by each of the parties and provided to the Court in both hard copy and electronic formats. It is intended that the documents housed within the Courtbook will be referred to by the parties during the course of the proceedings, and as to many documents, no doubt eventually tendered as exhibits.

It is important to note that whilst the storage and deployment of electronic documents plays a vital role in the day-to-day administration of the case, it has been necessary for each of the parties as well as myself to also maintain a hard copy version of each of these documents. In my view, the current state of technology simply does not go far enough in facilitating a completely paperless trial and the need to view and mark actual documents cannot be over-emphasised. This is partly due to the particularly complex nature of the proceedings, but is also associated with the general need to view many documents in their entirety rather than page by page.

As a result, the paper documents associated with this case require corridors of shelving in around my chambers, the courtroom and even my home. Furthermore, there is a great need for physical document management and updating of paper as the case progresses by all involved.

The Database has a wide variety of uses and functionality, some of which include:

i) Document management

Perhaps the most fundamental function of the Database is its powerful document management capabilities. The sheer size and scope of the case have made this centralised "storage house" of categorised information an invaluable tool. The database thereby allows the participants to keep an accurate and ongoing record of past as well incoming documents.

ii) Viewing and printing documents

The majority of documents listed and categorised within the Database have been scanned in as images or text. In this way, users are able to access most of the documents on their screen within seconds. They can also print individual pages or complete documents if the need arises. These functions are especially useful in a case where the location of hard-copy documents is often a time consuming process.

iii) Centralisation and standardisation

The standardisation of document categorisation and storage within the Database means that participants can maintain meaningful communication between themselves in relation to the vast sea of information. In other words, by using the same tool, everyone is able "speak the same language" and thereby exchange information in an efficient and useful manner.

iv) Searching tools

An important feature of the Database is the ability to quickly access specific classes of information from an enormous pool of data. Users can perform powerful Boolean searches within certain categories of documents in order to sort the information and locate materials relevant to certain aspects of the case. For example, a user is able to search through the entire collection of the past transcript pages to find all references to certain word or phrase.

v) Hypertext linking

Another useful aspect lies in the capacity to link various documents stored within the database with other documents of relevance. For example, where a witness refers to a Courtbook page in his or her witness statement, hypertext links may be inserted into the statement, allowing the user to "click" and "jump" to the relevant Courtbook page. Users are thereby able to move back and forth between interconnected documents and gain speedy and effective passage through the intricacies of the case. Links may be created by users for their personal use, or can be inserted by the project manager into the global database for all to see.

vi) Public view mode

The Database has a "public view" option that enables the court officer to display documents on the screens of each PC logged in at that time. This enables everyone to see the same image before them, and thereby enhances communication during hearing time.

vii) Notes and bookmarks

The Database also allows individual users to place bookmarks and make notes at specific points of the transcript of proceedings. The point in the transcript where the bookmark or note has been made is then highlighted for future identification, and the user is able to search or browse through these markings at a later stage. The bookmarks and notes are personal to the user who makes them, and cannot be viewed by users with a different login name.

b) Court documents accessible via CD ROM and email

There are a number of documents relevant to the proceedings that are not electronically stored in the centralised database system. It has therefore been my practice during the proceedings (pursuant to Practice Note 105) to direct the parties to email such documents to my associate in addition to receiving them in their hard copy counterparts. For example, receiving an electronic copy of written submissions assists me during judgment writing as I am able to copy and paste sections of the document directly into my judgment and thereby save a great deal of time and energy.

In addition, the project manager maintains and distributes an up-to-date collection of witness statements stored as text files on CD ROMs. This procedure has been necessary because some of the witness statements on the Database are stored as images and cannot be manipulated and inserted into judgments where required.

c) Use of PCs in the court room

An important feature of the Technology Court is the ability of participants to use the Ringtail database, email, the internet, Microsoft Office and other software during court time. A series of networked computers and laptops line the bench and bar of the courtroom allowing participants to make electronic notes, communicate with their offices and so on. To take my staff as an example, my research assistant is able to sit beside me and assist with the administration side of the proceedings whilst concurrently continuing with her research tasks. She is also able to access online legal databases such as Austlii and thereby retrieve and print authorities as they become relevant to the proceedings. These facilities make for a highly efficient working environment, especially when one considers the extensive hours spent in the courtroom during this case.

Furthermore, most of the computers situated in the courtroom are connected to a "V-Net" button which allows the user to switch between their local computer and the "public view" mode often utilised in the Ringtail Database (as previously described). This allows users to alternate between their own private work and the documents being shown to the court at that time.

d) Cross examination by reference to electronic documents

It was originally envisaged at least from the plaintiff's side of the record, that during cross-examination, the witness would be taken to the Courtbook documents in their electronic form as stored on the Database. The defendants made plain that their approach was almost certainly to be one of cross-examining by reference to hard copy. As necessary, a separate set of the hard copy Courtbook was to be made available to the witness. For these purposes, a stand-alone monitor was set up beside the witness stand; networked to the Database and operated by the Court Officer; an extra-large monitor was specifically chosen to enable an A4 document to fit onto the screen in its actual size. This set-up was thought to have the clear potential of saving time and effort for the cross-examiner.

Up to this point in time, certain of the documents referred to have often been of real length, and even with shorter documents cross examining Counsel has elected to take the witness to the document in its entirety rather than page by page on the monitor. Furthermore, witnesses are unable to scroll through the documents themselves, and must communicate with the Court Officer to do this for them. The relaying of such instructions has often found to be burdensome and slow; and to date, all of the witnesses who have been cross-examined have primarily made use of the hard copy documents. The matter remains dynamic and the Court has the power to give such directions in this regard as may be necessary.

e) Court reporting and real-time transcript

A private court reporting company has been contracted to transcribe the *Idoport* proceedings. The court reporting is especially fast and accurate, and multiple copies of the day's transcript become available only hours after the court has adjourned.

Another powerful tool available is the real-time feed of transcript running simultaneously to actual proceedings as they occur. This feature is especially useful when following long and complex cross-examination and legal argument; allowing one to listen to and read the exchanges as they take place. Moreover, complicated questions asked of witnesses may be repeated to them immediately.

f) VCM

VCM is an electronic corporate messaging service which allows my staff and I to communicate, chat and send files to one another at the touch of a button. VCM has been installed on each of our PC's in chambers and in the courtroom, and also connects us to the court officer and a Supreme Court IT Consultant. Using this facility, I am able message my staff in chambers or in court when something is required of them without disrupting the proceedings. Being "on-call", my research assistant and associate are therefore able to work in chambers during court time, increasing their efficiency to a large extent.

g) Videolinking

The Technology Court is also set up to facilitate videolinking and telephone conferencing.

h) IT Court Officer

The day-to-day running of the Technology Court relies heavily upon the employment of a Court Officer with specialised IT training. Whilst fulfilling his traditional role of swearing in witnesses and passing documents between the parties, the Court Officer is also the central operator of the Ringtail Database system. More specifically, he is responsible for administering the public view mode and for dealing with technical glitches as they occur.

Practice Note 105

On 15 March 1999, the Chief Justice of the Supreme Court of NSW issued Practice Note Number 105 entitled, "Use of Technology in Civil Litigation". The purpose of the Practice Note is stated as being:

"to provide for and encourage the use of technology in civil litigation in the Court."

The Practice Note encourages such use of technology in two major areas: discovery and the exchange of court documents.

a) Discovery

Parties are encouraged to use databases to create lists of discoverable documents and give discovery by exchanging databases. They are also encouraged to allow inspection of discovered material by way of images if appropriate.

Under the Practice Note, parties are recommended to consider the exchange of discovery databases where more than 500 documents are to be discovered between them. From the commencement of proceedings, parties are also encouraged to consider other ways in which technology can be implemented in managing the discovery process; the methods chosen will invariably depend upon the volume and categories of documents to be discovered.

Once this course has been decided upon, the parties must reach some agreement as to a number of matters including the media, data formats and terms and conditions to be employed. The Practice Note provides guidance as to standard fields and formats that may be utilised by the parties. Once the parties have agreed as to the protocol to be applied, they are required to seek a direction (by consent) in relation to these matters.

At the initial directions hearing, the Court may order a meeting between the parties in order to discuss the best way forward; and/or that parties may address written submissions concerning the best use of the technology available and management of information generally.

By the second directions hearing, the parties are expected to have investigated the nature of the discoverable documents, to have attempted to agree and to put forward informed submissions regarding the way in which technology will be utilised during the discovery process.

Where the discovery process is to be facilitated in this way, parties are further encouraged to consider ways in which technology may be implemented throughout the entire proceedings; including the use of equipment, services and arrangements between the relevant parties.

b) Exchange of court documents

The Practice Note also encourages parties to exchange electronic versions of other documents; and to allow inspection of these documents by way of images. These recommendations are aimed at increasing efficiency for the parties, as well as providing the Court with electronic access to relevant documentation.

Parties are required to agree upon a number of matters including word processing format, the method of exchange and relevant terms and conditions.

As a result, where a party serves pleadings, affidavits, statements, lists of document or interrogatories upon another party, the recipient may request a further electronic copy of the document. Parties are required to accede to reasonable requests. Moreover, the Court may direct a party to provide it with electronic copies of court documents.

Evaluation of the Technology Court

It is important to bear in mind that the Idoport litigation still has a considerable period of hearing time remaining. Although use of the monitor for cross-examination has been fairly sparse up to this point in time, that form of use has certainly occurred. From time to time the witness has been entitled to view the real-time transcript or previous day's transcript on the monitor. But it is certainly the case up to this point in time that hard copy has been used very often in precisely the same way as hard copy is used in conventional proceedings. As the hearing progresses, one or both parties may well find that with particular witnesses it becomes possible to use the monitor far more often for cross-examination purposes. The matter remains dynamic.

To my observation notwithstanding the fact that up to this point in time use of the monitor in showing the witness documents through cross-examination has been fairly sparse, it is still clearly the case that the Technology Court has given huge benefits in terms of an overall increase in the efficiency and organisational techniques presumably enjoyed both by the parties as well as by the Court. A paradigm shift takes place when the parties and the judge have immediate access to a database which includes the enormous amount of information needed by the parties and the court in the everyday administration of the proceedings. The simplicity of being able at a seconds notice to access any pleading, any statement, any page of the transcript, any judgment, many of the documents marked for identification, as well as the hundreds of thousands of documents reposing in the courtbook itself provides elegant testimony to the efficiencies achieved. Tools such as VCM, real-time transcript, the Ringtail Data base and PCs in the courtroom have contributed to the speedy management of the day-to-day hearing. My own experience has been that the Technology Court system in place has been of immense use both inside the courtroom as well as in chambers or at home when writing judgments or otherwise keeping a detailed note of the evidence or submissions.

Hence whilst a purist might suggest that in the absence of a wholly paperless courtroom, the employment of the ideal Technology Court has certainly not been achieved in the Idoport litigation, I prefer to take a more pragmatic approach to the evaluation of that courtroom believing that it is misconceived to approach the topic with an "all or nothing"

perspective. The use of a centralised database has been the most significant of steps forward and this regardless of the fact that hard copy documents are often used in tandem and often used as the sole source of materials.

Appellate Courts and technology

Clearly the nature and function of appellate court proceedings are fundamentally different to that of the trial court and they must therefore be treated accordingly. On the other hand there are certain sets of proceedings where appellate judges may be assisted by access to an electronic database of the type used at first instance. Upon the assumption for example that any judgment in the Idoport litigation became the subject of an appeal to the Court of Appeal and even to the High Court of Australia, it would be difficult it seems to me to imagine that access to the transcript database would not be of assistance in the conduct of those appeals. Likewise access to the statement database particularly the hypertext links within those statements to particular documents, could be of obvious assistance. Likewise access to the numerous interlocutory judgments could be of assistance on such appeals. Whilst care would need to be taken in relation to the precise setup of an electronic casebook for an appeal it would seem to be logical that there would be many efficiencies in an appellate tribunal having electronic access to nominate materials.

The future and beyond

The inherent jurisdiction of the Supreme Court to regulate its own proceedings so as to promote matters relating to convenience, expedition and efficiency in the administration of justice, includes directing or ordering the parties to use certain procedures, if the benefits derived from the use of such procedures justifies the costs and will ensure that the trial proceeds quickly and efficiently.

It seems clear that notwithstanding the technological advances which permit for efficiencies in relation to diverse aspects of and related to the conduct of civil as well as criminal proceedings, the lodestar must remain the administration of justice. A parameter of the administration of justice does require efficiency in the preparation of and in the running of proceedings. In precisely the same way as technology is now in common use as an everyday tool in almost any aspect of most disciplines, in commercial life as well as in government, use of technology to achieve necessary efficiencies in relation to litigation is not only highly desirable but sometimes absolutely essential. The practitioner in 2001 is expected to turn his or her mind to the efficiencies which may be achieved by use of technology in litigation and in doing so is doing no more and no less than using common sense in the jointly shared interests of litigants as well as the Court in the administration of justice.

Understanding the Evidence Act 1995 - A Daunting Task !

UNDERSTANDING THE EVIDENCE ACT 1995 - A DAUNTING TASK!

“Anyone studying the Acts will be forgiven for thinking that much is familiar. The language and concepts used will have a familiar ring to them. The Acts assume the continuation of the adversary system and its practices. They assume, for example, that, as in the past, it will be for the parties to invoke the rules except where the terms of the legislation indicates otherwise. As in the past, objections to the admissibility of evidence will require consideration of the evidence sought to be adduced and not the questions asked. That having been said, the task facing persons trying to become completely familiar with the Acts is a daunting one. They face a comprehensive statutory restatement of the laws of evidence which introduces changes in most areas of the law”.

[The Hon. Justice Smith, *“The More Things Change The More They Stay The Same? The Evidence Acts 1995 - An Overview”*, (1995) UNSWLJ (18) 1, at p.3]

The Section 135, 136, 137 discretions - As applied to date

- Appellate Court guidance v’s fettering the manner in which the discretions are to be exercised

Opinion Evidence - Fields of ‘specialised knowledge’

- Experts venturing opinions outside their field of specialised knowledge

- AIJA survey of Australia’s Judiciary

First Hand [or ‘contemporaneous’] hearsay

**SCOPE OF THE APPLICATION OF
THE EVIDENCE ACT DECISIONS OF HIGH COURT IN**
- *NORTHERN TERRITORY v GPAO (1999) 196 CLR 553*
- *MANN v CARNELL (1999) 73 ALJR 378*
- *ESSO v COMMISSIONER OF TAXATION (1999) 73 ALJR 339*

CLIFFORD EINSTEIN

Revised version of paper delivered at a seminar ‘Civil Issues in Evidence’ held by the Judicial Commission of New South Wales on 14 November 2000 - [Revisions appear in end notes]

TABLE OF CONTENTS

INDEX Page

Introduction	1
The Discretions	2
The Position before the Act	2
The Position after the Act	3
Section 79 Tree	3
Unfair Prejudice	7
Justice McHugh’s Observation	8
Appellate Court Guidance	11
Specific Guidance from the Court of Appeal Decision	

in Commonwealth v McLean 13
The First Ruling 13
The Second Ruling 14
The Third Ruling 14
The Fourth Ruling 15
The Fifth Ruling 15
Orduka v Hicks (unreported, CA 40397/9 919 July 2000,
New South Wales Court of Appeal) 18
What is an Opinion? 22
Contemporaneity - First Hand Hearsay 23
The Discretionary Cocktail 27
NRMA Ltd v Morgan 28
AIJA Survey 31
Scope of the application of the Act 34
Conclusion 39

AUTHORITIES CITED

Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360.
Akins v Abigroup Ltd (1998) 43 NSWLR 539
Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd [No 5] (1996) 64 FCR 73
Arnotts Limited v Trade Practices Commission (1989) 24 FCR 313 at 347
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1999] FCA 1269
Australia Resources Ltd v Commissioner of Taxation (1998) 83 FCR 511.
Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd and Exxon Coal Australia Ltd
[unreported, Supreme Court of NSW, Einstein J, 8 February 1999]
Bank of Valletta PLC v National Prime Authority (1999) 165 ALR 60
Browne v Dunn (1893) 6 R 67
CDJ v VAJ (1998) 197 CLR 172
Chambers v Jobling (1986) 7 NSWLR 1
Clark v Ryan (1960) 103 CLR 486
Commercial Union Assurance Co of Australia v Ferrcom Pty Ltd (1991) 22 NSWLR 379
Commonwealth of Australia v McLean (1996) 41 NSWLR 389
Cropper v Smith (1884) 26 Ch D. 700
Dijkhuijs v Barclay (1988) 13 NSWLR 639
Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd (1992) 38 FCR 471
Ellis v Wallsend District Hospital (1989) 17 NSWLR 553
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 74 ALJR 339.
Frye v United States -293 F 1013 (1923)
Gordon (Bankrupt) Official Trustee in Bankruptcy v Pike (No. 1) (unreported, Federal Court of Australia, 1 Sept 1995,
Beaumont J)
Graham v The Queen (1998) 195 CLR 606
Grant v Downs (1976) 135 CLR 674
Guide Dog Owners' and Friends' Association v Guide Dog Association of NSW and ACT (1998) 154 ALR 527
H G v The Queen (1999) HCA 2
Hughes Aircraft Systems International v Air Services Australia (1997) 80 FCR 276
Huntsman Chemical Co Australia Ltd v International Pools Australia Ltd (1995) 36 NSWLR 242
Mann v Carnell (1999) 74 ALJR 378
National Employers Mutual General Association Ltd v Waind and Hill [1978] 1 NSWLR 372.
Norbis v Norbis (1985) 161 CLR 513
Northern Territory v GPAO (1999) 196 CLR 553
NRMA Limited v Morgan & Ors (unreported, Supreme Court of NSW, 1 September 1998, Giles J).
Orduka v Hicks CA 40397/9 9, unreported.
Osland v The Queen (1998) 159 ALR 170
Papakosmas v The Queen (1999) 196 CLR 297
Papakosmas v The Queen (1999) HCA 37
Quick v Stoland Pty Ltd (1998) 157 ALR 615
R v Adam (1999) 47 NSWLR 267
R v Andrews [1987] AC 281
R v BD (1997) 94 A Crim R 131
R v Bedingfield (1879) 14 Cox CC 341

R v Bonython (1984) 38 SASR 45

R v Lillyman [1896] 2 QB 167

R v Lockyer (1996) A Crim R 457

Ratten v The Queen [1972] AC 378

Rex v Christie [1914] AC 545

Tante v Roth (unreported, Supreme Court of NSW, 28 November 1996, McLelland J)

Telstra Corporation v Australis Media Holdings [No 1] (1997) 41 NSWLR 277

Trade Practices Commission v Port Adelaide Wool (1995) 60 FCR 336

Trust Company of Australia Ltd v Perpetual Trustees WA Ltd unreported 18 Sep 1996

US Supreme Court in Daubert v Merrell Dow Pharmaceuticals 113 S Ct 2786 (1993)

Wentworth v Wentworth (unreported Supreme Court of NSW, 17 April 1997, Santow J.)

Whitehouse v Jordan [1980] 1 All ER 650

X & Y (by her tutor X) v PAL (1991) 23 NSWLR 26

Introduction

Some five years have now passed since the *Commonwealth and New South Wales Evidence Acts* ('the Act') commenced in operation. In 1997, I was able, I believe correctly, to suggest that to many, practitioners and judges alike, the Act then remained a relatively unexplored wilderness, seldom referred to, rarely utilised and certainly more feared than welcomed. In 2000, the operation of the Act continues to attract close attention.

The significance of the new regime to practitioners and to the Court was then and remains obvious. Important discretions have been given to the Court across the full spectrum of conduct of proceedings. The discretionary provisions [sections 135, 136 and 137] permit the Court to exclude evidence or to limit the use to be made of evidence. Exceptions to the hearsay rule fundamentally altered the common law.

I intend to refer briefly to the Part 3.11 discretions to exclude evidence. There is now a body of case law, mostly unreported, which inform the mode in which judges have been applying these sections. These discretions have recently been referred to, inter alia, by the High Court of Australia and by the New South Wales Court of Appeal. I shall deal at the same time with aspects of opinion evidence endeavouring to point up the close interrelationship between the sections of the Act dealing with the two topics.

Some basal issues going to the extent to which the Evidence Act applies outside of the trial/hearing situation and to the extent to which the common law develops or is modified as a result of statutory law were addressed in three decisions of the High Court of Australia, the first decided in March 1999 and the second and third decided in December 1999. These issues are also dealt with.

The Discretions

The discretionary provisions are as follows:

'The Relevance Discretions (to exclude or to limit use of evidence)

Section 135 *"The court may **refuse to admit** evidence if its probative value is substantially outweighed by the danger that the evidence might:*

- (a) be unfairly prejudicial to a party; or*
- (b) be misleading or confusing; or*
- (c) cause or result in undue waste of time."*

Section 136 *"The court may **limit the use to be made of** evidence if there is a danger that a particular use of the evidence might:*

- (a) be unfairly prejudicial to a party; or*
- (b) be misleading or confusing."*

The Probative Value/Prejudice discretion

Section 137 *"In a criminal proceeding, the court **must refuse** to adduce evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."*

These discretions play a pivotal role in a number of areas treated with by the Act. They temper the new and expanded definition of 'relevance' in section 55(1). Further, the discretions impact on the new regime introduced in relation to

admissibility of expert evidence.

The Position before the Act

Prior to the commencement of the Act, to be admissible the opinion of an expert needed to satisfy the following tests:

- (1) *the opinion had to be relevant to a fact in issue;*
- (2) *there had to be evidence capable of proving the facts upon which the opinion was based;*
- (3) *the witness had to disclose the facts upon which the evidence was based;*
- (4) *there had to be a relevant field of expertise, which was sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience;*
- (5) *the witness had to be an expert in that field;*
- (6) *the opinion could not be related to a matter of common knowledge;*
- (7) *the opinion could not concern the ultimate issue, that is, the expert was not permitted to give an opinion on the very issue of fact or law which the court had to determine.*

The position after the Act

The current rules for the admissibility of expert evidence at least include:

- (1) *the evidence must be relevant (s 55) and have sufficient probative value (s135 and in criminal proceedings s137);*
- (2) *the witness must have specialised knowledge based on training or experience (s 79);*
- (3) *the opinion expressed by the witness must be based wholly or substantially on that knowledge (s 79).*

Section 79 Tree

(3) Opinion based wholly or substantially on (2)

[critical nexus]

(2) Specialised knowledge based on (1)

[critical nexus]

(1) Training, study or experience

It is to be noted absent the making of a limiting order, s 79 will apply in terms. The section provides that if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to an opinion of that person that is wholly or substantially based on that knowledge.

Section 79 appears to be a direct rejection of the American Frye Test [Frye v United States -293 F 1013 (1923)]. The Frye test had required that an expert's opinion be related to a recognised field of expertise or result from the application of theories or techniques accepted in that field.

It is important to note that an expert witness should not be allowed to stray outside the witness' area of expertise. It is for this reason that the opinion expressed by the witness must be based wholly or substantially on the witness' specialised knowledge, which is in turn specialised knowledge based on training, study or experience.

At common law, the field of expertise prerequisite required a court in determining the admissibility of expert evidence, to assess the reliability of the knowledge and experience on which the opinion was based. An immediate question arose as to whether a similar exercise was required under the Act. The question appears to have been answered by Gaudron J in terms of the expression 'specialised knowledge' in a recent decision to which I shall refer.

I note that the Australian Law Reform Commission did not enter the difficult field of determining what were the criteria which were required to be shown before the field of expertise would be treated as a recognised or accepted field of expertise. The Commission recommended that there be no field of expertise test. The Commission's position was that:

"There will be available the general discretion to exclude evidence when it might be more prejudicial than probative, or tend to mislead or confuse the tribunal of fact. This could be used to exclude evidence that has not sufficiently emerged from the experimental to the demonstrable."

Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Vol.1 (AGPS, Canberra, 1985) at para 743.

This position one might have thought, is reflected in s 79 of the Act, which requires only that the expert have "specialised knowledge", with the exclusionary rules regarding irrelevant, prejudicial or misleading evidence presumably operating to exclude the opinions of specialists in unreliable and unacceptable fields of expertise.

[See generally Peter Berman *"Fundamentals of Expert Experience: part 2"* (1996) 3 Criminal Law News 55-56.]

It is appropriate then that a trial judge examine evidentiary reliability under s 79, s 56 and/or s 135, and when doing so, exercise the court's appropriate discretion to ensure that the manner in which evidence is adduced by an expert does not have the quite often unforeseen consequence, which by dint of s 60 and/or s 77 of the Act would otherwise result, namely that evidence which neither party intended to be evidence of the fact, becomes evidence of the fact. That situation can very easily arise if the court is not astute to limit the precise purpose for which assumptions relied upon by experts in their reports or matters stated in those reports as facts, are admitted into evidence.'

'Stephen Odgers has argued that the requirement of "specialised knowledge" itself could be interpreted to impose a standard of evidentiary reliability. He bases his argument on the use of the word "knowledge" which suggests more than belief or speculation. As he points out, the US Supreme Court in Daubert v Merrell Dow Pharmaceuticals 113 S Ct 2786 (1993) recently came to a similar conclusion when it considered r 702 of the Federal Rules of Evidence. That rule is similar to s 79 in that it refers to "specialised knowledge". The court said:

"the word knowledge connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'

...

The US Federal Rules of Evidence, as interpreted by the majority in Daubert v Merrell Dow Pharmaceuticals impose a broadly similar requirement upon the admissibility of expert evidence. Therefore the factors which the US Supreme Court suggested were matters which judges should consider in assessing the reliability of the field of expertise will be of considerable assistance when a judge performs that task under the Evidence Acts. As the minority in Daubert v Merrell Dow Pharmaceuticals point out, this will not be an easy thing for judges to do. Fortunately in the vast majority of cases there will be no dispute and the validity of the expert's field of expertise will be accepted by all parties.

The matters which were listed "for a judge to consider when deciding the reliability of a scientific theory are:

- 1. Testability of the theory.*
- 2. Peer review and publication of the theory.*
- 3. Known or potential rate of error.*
- 4. General acceptance within the relevant scientific community.*

These factors were not to be considered inflexibly, and no one factor should be dispositive of whether a theory is reliable or not.

Of course this does not mean that only those fields of knowledge which are beyond doubt may be the subject of expert evidence. New and evolving fields of expertise may be areas of "specialised knowledge" with enough reliability to make opinion evidence based on that knowledge relevant and sufficiently probative even though there is a risk of inaccuracy and need for caution.'

[P. Berman, supra at 55-56]

In *H G v The Queen* (1999) HCA 2, Gleeson CJ adverted to the significance of the need for an expert whose opinion is sought to be tendered, to differentiate between the assumed facts upon which the opinion is based and the opinion in question. In the view of the Chief Justice, the provisions of section 79 of the Act will often have the practical effect of emphasising the need for attention to requirements of form. His Honour said:

'By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.' [at para 39] [cf approach taken in *Trust Company of Australia Ltd v Perpetual Trustees WA Ltd* Supreme Court of NSW, unreported 18 September 1996 per McLelland CJ in Eq] [1]

Gleeson CJ pointed out that in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with section 79, to opinions which are wholly or substantially based on their specialised knowledge. As his Honour said at paragraph 44:

'Experts who venture "opinions", (sometimes merely their own inference of fact), outside their field of specialised knowledge, may invest those opinions with a spurious appearance of authority, and legitimate processes of fact finding may be subverted.'

In that case, Gaudron J saw the first question raised by the suggested expertise of the psychologist, as whether psychology or some relevant field of psychological study amounted to 'specialised knowledge'. Her Honour said at paragraph 58:

'The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment . . . without the assistance of [those] possessing special knowledge or experience . . . which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience.'

[Citing in support of that proposition Australian authorities running from *R v Bonython* (1984) 38 SASR 45 at 46-47, *Clark v Ryan* (1960) 103 CLR 486 at 491 through to *Osland v The Queen* (1998) 159 ALR 170 at 184].

Gaudron J then continued:

'There is no reason to think that the expression "specialised knowledge" gives rise to a test which is any respect narrower or more restrictive than the position at common law.'

Gleeson CJ held that it was not in dispute that psychology is a field of specialised knowledge and that a psychologist may be in a position to express an opinion based on his or her specialised knowledge as a psychologist. However, his Honour's holding was that the witness had to identify the expertise he or she could bring to bear and cited *Clark v Ryan* (1960) 103 CLR 486 in support of the proposition that the opinions of the expert had to be related to his or her expertise.

Here again, the emphasis is on a close examination of the assumptions upon which the opinion is based and upon the nexus between the opinion on the one hand and the suggested specialised knowledge on which the opinion is said to have been wholly or substantially based, on the other hand.

The view expressed by Gaudron J focuses, when one is examining questionable special knowledge or experience, upon the parameters of whether that specialised knowledge or experience is firstly sufficiently organised, or secondly sufficiently recognised, to be accepted as a reliable body of knowledge or experience.

One thing which is clear in relation to the section 135, 136 and 137 discretions, as McHugh J stated in *Papakosmas v The Queen* (1999) HCA 37 at paragraph 97, is that those discretions contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case. Subject, as his Honour recognised, to the propriety of appellate courts developing guidelines for exercising the powers conferred by these sections so that certain classes of evidence would be usually excluded or limited, the sections 'confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility'. I shall return to this below.

Unfair Prejudice

Up to this point in time, a number of judges have approached the term 'unfairly prejudicial' as including as appropriate, procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act. In *Gordon (Bankrupt) Official Trustee in Bankruptcy v Pike (No. 1)* (unreported, Federal Court of Australia, 1 Sept 1995), Beaumont J used his discretion under section 135(a) to exclude the transcript of a bankrupt, which would otherwise have been admitted as an exception to the hearsay rule pursuant to section 63, on the basis that the prejudicial effect of being unable to cross-examine the maker of the representation on a crucial issue in the litigation, substantially outweighed the probative value of the evidence. In *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389 at 401-402, the New South Wales Court of Appeal also used section 135(a) to exclude hearsay evidence otherwise admitted via the exception contained in section 64, on the basis that the defendants were prevented by other evidentiary rulings from effectively challenging the evidence. However, the correctness, of such an approach has recently been questioned in some obiter comments by McHugh J in the High Court. It is convenient to start with those comments and then consider the cases

prior to and subsequent to his Honour's observations.

Justice McHugh's Observation

In *Papakosmas*, McHugh J, in referring to *Gordon* and to *McLean* said at paragraph 93:

'It is unnecessary to express a concluded opinion on the correctness of these decisions, although I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of "prejudice" in a context of rejecting evidence for discretionary reasons.'

In referring to the "traditional meaning of prejudice", his Honour was presumably referring to a comment summarised by the Australian Law Reform Commission in its interim report in the following terms:

'By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finders' sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the factfinder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence, the factfinder may be satisfied with a lower degree of probability than would otherwise be required.'
[ALRC Evidence Report No. 26 Interim (1985) Vol 1 paragraph 644]

In an article entitled "*Reining in the Judges?*" - *An Examination of the Discretions conferred by the Evidence Acts 1995*' (1996) 19 UNSW Law Journal 268 at 273-274, the commentator said as follows:

*'It seems more likely that the concept of 'unfair prejudice' to a party will be construed to include situations where the party against whom the evidence is sought to be tendered would be placed, forensically, in an awkward or impossible position. [Santow J so held in *Wentworth v Wentworth* (unreported Supreme Court of NSW, 17 April 1997) at page 12.] This may occur for example, by reason of uncertainty as to the possible inferences to be drawn from the admission of the evidence in issue. The party resisting the tender may, if the tender is successful, be placed in the forensic position of having to elect:*

(a) whether to leave the evidence unanswered and to address submissions that no (or virtually no) weight should be given to the evidence in question because, properly viewed, it does not give rise to inference A; or

(b) whether to avoid any doubt on the issue by calling other evidence in relation to the matter.

The court may take the view that the weak probative value of the item of evidence in issue, in fairness to the party against whom the tender is sought to be made, ought not require that party to be placed in this forensic dilemma.

Many but by no means all of such situations would also be embraced within section 135(c). On the other hand, evidence having significant probative value (if admitted) may be unfairly prejudicial to a party and yet, by definition, may not cause or result in undue waste of time.

The concept of "unfair prejudice" would also appear to embrace the rule against pleading or procedure which is calculated to cause "surprise", in the sense of "denying a party due warning of what is to be said against him, and so, effectively [denying] him an opportunity to be heard".'

The same commentator in referring to the words 'misleading or confusing' in sections 135(b) and 136(b) said:

'Whether the admission of evidence or the particular use to be made of evidence will be misleading or confusing is a question of impression to be determined by the trial judge in the context of other evidence and of the issues being tried. The word "mislead" has been held to mean "to lead into error".'

The word "confusing" is unlikely to be given a narrow construction. The relevant confusion may arise from a particular item of evidence sought to be adduced seen in isolation or seen in the context of other material admitted or proposed to be admitted into evidence.'

In referring to section 135(c), the commentator said:

'This sub-section has at least in civil proceedings, the potential to be the most used of the ss 135/136 gateways. The court may, for any number of reasons in any particular case, view the probative value of an

item of evidence as substantially outweighed by the danger that the evidence may enable a blowout on a most peripheral issue. A single factual issue seemingly of the most marginal relevance to the principle issues in the case can, if allowed full rein, lead to an undue waste of time by way of prolongation of cross examination, the calling of additional witnesses or evidence, the need to issue further subpoenas, the recalling of witnesses and the like.'

McHugh J specifically identified these pages of this article by that commentator in expressing the view to which I have referred. At paragraph 93 of his Honour's judgment, the sentence referring to those pages is as follows:

'Some recent decisions suggest that the term "unfair prejudice" may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act.' [Then referring to the article, to the Beaumont J decision in *Gordon* and to the Court of Appeal decision in *McLean*.]

As I happen to have been the commentator who wrote that article, I have a special interest in his Honour's tentative view that the approach expressed in the article and the case law trend suggest an excessive influence by the common law attitude to hearsay evidence, failure to give sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue and a failure to give sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons.

It seems unlikely that McHugh J was confining his comments to criminal law or jury trial contexts. [See the references to the Beaumont J and Court of Appeal decisions.]

I note that in *R v Lockyer* (unreported, Supreme Court of NSW, 11 October 1996), Hunt CJ at Common Law said:

'Section 135 does not depart from the "Christie" discretion at common law. (His Honour cites a number of authorities, including Rex v Christie [1914] AC 545 at 559, 564.) Such prejudice is not established by the mere fact that the evidence has only slight probative value; nor is it established because it may (quite properly) reduce the effect of the Crown case . . . There must be shown to be a danger that the tribunal of fact will use the evidence upon a base logically unconnected with the issues in the case.'

Lockyer involved a close examination of tendency evidence in a criminal trial and in particular the inter-relationship of sections 97, 101, 135 and 137. It is suggested that the references to the 'Christie' discretion and the context involved, make it reasonably clear that Hunt CJ's discussion of section 135 was not intended to cover a civil suit.

The effect of McHugh J's observations as to the scope of the discretions invested by the *Evidence Act* is a particularly important question especially given the hitherto wide perception of the discretion conferred upon judges by those provisions.

Finally, I note that at common law there was no discretion in a court to reject evidence sought to be adduced in non-jury civil proceedings on grounds of unfair prejudice or limited probative value. Relevance was of course a different parameter. Stephen's definition of relevance was that the word 'relevant' means that:

'Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in conjunction with other facts proves or renders probable the past, present or future existence or non-existence of the other.'
[Digest of the Law of Evidence, 12th ed, Part 1]

As previously mentioned, the definition of 'relevance' in the *Evidence Act* represents a considerable expansion over the common law concept. The expanded definition is probably the single most significant aspect of the Act and is to be borne in mind at every turn.

Appellate Court Guidance

The question is one of particular importance when one takes into account the inter-relationship between many other sections in the Act and the discretionary provisions. Time and time again, the court has the opportunity to exercise the discretions so as to limit or exclude the use of evidence on an instant specific basis. As McHugh J pointed out, the three sections contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case.

His Honour further pointed out that 'it may be proper for appellate courts to develop guidelines where exercising the powers conferred by these sections so that certain classes of evidence are usually excluded or limited'. However, until very recently such guidance has been sparse. There is, of course, a fundamental disinclination in all courts to circumscribe the exercise of a discretion granted by the legislature too closely by yardstick or guideline as to how that discretion ought to be exercised. That disinclination is evidenced by a decision of the Court of Appeal - *Dijkhuijs v Barclay* (1988) 13 NSWLR 639 where Kirby P dealt with 'guidelines' to which the trial judge had adverted in dealing with the new

section 9(1) of the *Family Provision Act 1982*. Kirby P said at 652:

'... to the extent that the categories listed [by the trial judge] purport to harness the discretion stated in the wide terms of s9(1) of the Act, I consider that they impede rather than help the performance of the task assigned to the Court by Parliament.'

There is of course a close tension between, on the one hand, preserving the width of the discretion which the legislature has created, and on the other hand, the need for the guidance of appellate courts to assist in consistency. The position was put as follows by Mason and Deane JJ in *Norbis v Norbis* (1985) 161 CLR 513 at 519:

'It has sometimes been said by judges of high authority that a broad discretion left largely unfettered by Parliament cannot be fettered by the judicial enunciation of guidance in the form of binding rules governing the manner in which the discretion is to be exercised: see, e.g. Mallet; Evans v Bartlam; and Gardner v Jay. However, it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well-settled principles: United Engineering Workers' Union v Devanayagam. It has been a development which has promoted consistency in decision-making and diminished the risks of arbitrary and capricious adjudication. The proposition referred to at the beginning of this paragraph should not be seen as inhibiting an appellate court from giving guidance, which falls short of constituting a binding rule, as to the manner in which the discretion should be exercised: but cf. Reg. v Bicanin. And despite the generality of some of the statements to which we have referred, there may well be situations in which an appellate court will be justified in giving such guidance the force of a binding rule by treating a failure to observe it as constituting grounds for a finding that the discretion has miscarried.'

The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of evidence by appellate courts, whether in the form of principles or guidelines.'

In addition to the demands of consistency, appellate court guidance is especially necessary for the true issue under consideration is not so much the principles upon which an undoubted discretion may be exercised but the circumstances in which a Court possesses the discretion at all. For the words 'unfair prejudice' in s135(c) govern not only the chief matter to be considered in the exercise of the discretion but the principal factor in the possession of the discretion in the first place.

I shall proceed to the first and examine the guidance by the Court of Appeal in *Commonwealth v McLean* and more recently by the Court of Appeal in *Orduka v Hicks*.

(i) *Commonwealth v McLean* (1996) 41 NSWLR 389

A close examination of the decision of the Court of Appeal in *McLean* throws up the possibility of a temporal or time specific, unfair prejudice. In short, evidence allowed as not unfairly prejudicial to the defendant at one point during the hearing was held by the Court of Appeal to have become unfair later when its use against the plaintiff was restricted. Hence, the progress of admission of evidence through the trial is to be regarded as dynamic and in particular circumstances what may appear to be the case at one point in the trial, may later alter.

The plaintiff was a seaman on HMAS 'Melbourne' on 10 February 1964 when it collided with and sunk HMAS 'Voyager'. In 1995 he brought an action in the Supreme Court as a result of his experiences on the night of the collision claiming post traumatic stress disorder.

The First Ruling

The first ruling of the trial judge was that the plaintiff's wife could give evidence of what the plaintiff had told her in February/March 1964 about the events on the night of the collision. The plaintiff had given evidence without referring to these events. The wife's evidence was admitted under the exception in section 64 to the general exclusion of hearsay in section 59(1).

The evidence was allowed as first hand hearsay. In allowing the evidence in that fashion, the judge noted that it would also have been admissible as direct evidence to prove the plaintiff's state of mind at the time, which may have been relevant on medical issues. The defendant objected that at the time of the conversation the events were no longer 'fresh in the memory' of the plaintiff and that section 64(3) was not satisfied. The judge held that spontaneity was not required as it had been under the *res gestae* exception at common law and that such traumatic events remained fresh in the memory of the plaintiff at the time. Handley JA and Beazley JA with whose reasons Santow AJA generally agreed, were not persuaded that the judge fell into error in this ruling.

The Second Ruling

The trial judge's second ruling was his rejection of the defendant's applications to exclude the evidence under section 135 or to limit its relevance under section 136. The Court of Appeal saw no reason to differ from the conclusions of the judge that the evidence was not unfairly prejudicial to the defendant and that its use should not be limited.

The evidence of Mrs McLean allowed by that ruling, was as follows:

A. . . . I asked him what happened when the 'Melbourne' hit the 'Voyager' and he said it was horrific. He said picking bodies out of the water, severed arms, legs, heads, putting them in green plastic bags, he kept saying it was horrific and I said to him: "What about Leo?" and he hesitated and he said "Leo went down with it, he didn't have a chance" you know, "it could have been me". He said "I don't want to talk about it any more."

Q. On subsequent occasions did you ask him again about the "Voyager" collision?

A. I asked him quite a few times but he just avoided the question, wouldn't answer.'

The Third Ruling

The third ruling involved the defendants having called Mr Halley, a retired naval officer, and Dr Treloar, a former naval doctor, who had both been on the 'Melbourne' on the night of the collision, to rebut the hearsay evidence given by Mrs McLean. The plaintiff objected to such evidence being led, invoking sections 135 and 136. The judge, however, ruled that the evidence should be allowed, reserving the question of whether it could be used to challenge the plaintiff's reliability.

Mr Halley gave evidence of his movements after the collision which included being in command of one of the 'Melbourne's' motor boats which picked up survivors. He did not witness the events described by the plaintiff to his wife.

Dr Treloar was the senior medical officer on the 'Melbourne' responsible for the care of survivors brought on board, and the treatment of the injured. He stationed himself on the deck where the survivors, rescued by the 'Melbourne's' boats came aboard. He did not witness the events described by the plaintiff to his wife. He was responsible for the examination of any dead bodies brought on board, but had neither conducted nor arranged for any such examination. He said that any dead bodies would have been brought to the sick bay and disposed of from there and this did not happen.

The Fourth Ruling

The judge's fourth ruling confirmed that this evidence could be used by the jury in deciding whether the plaintiff saw what he described to his wife. The credit of Mrs McLean, in the sense of her honesty, had not been challenged in cross examination, but her reliability was. There had been no occasion for the defendant to cross examine the plaintiff on these matters, but it did not seek to have him recalled for further cross examination after Mrs McLean had given evidence. Accordingly, there had been no challenge to the plaintiff on this point and, as the trial judge had stated, no serious challenge to the reliability of Mrs McLean either.

The Fifth Ruling

The trial judge held that it would be unfairly prejudicial to the plaintiff to allow the evidence of Mr Halley and Dr Treloar to be used to attack the reliability of the plaintiff and Mrs McLean. Accordingly he ruled, pursuant to section 136, that this evidence might be used to determine whether the plaintiff truly saw what he described to his wife but may not be used . . . to impugn the credibility of the plaintiff or Mrs McLean by suggesting . . . that the plaintiff gave an untruthful account of matters to his wife or that Mrs McLean gave an untruthful account to the Court of her conversation with the plaintiff. The Court of Appeal pointed out that it was clear in context that these references to 'untruthful account' were intended to cover their reliability as well as their honesty.

I shall set out hereunder a section from pages 401 to 402 of the Court of Appeal decision and take the opportunity to emphasise the two sentences which it seems to me, may well be the first or at least an early involvement of that Court in the area by way of pointing up some guidance in approaches to the Act.

'Section 136 confers a discretion to limit the use to be made of evidence. . . .

The present difficulties have arisen because s 64 read with s 62 now allows first-hand hearsay. The first ruling allowed hearsay from Mrs McLean about events witnessed by the plaintiff as proof those events had occurred. The weight to be given to such evidence depends on the honesty and reliability of the person who made the representation, and the person giving the evidence.

A party against whom such evidence is tendered must be free to challenge any link in the chain, or the chain as a whole. It would be unfairly prejudicial within s 135(a) for evidence to be tendered against a party

*who could not contest it. The rule in *Browne v Dunn* (1893) 6 R 67 prevented the defendant from submitting that Mrs McLean had been dishonest in her evidence, or that the plaintiff had lied in the original conversation. Despite the tentative nature of the cross-examination of Mrs McLean directed to her reliability, we can see no reason why the defendant should not have been free to argue that the evidence of Mr Halley and Dr Treloar, established that the hearsay was unreliable, and therefore either Mr or Mrs McLean or both, although not dishonest, were unreliable on this issue.*

*The plaintiff's legal advisers could have tendered the evidence of Mrs McLean under s 72 as evidence of the plaintiff's health and state of mind at the time, but they elected to tender it as hearsay. It would have been unfairly prejudicial to the defendant to admit that evidence on any basis which restricted its capacity to answer it. The defendant was not entitled to protection from the rule in *Browne v Dunn*, but we fail to see why it should have been further restricted in the use it made of its evidence in answer.*

The judge acknowledged the unprecedented difficulties in dealing with first-hand hearsay under the new Act and, with the wisdom of hindsight, the better course may have been to disallow the wife's evidence as hearsay. However, once her evidence was admitted, the plaintiff was not entitled to be protected from the consequences of that evidence being found to be an inaccurate account of what had occurred. It would be unfairly prejudicial for a party who showed that first-hand hearsay was unreliable to be denied the wider benefits of that finding.

The combined result of the . . . rulings was a one-sided situation in which the plaintiff was protected from some of the normal risks of adducing evidence. We cannot think of any instance in which such a one-sided situation could arise under the common law. Evidence should be "a two-edged sword", with both benefits and risks for the party tendering it.

The result in our opinion was unjust. The evidence allowed as not unfairly prejudicial to the defendant became unfair when its use against the plaintiff was restricted. A similar situation could occur if first-hand hearsay was admitted under s 64(2) without the maker having to be called, because, for example, he was dead, ill, or out of the country. The other party could never cross-examine the maker, but if it proved that the representation was incorrect could it justly be denied the benefit of that finding on the credibility of the maker and the witness?

Such a situation bears a close analogy to the present, where the maker did not give evidence of the truth of the representation.

In our opinion the ruling of 25 July created an unfair situation which occasioned an injustice to the defendant and was clearly wrong. This ground of appeal has been established.'

There ought, I think, be said a number of things concerning the decision of the Court of Appeal in *McLean*.

In the first place, post the decision of the High Court in *Graham v The Queen* (1998) 195 CLR 606, it may be arguable that the evidence of Mrs McLean would not be allowed as an exception to the hearsay rule. The two ships had collided on 10 February 1964. The plaintiff had apparently told his wife in February or March 1964 about the subject events. Given the circumstances in which the accident in *McLean* occurred a question mark may arise as to whether the occurrence of the asserted fact was "fresh in the memory of the plaintiff" when the statement was made [cf: Act ss64(3), 66(2)]. *Graham* involved a complaint made six years after the last of the acts alleged against the appellant. Gaudron, Gummow and Hayne JJ held that too long had elapsed between the events and the complaint. Their Honours said at para. 4:

"The word 'fresh', in its context in s 66, means 'recent' or 'immediate'. It may also carry with it a connotation that describes the quality of the memory (as being 'not deteriorated or changed by elapse of time'... but the core of the meaning intended, is to describe the temporal relationship between 'the occurrence of the asserted fact' and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years'.

Callinan J, with whose reasons for judgment Gleeson CJ agreed, said at para. 34:

"Whilst it cannot be doubted that the quality or vividness of a recollection will generally be relevant in an assessment of its freshness, its contemporaneity or near contemporaneity, or otherwise will almost always be the most important consideration in any assessment of its freshness. The Court of Criminal Appeal took the view that the section laid emphasis on the 'quality' of the memory and in consequence, the regard that should have been paid to the delay in making the complaint was not paid. There may be cases in which evidence of and events relatively remote in time will be admissible pursuant to section 66, but such cases will necessarily be rare and requiring of some special circumstance or feature. It is desirable that s 66 be given such a construction not only for certainty but also to avoid as much as possible the delay and

expense of voir dire hearings to explore questions of vividness and the like, with their attendant opportunities for the rehearsal of cross-examination and evidence”.

[cf New South Wales Court of Appeal in *R v Adams* (1999) 47 NSWLR 267] [2]

Second, the prejudice to the defendant in the evidence of Mrs McLean was a prejudice not inherent in the evidence itself but prejudice which arose from the later ruling of the trial judge that the evidence of Mr Halley and Dr Treloar could not be used to attack the reliability of the evidence of the plaintiff and Mrs McLean. Third, the Court appeared to consider that the ruling of the trial judge was unfairly prejudicial to the plaintiff. To refuse to permit the evidence of Mr Halley and Dr Treloar to be used to challenge the reliability of the evidence of the plaintiff and Mrs McLean, seemingly on the basis that Mrs McLean was not cross-examined on that issue, was erroneous.

Perhaps the central proposition to be distilled from the intricate series of rulings in *McLean* is that unfair prejudice may arise not only from the nature of the evidence itself - that is, evidence which is emotive or likely to provoke an irrational reaction - but may also arise from the forensic mosaic in which the evidence is led. In particular, the decision of the Court of Appeal in *McLean* plainly shows that unfair prejudice may arise from an inability to challenge evidence and shows how evidence allowed as not unfairly prejudicial to one party, may become unfair when its use against the other party is restricted. What is sauce for the goose ought to be sauce for the gander! It is this additional source of unfair prejudice which seems to have attracted the observations of McHugh J in *Papakosmas*.

(ii) *Orduka v Hicks* (unreported, CA 40397/99, 19 July 2000, New South Wales Court of Appeal)

The Court of Appeal has in a very recent decision delivered on 19 July 2000 had occasion to deal with the cautioning by McHugh J against failure to give sufficient weight to the changes the *Evidence Act* has brought about in making hearsay admissible to prove facts in issue: *Orduka v Hicks*.

Those proceedings concerned an injury to the plaintiff at residential premises occupied by the defendant who was a 92 year-old lady whom the trial judge found to have been unable to give evidence. A statutory declaration made by the defendant was admitted into evidence under section 64 of the *Evidence Act*.

The trial judge had declined to exercise his discretion to reject the declaration it having been argued that its probative value was substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party. The submission had been that the statement was unfairly prejudicial because the plaintiff was denied the opportunity to cross-examine the defendant.

The trial judge stated:

“to my mind that is not what is meant by unfairly prejudicial in the context of section 135 of the Act. What is meant in the context of the Act is unfairness in the obtaining of the evidence, that is, in the circumstances under which the evidence was procured”

[emphasis added]

Sheller JA with whose reasons Meagher JA agreed made the important point that the term “prejudice” in section 135(c) was qualified by the term “unfair”. His Honour said:

“Any understanding of the way in which s135 works, where evidence is admissible under s64, must start by accepting that, conformably with s64, the hearsay rule does not apply to the statement. The admission of a document of probative value against a party involves prejudice to that party. However it is not prejudice, but unfair prejudice, which must be weighed against the probative value of the representation.”

After citing the passage from the judgment of McHugh JA which has already been set out in detail and the Australian Law Reform Commission’s view of the meaning of ‘unfair prejudice’ expressed at para 644 of its Interim Report No. 26, Sheller JA continued:

The purpose of s64 is to remove the obstacle of the hearsay rule in cases like the present where a party, due to age and ill health, is unable to give evidence and may suffer great injustice as a consequence. Inevitably the removal of the hearsay rule as an obstacle to admitting the statement carries with it prejudice to the other party. One such prejudice is that the witness whose statement is put in evidence cannot be cross-examined. Historically, one justification for the exclusion of hearsay evidence has been “the irresponsibility of the original declarant, whose statements were made neither on oath, nor subject to cross-examination”.

His Honour then quotes a passage from Phipson on Evidence 15th Edition, para 25-06 and goes on to say:

The irresponsibility referred to endures when, in the particular circumstance that it is impracticable for the witness to be called, the legislature provides that the hearsay rule is not to apply. But I do not think that it can be said that such irresponsibility makes the prejudice unfair to the point of outweighing material of high probative value such as this statutory declaration. It is not necessary in this case to decide whether it ever could or whether it is confined to situations, like those in the cases to which I have referred, where the

statement has been obtained by unfair means or has a tendency wrongly to excite the fact finder's emotions and is of little probative value.

Judge Cooper gave an illustration of the ordinary case where s135(a) might apply. I am not persuaded that Judge Cooper erred in his approach to the question.

In any event... the statutory declaration was, in my opinion, rightly admitted into evidence. Of course, in determining what weight should be given to its contents, the trial Judge had to bear in mind, as he did, that the defendant had not been cross-examined. Some of the matters raised related to inconsistencies or unreliability. None of these things required the Judge to exclude the statutory declaration nor would exclude its admission in the proper exercise of discretion."

[Emphasis added]

In summary, the view of Sheller JA appears to be that while the inability to cross examine the maker of a hearsay statement does not, without more, call for the exercise of the discretion to exclude on the grounds of unfair prejudice, the inability to cross examine is a matter to be taken into account in the weight to be given to such evidence. His Honour did not go on to express a view as whether the inability to challenge hearsay evidence could ever call for the exercise of the discretion or as to the exact ambit of the concept of 'unfair prejudice'.

Mason P said:

" At common law, it is doubtful whether otherwise admissible evidence could be rejected on the grounds of prejudice in proceedings other than criminal proceedings (see CDJ v VAJ (1998) 197 CLR 172 at 215 fn (106)). Sections 135 and 136 of the Evidence Act have now introduced such a rule, conferring a very wide discretion upon trial judges. Having regard to the likely common law position and the broad language of those sections, the notion that evidence might "be unfairly prejudicial to a party" should not be confined beyond that which emerges on a fair reading of the sections in context.

Part of that context is the significant qualification of the hearsay rule in the Evidence Act itself. In light of this, McHugh J has cautioned against failure to give sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue (Papakosmas v The Queen (1999) 196 CLR 297 at 325-6)..... Sheller JA ...points out that the Australian Law Reform Commission in its Interim Report on Evidence, No 26 at par 644 conceived of unfair prejudice as: the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional basis, ie on a basis logically unconnected with the issues in the case.

In my view this danger identifies the core notion of "unfair prejudice" and the purpose of the discretion to exclude evidence on that basis. In R v BD (1997) 94 A Crim R 131 at 139, Hunt CJ at CL referred to evidence as unfairly prejudicial "if there is a real risk that the evidence will be misused by the jury in some unfair way". Citing this, the learned author of Odgers, Uniform Evidence Law 3rd ed (1998) states at p443: Plainly, it is likely that this 'danger' will usually only have significance in a jury trial. Where the trial is by a judge without a jury, it will be an unusual judge or magistrate who is prepared to concede that a danger exists that he or she might be "unfairly prejudiced" by evidence. On the other hand the provision is not limited to misuse of the evidence by the tribunal of fact. Unfair prejudice may arise from procedural considerations. Thus an opposing party may be significantly prejudiced by hearsay evidence if unable to cross-examine on a crucial issue in the litigation. Alternatively, the opposing party may be unfairly prejudiced by evidence if prevented from properly challenging its reliability

I agree. See also Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1999] FCA 1269.

It is unnecessary to consider whether unfair prejudice extends to substantive unfairness in the obtaining of evidence, as suggested by the primary judge in the present case. If it extends that far, it is certainly not confined to that category of case. Indeed that category is outside the core category of situations to which the discretion is primarily addressed, as I have endeavoured to show."

[Emphasis added]

To my mind following the decision in *Orduka* it is likely that a trial judge is entitled to approach section 135 of the Act upon the basis that unfair prejudice may indeed at the least arise from procedural considerations.

Such procedural considerations may include the inability of one party to properly challenge evidence lead by the other. The mere inability of one party to cross-examine the maker of a hearsay statement which was properly admissible as an exception to the hearsay rule cannot, without more, call for the exclusion of the evidence. As McHugh J and Sheller JA have pointed out, to do so would be to circumvent the substantive provisions of the Act. But when the procedural factors would result in one party being unable to challenge or contradict evidence which is clearly partial or incomplete, it is conceivable that it would be unfair to permit that evidence to be led. If the core meaning of 'unfair prejudice' refers to the irrational use of evidence then such a situation is surely capable of coming within it. To proceed on evidence which is

partial or incomplete and not capable of being tested or contradicted is truly prejudicial; that is, it is to judge matters on less than full information. To my mind, this was the basis of the decision of the Court of Appeal in *McLean*. After *Orduka* it remains good law.

What is an Opinion?

Section 76 provides:

'Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.'

Importantly, the word 'opinion' is not defined in the Act.

In an address delivered in February last year [(1999) 18 Australian Bar Review 122], Heydon JA (then Heydon QC) identified several recent decisions of the Federal Court which applied the common law definition as stated by Wigmore:

'... an inference from observed and communicable data.' [3]

These decisions involved reliance evidence that had the witness known of certain facts [which had not been known at the time - which non disclosure formed the basis of a *Trade Practices Act* s52 count], the witness would not have acted in a particular way. *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd [No 5]* (1996) 64 FCR 73 involved the admissibility of a statement by an employee of Colonial Management Associates Incorporated. He had recommended that certain funds managed by Colonial invest in debentures owned by Linter Textile. The Court admitted evidence that had the witness known that it was intended that Linter Textiles was to give certain guarantees to banks, he would not have given the recommendation.

The point about the admission of this statement into evidence is that Lindgren J held that it was not 'opinion' evidence. It was rather 'direct' evidence from the person uniquely placed to give it of what that person would have done in a hypothetical situation. As Heydon JA points out:

'[Lindgren J] admitted the evidence. . . . He said that the aversion of the common law to evidence of opinion is based on the concern of the common law to receive the most reliable evidence. Reliance evidence of the type under consideration was reliable in the sense that where the issue is what a person would have done in a situation different from that which actually occurred, the person in question is better qualified than all others to give evidence on the matter.'

To the cases referred to by Lindgren J, namely *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471, *Huntsman Chemical Co Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242; *Commercial Union Assurance Co of Australia v Ferrcom Pty Ltd* (1991) 22 NSWLR 379, may be added *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd and Exxon Coal Australia Ltd* [unreported, Supreme Court of NSW, Einstein J, 8 February 1999] which deals with a suggested, but rejected by the Court, constraint on the hypothetical comparison, based upon the proposition that the evidence must be rejected as 'a wrongdoer cannot be assumed to put forward a hypothetical involving his own wrongdoing'.

Of course, questions of reliability of evidence of the type in question arise. Samuels JA, as Heydon JA points out, said in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 581 that it was 'open to a Court to disbelieve evidence tainted by hindsight'.

Three other cases which applied the common law definition of 'opinion evidence' are *Hughes Aircraft Systems International v Air Services Australia* (1997) 80 FCR 276; *Guide Dog Owners' and Friends' Association v Guide Dog Association of NSW and ACT* (1998) 154 ALR 527 and *Quick v Stoland Pty Ltd* (1998) 157 ALR 615 at 617 per Branson J.

Contemporaneity - First Hand Hearsay

Papakosmas concerned the effect of the *Evidence Act* on evidence of recent complaint in sexual assault cases.

The facts were as follows:

'4. In December 1995 both the appellant and the complainant worked for a television company; the appellant as a producer, and the complainant as a secretary. They were both present at a Christmas party held by their employer on the evening of 16 December 1995. During the course of the evening, when both were affected by drink, there was some jocular conversation between them about sexual matters in the presence of other people. Later, as the complainant was leaving a toilet, she encountered the appellant in a corridor. They spoke to one another and he guided her into a small room. He tried to kiss her, and

attempted unsuccessfully to persuade her to engage in an act of fellatio. This was not disputed. According to the complainant, the appellant then forced her to have sexual intercourse with him, despite her resistance and protests. The appellant agreed that he had sexual intercourse with the complainant, but said that she consented. The complainant said that she asked the appellant to let her go, and told him that she was going to be sick. She said the appellant then left the room and closed the door behind him, and she fell on to the floor and vomited into a waste bin. She then went to a bathroom where she washed her face and her underwear.

5. The complainant, and a number of other witnesses, gave evidence, [Stephens, Fahey and Ovadia] without objection, of virtually immediate complaint. According to that evidence, as the complainant was leaving the bathroom she saw a workmate, Ms Ovadia. The complainant was crying. Ms Ovadia asked her what was wrong, and the complainant said she had been raped by the appellant. That evidence was supported by Ms Ovadia. Ms Ovadia took the complainant outside to a table where she repeated her complaint to Ms Stephens. She was crying and holding her head in her hands, and appeared distressed. Shortly afterwards the complainant repeated her complaint to Ms Fahey. The evidence of Ms Fahey was that the complainant was crying uncontrollably and appeared extremely distressed. Soon afterwards, the complainant attended a hospital and was examined by a doctor, who took a history and made clinical observations.

In that case, the issue at the trial was not whether sexual intercourse between the appellant and the complainant had occurred, but whether the complainant was a consenting party.

The trial judge gave the jury the following directions about the evidence of complaint:

“Stephens, Fahey and Ovadia give what is called ‘hearsay evidence’ because the [complainant] complains to them that she has been raped by the accused. . . .

Under the law in this State, the hearsay evidence, as it is called, is some evidence of the fact that the incident did take place. Once again, you have got to be careful because you will understand that, if you are lying about it originally, then the fact that you keep repeating it does not make it any less of a lie but, if you are telling the truth about it, then it is some evidence of the fact. It is a matter for you as to whether you accept it or not, but it is evidence of the fact of the proof of the truth of the allegation that was being made - that is, that she had not consented to having intercourse with this man, that she had been raped.

There is criticism concerning her and the details of what was said to the various women in that Counsel for the accused says there were inconsistencies, and there were. You heard the evidence as it was given here and I am not going to go through it again, but you will remember he pointed to those inconsistencies that occurred in the evidence between what she had said to one woman and another. Is it important in the circumstances of this particular case that there were some inconsistencies in the evidence - if you find there to have been some inconsistencies? When I say there were, it is a matter for you to decide if there were or were not inconsistencies concerning it. So that you have got that evidence concerning the complaint, as I say, that is hearsay evidence but it is some evidence of the fact. If you accept it, in relation to what took place on this night, that goes to support what the complainant says occurred.”

The case contains a detailed discussion of the common law approach with respect to evidence of recent complaint. That approach was expressed in *R v Lillyman* [1896] 2 QB 167 at 170 as follows:

‘It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains.’ (emphasis added)

Gleeson CJ and Hayne J at paragraph 20 of their joint judgment, pointed out some of the difficulties which the Australian Law Reform Commission took into account in determining the exceptions to the hearsay rule now set out in the Act. They said in paragraph 20:

20. Insisting upon the observance of the common law rule against hearsay, whilst, at the same time, receiving evidence of recent complaint, and instructing juries, consistently with Lillyman . . . as to the use that could be made of such evidence, involved the drawing of a distinction which juries might not have found easy to comprehend or apply. The facts of the present case provide a good example. The issue was that of consent. There was no dispute that sexual intercourse had occurred between the appellant and the

complainant. There was evidence, from the complainant herself, and from a number of witnesses, that almost immediately after the intercourse had occurred, the complainant was in a very distressed condition, crying uncontrollably, and saying that she had been raped. Evidence of her condition, and her distress, was admissible, and in the circumstances could be considered by the jury in determining whether or not she was telling the truth when she said that she had not consented to what occurred. However, when it came to the matter of her statements that she had been raped, at common law a jury would have been directed that they could consider such evidence, not as evidence of the truth of what she was asserting, but as evidence which had a bearing upon her credibility, and in particular, upon the consistency of her behaviour and her allegations.' (emphasis added)

The joint judgment at paragraph 22 also included the following:

'That evidence of complaint is at least potentially relevant, and is capable, depending upon the circumstances of the case, of having substantial probative value if it is received as evidence of the truth of what is asserted by the complainant, may be illustrated by reference to cases which were treated by the common law as a true exception to the hearsay rule: cases involving receipt of evidence as part of the res gestae. The law on this subject was considered by the House of Lords in R v Andrews [1987] AC 281. In his speech, Lord Ackner referred to the opinion given by Lord Wilberforce in Ratten v The Queen [1972] AC 378. He also referred to the well-known case of R v Bedingfield (1879) 14 Cox CC 341. In that case the accused was charged with murder. The defence was suicide. There was an attempt to lead evidence that the victim, who had been in a house with the accused, rushed out of the house with her throat cut, and said: "See what Harry has done". That evidence was excluded, but Lord Ackner said that Bedingfield would be decided differently today. He also remarked that there could "hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement". . . . Although it may be necessary to exercise caution to guard against the possibility of fabrication, it cannot be doubted that the evidence in Bedingfield was evidence that could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding. Whatever view may be taken as to the policy of the law in relation to the reception of evidence that a mortally wounded woman immediately asserts that a named person did it, an argument that such evidence was irrelevant would be surprising.'

Papakosmas includes a number of specific statements by the Court on the discretionary provisions and in particular on section 136. Gleeson CJ and Hayne J said as follows:

'36. The appellant's second submission is that, even assuming the hearsay evidence in the present case was relevant, and fell within the exception created by s66, nevertheless there was a miscarriage of justice because the trial judge (although not asked to do so) failed to apply one of the additional safeguards, being that expressed in s136.

37. In brief, the appellant contends that this was a case in which s136 should have been applied to limit the use that could be made of the evidence of complaint to the use which could have been made of such evidence at common law, as explained in cases such as Lillyman and Kilby. The jury, it is argued, should have been given the standard common law direction in relation to the use of evidence of recent complaint in sexual assault cases.

38. Counsel went so far as to argue that, as a general rule, a court which receives evidence of complaint in any criminal case should limit its use under s136 so that it is not used for a hearsay purpose.

39. The submissions must be rejected. They amount to an unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded.

40. There may well arise circumstances in which a court, in the exercise of a discretion enlivened by the requirements of justice in the facts and circumstances of the particular case, will see fit to limit the use of complaint evidence, and, in some instances, it may be appropriate to effect that limitation in a manner which corresponds to the previous common law. To assert a general principle of the kind for which the appellant contends, however, would be to subvert the policy of the legislation.

41. In the instant case, the facts and circumstances surrounding the complaint were not such as to make the use of the evidence for a hearsay purpose either unfairly prejudicial to the appellant, or misleading or confusing. The recency and spontaneity of the complaint, and its consistency with other aspects of the complainant's appearance and demeanour, meant that it was not unfairly prejudicial. There is nothing to suggest such evidence was either misleading or confusing in its use for a hearsay purpose.'

The Discretionary Cocktail

Particularly significant is the circumstance that the facts will often permit a court to base its exercise of the section 136 discretion upon a combination of the section 135 subparagraphs. In *Tante v Roth* (unreported, Supreme Court of NSW,

28 November 1996) McLelland CJ in Eq ruled as follows:

'I do not admit those parts because they either do not fall within s79 or I think that I should decline to admit them by virtue of s135(c), which requires a balance between the probative value of the evidence and the prospect of undue waste of time which may be involved in its being admitted and in some instances also by virtue of para (a) and para (b) of s135.'

NRMA Ltd v Morgan

An interesting example of the use of section 135 as an alternative approach to rejection of particular expert evidence is to be found in an interlocutory judgment in *NRMA Limited v Morgan & Ors* (unreported, Supreme Court of NSW, 1 September 1998, Giles J).

In that case, evidence was sought to be adduced from a Mr Hackett who had a degree in psychology and considerable experience in that part of the advertising industry concerned with market research and in that connection, the devising and analysis of communications with consumers. He gave evidence that in that area it was necessary to understand the consumers' point of view and how communications were working and would work, presumably to affect the consumers' conduct. He described the principles he applied as really about trying to isolate in his own mind the effects of communications on peoples' behaviour, and said that they were simply logical principles based on experience and that there was no discipline analysing the effect of communications on peoples' opinions and behaviour in any structured way. Giles J expressed the view that it seemed that at least part of what Mr Hackett meant by logical principles was what he described as the basic principle of eliminating other factors and then drawing the conclusion that the communication was the agent of change.

Evidence was sought to be adduced from Mr Hackett, based on certain assumptions as to his views as to whether it was likely that a smaller proportion of votes cast would have been in favour of the proposal, than were cast, and as to what could be said as to the likelihood that 75% of the votes cast had been in fact in favour of the proposal - the assumptions being intended to be to the effect that the prospectus and the external communications were not misleading because of the use of the notion of free shares or the inadequate disclosure of disadvantages found unacceptable in the Full Federal Court.

Giles J importantly pointed out that Mr Hackett had no experience of market research in relation to voting or voting intentions of members of a company, in relation to a demutualisation such as that the subject of the proposal, or at all.

Giles J accepted that Mr Hackett's opinion was clearly enough opinion evidence falling within Part 3.3 of the Act and referred to section 76 of the Act which of course makes it inadmissible to prove the existence of a fact about the existence of which the opinion is expressed - in the *NRMA* situation the facts being the likelihoods in relation to the casting of votes. As Giles J pointed out, that operation of the opinion rule is overcome in the circumstances prescribed in section 79 of the Act.

The NRMA submitted that Mr Hackett's opinion had not been shown to be wholly or substantially based on his specialised knowledge. Giles J pointed out that it was necessary that the link between the opinion and the knowledge, and between the knowledge and the training, study or experience, be shown. That was not easy as his Honour pointed out, if it was not clear what the specialised knowledge was. But assuming something to do with the behaviour of consumers was the specialised knowledge, Giles J held that that element in section 79 was not satisfied.

His Honour pointed out that the evidence did not descend into a description of the application of whatever were the principles according to which Mr Hackett acted in order to arrive at his opinion. It did not identify what it was, if anything, in the files of documents which Mr Hackett had been furnished, being evidentiary material, from which Mr Hackett arrived at his opinion. Three of those files were volumes of documents in evidence in the proceedings being documents to do with market research conducted by NRMA in relation to the proposals. The other two files contained what had been called in the proceedings, the external communications, being documents such as media releases, material in the 'Open Road' and question and answer scripts, through which the proposal was publicised and described in the period prior to the meeting of members. His Honour pointed out that there was simply reference to the five files and the assumptions and the expression of the opinions.

Prior to the Act, his Honour was of the view that the witness's statement would have fallen foul of the requirement that the expert identify the facts he had assumed - see *Arnotts Limited v Trade Practices Commission* (1989) 24 FCR 313 at 347 to 349. His Honour continued:

'But now applying section 79 of the Act, it must be able to be concluded that the opinions of Mr Hackett are wholly or substantially based on his specialised knowledge, and I am unable so to conclude. This is particularly so when, as I have said, Mr Hackett's experience did not include market research in relation to voting or voting intentions of members of a company, and although it may or may not be that whatever the general principles are upon which market researchers act would permit someone suitably qualified to express opinions in relation to voting or voting intentions of members of a company, that is not something which I assume and is not something which has been established.'

Giles J then held that for those reasons, the witness's statement was inadmissible. But his Honour went further referring to section 135 of the Act. His Honour held that the probative value of Mr Hackett's opinions was quite frankly slight because, for the reasons his Honour had set out, it could not be seen how it was found in the five files, how whatever Mr Hackett's specialised knowledge was, had enabled him to arrive from the material in those files and the assumptions his opinions, or how whatever his specialised knowledge was, could properly be translated and applied to assessment of the voting or voting intentions of members of a company. His Honour added:

'The risk of prejudice, if this evidence were admitted, is, it seems to me, high, because in a similar manner as in the case of the evidence of Professor Corcoran, the NRMA would be left with a vast mass of material, being the five volumes, with unclear specialised knowledge, and with an unexpressed line of reasoning or application of the knowledge from the five files and the assumptions to the opinions, and would have to either take the matter up in cross-examination and itself seek to find out what really lay behind the opinions or run the risk of the weight which the Court might attribute to the opinions. This would place the NRMA in the unfair forensic dilemma to which Santow J referred in Wentworth v Wentworth . . .

To this may be added the nature of the assumptions which Mr Hackett was asked to make.'

His Honour then referred in detail to the assumptions and said:

'It seems to me that, when faced with opinions founded on assumptions which include the assumption I have described, the prejudice to NRMA is increased, because in grappling with the unstated reasoning and application of whatever is Mr Hackett's specialised knowledge, it has to take up a large number of uncertain aspects of the assumption in this respect.'

Finally, his Honour expressed the view that his Honour would have reached the conclusion quite apart from that last matter that in the balancing exercise under section 135 of the Act, in which his Honour said, there was also an element of undue waste of time given the manner in which the witness statement was put forward and the possibility of evidence being misleading or confusing that the witness statement should not be admitted. In his Honour's opinion, the balancing exercise called for refusal to admit the witness statement.

This judgment draws together the number of ways in which a Court may treat with the evidence of an expert and in particular and crucial as it seems to me, points to the significance of the requirement that it must be concluded that the subject opinions are wholly or substantially based on the specialised knowledge.

AIJA Survey

An interesting survey was carried out by Dr Ian Freckleton, Dr Prasuna Reddy and Mr Hugh Selby between mid 1997 and April 1999 entitled '*Australian Judicial Perspectives on Expert Evidence : An Empirical Study*'. The survey focussed upon the attitudes of Australian judges to expert evidence. The survey instrument was circulated to all 478 Australian judges in mid 1997 by the Australian Institute of Judicial Administration and 244 judges or 51.05% of the Australian Judiciary responded.

In relation to the Act, the report on the survey stated at paragraph 1.7, inter alia:

'It may be that there will be increased focus upon ascertaining what constitutes an expert opinion, as against an opinion that essentially is speculation or is not based on the expert's specialised knowledge. The exclusionary discretions have an important and potentially enhanced role in regulating the admissibility of expert evidence as a result of the legislative changes. How this will translate into admissibility decisions remains to be seen. The survey respondents, drawn from all jurisdictions, when asked to evaluate those provisions revealed little inclination, however, to abolish traditional approaches to the admissibility of expert evidence.'

In dealing with the question of bias amongst forensic experts, the report included the following comment made by SG Gross in somewhat unsubtle terms in 1991:

'One of the most unfortunate consequences of our system of obtaining expert witnesses is that it breeds contempt all around. The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes, people who live by selling services that should not be for sale. They speak of maintaining 'stables' of experts, beasts to be chosen and harnessed at the will of their masters. No other category of witnesses, not even parties, is subject to such vilification.'

[SG Gross, '*Expert Evidence*' (1991) Wisconsin Law Review 1113 at 1135.

Gross of course deals with the situation in relation to the United States where there are significant differences to our system in the practice of litigation. In particular the combination of contingency fees and the availability of experts regarded as 'for hire' and the absence of the rule in civil litigation that costs generally follow the event, are suggested by

the authors of the report as having bred a culture that remains foreign to that which prevails in Australia. Of course, similar concerns about expert partiality have been occasionally and individually ventilated by judges, legal practitioners and commentators in Australia.

The report also treats with the position in Australia and in the United Kingdom of codes of ethics for expert witnesses. The English decisions have endorsed a code of ethics for expert evidence, the primary focus of which is to avoid partisanship and its consequences and which include as the duties and responsibilities of expert witnesses in civil cases, the following:

'(1) Expert evidence . . . should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness . . . should never assume the role of an advocate.'

[Report page 27]

Judges were asked which of certain categories of problems was the 'single most serious' problem with expert evidence. Over one third ranked 'expert bias' as the most serious problem, with failure to prove the bases of expert opinions, failure by advocates to pose questions adequately and failure by advocates to cross-examine effectively, the next most serious problems. [Report at para 4.9]

In relation to lawyers settling expert reports, Judges expressed concern. The report includes the following passage from a judgment of Lord Denning in the Court of Appeal in relation to the partisanship that excessive involvement by the experts in the legal process has brought about:

'[The] joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually "settled" by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel "settle" a document, we know how it goes. "We had better put this in", "we had better leave this out" and so forth. A striking instance is the way in which Professor T's report was "doctored". The lawyers blocked out a couple of lines in which he agreed with Professor S that there was no negligence.' (*Whitehouse v Jordan* [1980]1 All ER 650 at 655)

Judges were asked to identify the single most persuasive factor when an expert is giving expert evidence. The ranking 'clarity of explanation' was the most common answer.

I interpolate that in the report, the authors identified from the decision of Chief Justice Gleeson in *H G v The Queen*, the significance, in evaluating the admissibility of allegedly expert opinions, of assessing whether a field of expertise exists in the first place and then whether a proposed witness expresses opinions deriving from specialised knowledge in turn based on the witness's training, study or experience. Hence as the authors of the report point out at page 92:

'Three issues need to be proved before expert evidence can be adduced: the legitimacy of the field of expert endeavour, the relationship between the opinions and the specialised knowledge, and the person's training, study or experience - see also Quick v Stoland 1998 157 ALR 615.'

As one would expect, the end result of the report was that judges had identified clarity of explanation by expert witnesses as vitally important - and more important than many other factors that might play a part in influencing the evaluation of expert evidence. Judges candidly conceded that many of them - some 70% - had had occasions when they had felt that they had not understood expert evidence in the cases before them. Some 20% of judges responding to the survey said that they 'often' experienced difficulty in evaluating opinions expressed by one expert as against those expressed by another - report at page 4.

In conclusion in relation to opinion evidence, may I refer to a passage from Dr O.C. Mazengarb CBE, QC's work 'Advocacy in our Time'. Dr Mazengarb said: '*Beware of the experts*'.

I would have to agree with the opinions of Mr J.N. West QC, expressed in his paper '*Advocacy and Evidence : The New Evidence Act*' 26 September 1995 in referring to Dr Mazengarb's 'injunction'. Mr West first cites the following cautionary note given by Mahoney JA in *X & Y (by her tutor X) v PAL* (1991) 23 NSWLR 26 at 31:

'Expert evidence, is in my opinion, to be approached with reserve or scepticism because of the nature of it. It may take a number of forms. In the present case, it involves, as I shall describe it, a reasoning back. The experts had before them the end result of the birth process : the child had deficiency and deformities. Their tasks was to reason back from that end result to the cause or causes that produced it.'

In such a reasoning back process as is here involved, the experts' reasoning process ordinarily involves:

that the expert defines precisely what the end results of the process are; that he states the relevant principles of his expertise; and that he infers, from the application of those principles to the results which he has defined, what was the cause or precedent condition which led to those results.

The reason why a Court ordinarily should approach expert evidence in the way that it does is, I think, because of the imprecision of the facts and (or the uncertainty of principles in the particular case). In Chambers v Jobling (1986) 7 NSWLR 1 at 24 I said:

"The weight to be given to inferences drawn by an expert will depend upon, inter alia, the certainty of his facts and the stringency of his principles."

Mr West's view, which I share, is that Dr Mazengarb's injunction to 'beware of the experts', should not be dissolved.

Scope of the Application of the Act

A question which vexed various first instance judges and intermediate appellate courts was the precise reach of the provisions of the Act. In terms, the Act applies only to proceedings in court: s4(1). However, the notion - which may be traced back to the decisions of McLelland CJ in Eq in *Telstra Corporation v Australis Media Holdings [No. 1]* (1997) 41 NSWLR 277 [4] and Branson J in *Trade Practices Commission v Port Adelaide Wool* (1995) 60 FCR 336 - that the Act had an indirect or flow on effect to pre-trial proceedings, such as the issuing of a subpoena, or notice to produce, the answering of interrogatories, or the discovery of documents, obtained the approval of the NSW Court of Appeal in *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, and of the Full Court of the Federal Court in *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360. The latter decision was, however, overruled by a majority of a five member Full Court of the Federal Court in *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511.

The question whether the Act has an application by analogy to matters ancillary to proceedings in Court has now been resolved in the negative by the High Court in three recent decisions. *Northern Territory v GPAO* (1999) 196 CLR 553 decided in March 1999 dealt relevantly with issues concerning the interaction between the *Family Law Act* (Commonwealth) and the *Evidence Act 1995* (Commonwealth), and the *Community Welfare Act 1975* an enactment of the Legislative Assembly of the Northern Territory. The issue which arose for decision was whether the Manager Trial and Family Protective Services of the Northern Territory was obliged to produce documents relating to a young child in Family Court proceedings concerned with that child's guardianship. At the father's request a subpoena was issued by the Registrar of the Family Court pursuant to Order 28 r1 of the Family Law Rules (Commonwealth) requiring the Manager to produce "all files and records in relation to [the child]". On the return date, it was argued that the Manager was not obliged to produce the documents in question because of section 97 (3) of the Community Welfare Act which provided:

"A person who is, all who has been, an authorised person shall not, except for the purposes of this Act, be required to-

(a) produce in a court a document that has come into his possession or under his control; or

(b) disclose or communicate to a court any matter or thing that has come under his notice,

in the performance of his duties or functions under this Act"

A number of constitutional questions and questions of immunity arose for consideration on the case which was stated to the Full Family Court which asked whether the provisions of section 97 (3) of the Community Welfare Act were inconsistent with the provisions of the *Family Law Act* or the *Evidence Act* such that the provisions of section 97 (3) of the *Community Welfare Act 1983* were inoperative to the extent of such inconsistency.

The short issue relating to the Act concerned whether the Act applied to production of documents in response to a subpoena.

The High Court held that the Act had no application to the obligations of a party to produce documents in answer to a subpoena issued by the Family Court or to the principles which underpin the court's power to grant leave to parties to inspect documents in answer to a subpoena: at 571 per Gleeson CJ and Gummow J with whom Hayne J agreed, at 629 per McHugh and Callinan JJ. Kirby J expressly refrained from expressing a view on the matter: 649 - 650.

The issue was re-visited in two cases decided on the same day in December 1999: *Mann v Carnell* (1999) 74 ALJR 378 and *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 74 ALJR 339. Relevantly, both concerned the analogous application of the provisions of the Act which deal with the application of legal professional privilege ('client professional privilege'). *Esso* involved the commencement of proceedings by the appellant who appealed against notices of amended assessment of income tax issued by the Commissioner of Taxation. General orders for discovery were made. *Esso* claimed privilege in respect of certain documents in its list of documents asserting that their disclosure would result in the disclosure of a confidential communication made between it and a lawyer for the dominant purpose of the lawyer providing legal advice to *Esso*.

On the decision of a separate question of law, Foster J held that the 'sole purpose' test as formulated by the High Court in *Grant v Downs* (1976) 135 CLR 674 was the correct test for claiming legal professional privilege. The holding was further

that the Federal Court did not have the power to make an order to exclude from production documents which had been discovered, on the basis that such documents satisfied the 'dominant purpose' test set out in sections 118 and 119 of the Evidence Act.

The Full Federal Court majority decision essentially upheld the decision of the trial judge but modified the order concerning the second question. The holding was that the Federal Court was empowered to exclude production of discovered documents for the reason that they satisfied the 'dominant purpose' test, although to do so would in the circumstances have been an improper exercise of power.

It was made clear by Gleeson CJ, Gaudron and Gummow JJ (at para 16) that the Act deals with the adducing of evidence, at the interlocutory, trial and appellate stages, but does not deal with all circumstances where a claim for privilege is made, and in particular had no application to the instant circumstances, viz., a claim for an order for privilege in respect of documents produced on discovery. McHugh J (at para 64), Kirby J (at para 91), and Callinan J (at para 149) expressed the same view.

Mann v Carnell also concerned a claim for privilege in respect of pre-trial documents, in particular a contention by the appellant that privilege had been waived by disclosure of the respondent to another individual. Mann involved an application by the appellant who was a surgeon, for preliminary discovery of legal advices provided by the Chief Minister of the Australian Capital Territory, to an independent member of the ACT Legislative Assembly, as part of a practice of members being confidentially briefed by Territory ministers. The appellant sought pre-trial discovery with a view to commencing defamation proceedings against the Chief Minister.

The High Court dealt with whether the legal professional privilege attaching to the advices had been lost by reason of the disclosure by the Minister to the member of the Legislative Assembly. No issue was raised but that, although the privilege relevantly belonged to the Australian Capital Territory, the Chief Minister acted within her authority in disclosing the communications to the independent member of the Legislative Assembly.

Gleeson CJ, Gaudron, Gummow and Callinan JJ (at para 27) referred to the decisions in *GPAO* and *Esso* to conclude that the ACT Supreme Court and a Full Court of the Federal Court had erred in applying the Evidence Act to determine a claim for privilege and the question of its loss by waiver in respect of documents produced on discovery. McHugh J did the same (at para 41). Kirby J expressed the opinion that 'a host of undesirable and even irrational distinctions' would be avoided if a broad view of the application of the Act were taken, and that arguments existed for a wider application of the Act and its application to ancillary proceedings intimately connected with the adducing of evidence for later use in a Court hearing. However, his Honour bowed to the authority of *GPAO* as settling the issue.

In the course of their judgment in *Mann*, Gleeson CJ, Gaudron, Gummow and Callinan JJ stated that no argument had been made before Miles CJ (at first instance) or on appeal before the Full Court of the Federal Court or before their Honours to the effect that the inability of a party to prove the contents of a document under the *Evidence Act* might constitute a discretionary reason for refusing the order for preliminary discovery sought by the appellant under Order 34A, Rule 5 of the ACT Supreme Court Rules.

There are a number of questions raised by this suggestion. To my knowledge, it has not previously been the position that a document which is relevant in the applicable sense (itself a vexed question in New South Wales at the moment) and which does not enjoy any claim for privilege, is not properly discoverable because that document may not be capable, for one reason or another, of being adduced into evidence. Indeed, in relation to documents produced on subpoena, that proposition was specifically rejected by the New South Wales Court of Appeal in *National Employers Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372. The suggestion of Gleeson CJ, Gaudron, Gummow and Callinan JJ may well be productive of further disputes in this area.

The decision of the High Court in *Esso* to overrule *Grant v Downs* (1976) 135 CLR 674 and alter the common law rule for legal professional privilege has however deprived this question of much of its previous practical importance. Further, in New South Wales the *Supreme Court Rules* (Part 23, Rule 1(c)) adopt the Act provisions to determine what a privileged document is for the purposes of discovery or for documents produced on subpoena or notice to produce (Part 36, Rule 13). The effect of the Rules is that, notwithstanding the decisions of the High Court considered above, when it comes to the application of legal professional privilege in most instances in connection with litigation - both in Court and in matters ancillary to it - it is to the Act that one must now look.

Conclusion

Courts (both at first instance and at appellate level) have, albeit ever so slowly and carefully, commenced to treat with the Act in terms of a principled but necessarily pragmatic approach to a number of difficult questions thrown up not the least of which concerns the reach of the Act. This paper has sought to highlight some only of the recent developments of significance in the area.

[1]

This emphasis appears to suggest the correctness of the approach taken by McLelland CJ in Eq., in *Trust Company of Australia Ltd v Perpetual Trustees WA Ltd* Supreme Court of New South Wales unreported 18 Sep 1996, which was as follows:

- To first examine the training, study or experience of the witness ;
- To next examine whether the witness has been shown to have specialised knowledge based upon that training, study or experience
- To then outline the extent to which the witness has been shown to be entitled to express opinions based wholly or substantially on the specialised knowledge which has in turn been shown to have been based on his or her training, study or experience.

Hence His Honour said: "*I consider that [the witness], has been shown to have specialised knowledge based on his training and experience... which qualifies him to express opinions on matters of the following descriptions which do appear in his report [and his Honour then set out the particular areas in respect of which the expert evidence was to be admitted].*

In relation to opinions expressed in the report on matters going beyond those descriptions, my view is that assuming, without deciding, that they would be admissible under section 79, I would refuse to admit them in the exercise of the Court's power under section 135, in particular in reliance on sub paragraph (c)."

[2]

Ogders - *Uniform Evidence Law* LBC Information Services 4th Edition, 2000, points out that the majority in Graham explained that limiting this hearsay exception to statements made "very soon after" the events in question reflects experience that "the memory of events does change as time passes" and will ensure that attention will not be distracted from the quality of the evidence that the witness gives in court by material of "little usefulness". As the Author further observes at 66.4 :

" This approach reflects the views of the ALRC. Psychological research on memory suggests that memory tends to diminish rapidly at first, and then more slowly. Within hours of an event there is likely to be a substantial loss of memory. The remaining memory may be "reliable" (at least, in one sense) but not "fresh". Equally, care must be taken in differentiating "freshness" of memory from the strength of the "impression" which the person who made the representation has at the time of making it. A memory of a traumatic event sometime in the past may be vivid but not reliable and certainly not "fresh". Apart from lost memory of relevant details, psychological research suggests that post-event information is likely to contaminate (change) the memory of the event, altering it and filling in gaps arising from the rapid process of "forgetting"

That the courts will continue to have difficulty in applying Graham is clear from the later decision of the New South Wales Court of Appeal in *R v Adam* (1999) 47 NSWLR 267 which involved a trial of the appellant who was found guilty of the murder of an off-duty police officer who was killed on the evening of 18 April 1997 in the carpark of the Cambridge Tavern Hotel at Fairfield. The report summarises in great detail the events of the night in question and the evidence of the murder of the police officer adduced at the trial from a number of witnesses. Relevantly the Court of Appeal had to deal with the admissibility under section 66 of the Act of representations made by a witness in the police interview some 10 weeks after the events in question. The Court of Appeal points out that Graham establishes that the reference to "fresh" in section 66 means "recent" or "immediate" and is not concerned with the vividness or quality of the recollection. The Court of Appeal points out that the trial judge did not, in his judgment, deal at length with the issue of freshness which may have been because he had considered Graham in detail in an earlier judgment where the question which arose was leave under section 32 of the Act for a witness to refresh his memory. The Court of Appeal points out that in that earlier judgment the trial judge was concerned with the ability of a witness to refresh his memory from a recorded interview seven weeks after the events in question. Wood CJ at CL who was the trial judge, had said:

"In my view the judgment of Gaudron J, Gummow J and Hayne J was not intended to confine the expression "freshness strictly or exhaustively in terms of mere hours or days. As the Law Reform Commission Report underlined, a measure of flexibility is appropriate. The question is, as their Honours point out, one of fact and degree

In my view a statement made seven weeks after an event is not one which should be regarded as being outside the period of fresh memory. It is in fact a relatively short period after events of the kind here involved. Having regard to normal expectation and experience of life, I would regard a statement made at that point of time as still being fresh in the memory of a relevant witness"

The joint judgment of the Court of Appeal said that this view had much to commend it. However it was not necessary for the Court of Appeal to express a final opinion on that alternative basis for admissibility by reason firstly, of the application of section 60 and secondly, that it was not entirely clear that Wood CJ at CL was making a finding of fact on "freshness".

[3]

The Wigmore statement of the common law definition of an opinion as "an inference from observed and communicable data" applied by Lindgren J in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (No. 5) (1996) 64 FCR 73, is difficult to apply..

The Full Federal Court has held that a statement by a member of the National Crime Authority that 'the information then available did not identify... any particular suspect person in relation to any offence', was not an "opinion":

"The substance of his evidence is that the Authority has no information that enables it to identify a particular offence or suspect. That is a statement of fact. It is true it is made by a person who has knowledge of the material currently before the Authority and is made after that person has read the material. But it is a statement about a negative fact. The circumstance that the statement concerns that material does not make it an inference from observed and communicable data, any more than it would be such an inference if a witness were to depose that a file did not contain any document printed on yellow paper"

[*Bank of Valletta PLC v National Crime Authority* (1999) 165 ALR 60 at paragraph 22]

[4]

The test for client legal privilege applied by the Act was the dominant purpose test-whether the communication was made, or the document was prepared, for the dominant purpose of the lawyer providing legal advice or legal services. This was the test which was favoured by Barwick CJ in his dissenting judgment in *Grant v Downs* (1996) 135 CLR 674. The majority in that case preferred the "sole purpose test". Since 1976, courts in this country have applied the common law of legal professional privilege on the basis that privilege will only attach to a confidential communication, oral or in writing, made for the sole purpose of obtaining or giving legal advice or assistance or use in legal proceedings.

The situation in which practitioners and judges were unaware as to how to reconcile the apparently inconsistent treatment of privilege, depending as one applied the Act or as one applied *Grant v Downs*, had become a daily occurrence. One commentator published an article entitled "The Demise of *Grant v Downs*" (1995) 7 ILJ 234 which after dealing with the differences in the two tests, advocated the proposition that it was appropriate for practitioners to discover less documents applying the "dominant purpose" test as long as those practitioners made plain to their opponents that this was their view of the appropriate approach now permissible to be taken.

McLelland CJ in *Eq.* then held in *Telstra Corporation v Australis Media Holdings*, that although the provisions of the Act relating to client legal privilege do not, upon the true construction of the Act, apply of their own force to ancillary processes such as the production of documents in response to subpoenas, they were applicable to such ancillary processes in lieu of previous common law principles, for historical, conceptual and practical reasons. That implication of an alteration of the privilege for ancillary processes mirrored the development of the privilege itself in the last four centuries. That privilege emerged in the 16th century as a natural exception to ancillary processes as those processes in turn emerged and developed. As McLelland CJ in *Eq.* put it:

"In this sense the principles of legal professional privilege applicable to testimony at a trial, provide the paradigm and the extension of the same principles to ancillary processes was derivative in nature. Accordingly, any change to the paradigm should rationally be reflected in the derivatives."

Ultimately the High Court pointed up the fundamental difficulty with the line of reasoning adopted by McLelland CJ in *Eq.*. His Honour had concluded that the Act had created an entirely new setting to which the common law was now required to adapt itself. The problem was that the legislation does not apply throughout Australia and presently applies only in Federal courts and in the courts of New South Wales and the Australian Capital Territory. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court at 563 had held that there is but one common law in Australia which is declared by the High Court as the final court of appeal. The High Court (Gleeson CJ, Gaudron and Gummow JJ) pointed to the differing legislation concerning privilege to be found in a number of legislatures in Australia and to other differences where it was not possible to discern a consistent pattern of legislative policy to which the common law in Australia could adapt itself. Their Honours held that the fragmentation of the common law implicit in the qualification that such adaptation should occur only in those jurisdictions in which the Act applies was inconsistent with what was said in *Lange* and was unacceptable.

In short it was not possible to identify a "common law" of Australia with respect to questions of privilege where different legislatures had enacted differing legislation concerning privilege.

Swearing In Ceremony of The Honourable Clifford Roy Einstein

GLEESON CJ
AND THE JUDGES OF
THE SUPREME COURT

Monday 1 September 1997

SWEARING-IN CEREMONY OF THE HONOURABLE CLIFFORD ROY EINSTEIN QC AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

EINSTEIN J: Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court. I present to you my Commission.

GLEESON CJ: Thank you, Justice Einstein. Would you please be seated whilst the Commission is read.

Mr Wescombe, would you please read the Commission.

I ask you now to rise and take the Bible and repeat the oaths of office, first the oath of allegiance and then the judicial oath.

Mr Acting Prothonotary, I hand to you the oaths to be placed amongst the Court's archives. Sheriff, I hand to you the Bible so you may have the customary inscription inserted herein in order that it may then be presented to Justice Einstein as a memento of the occasion.

On behalf of the Judges of the Bench, and on my own behalf, I congratulate you and welcome you as a member of the Court.

DAVID BENNETT ESQ QC, PRESIDENT, THE NEW SOUTH WALES BAR ASSOCIATION: Your Honour was a baby boomer born in South Africa shortly after the Second World War. Your father was a candidate for Parliament and a Member of the Progressive Party. A Member of the Progressive Party at that time in South Africa was about as popular as Pauline Hanson paying a visit to a meeting of the Council for Civil Liberties. Because of his political beliefs your father was subjected to threats and intimidation by the Government and on one occasion was arrested. Your Honour was close to your father and shared his beliefs. Your childhood memories and experiences of social injustice in South Africa developed in you a compassion for the oppressed and disadvantaged in society and an intense belief in justice and equality before the law, a belief you demonstrate by your membership of the Australian Bar Association team which visits Bangladesh annually to carry out advocacy training for young Bangladeshi lawyers. Your contribution and commitment to this project has been outstanding and your Honour's name is held in high regard in the Dhaka legal community.

Your Honour's family came to Australia in 1963 and your Honour completed your secondary education at Vaucluse Boys High School. Even then your Honour was a great talker and you became a member of the school debating team and a prefect. You won a Commonwealth Scholarship to Sydney University where you undertook an Arts/Law Degree. You finished your Law Degree with First Class Honours. Your Honour was runner-up for the University Medal being beaten by Jim Spigelman but you have beaten him in the race to the Bench. You were articled at Michell and Gee and later worked as a solicitor at Minter Simpson (as Minter Ellison then was) before coming to the Bar in 1973. In 1974 you acquired chambers on the 10th Floor where you have remained under the tutelage of the doyenne of Sydney clerks, Ken Hall. You have been admitted to practice in Victoria, ACT, South Australia, Western Australia and the Republic of Ireland.

You were always noted at the Bar for your thoroughness. In one of your first cases you appeared for a director of a film defending an application to the Equity Division of the Court for an injunction to prohibit its exhibition. The plaintiff was a young actress who was the star of the film. She alleged the director had promised that her torso would only be filmed between one inch below her navel and three inches above it. She alleged that the film had been made in breach of this representation. Your Honour's thoroughness caused you to insist on having a view of the film. It was being screened at a city cinema and your Honour watched it from beginning to end. It quickly became apparent to you that any restraint of the public exhibition of this exciting and popular film had to be resisted at all costs. When the lights went up at the end of the third showing your Honour was surprised to see that most of the people in the theatre were middle-aged men wearing raincoats. This struck your Honour as surprising seeing as it was a bright sunny day outside and the theatre was quite warm. In accordance with your Honour's thoroughness you insisted on various offcuts from the film being obtained and your Honour studied those in the privacy of your Honour's chambers again and again.

Your Honour's cross-examination of the plaintiff was masterful and interspersed by the showing of frequent clips from the film. At the end of the cross-examination, and after the departure of the large number of law students who had come for the sole purpose of watching your Honour's management of the case, the plaintiff withdrew her claim. Since then your Honour has gone from success to success.

It is a mark of the esteem in which you are held that I have received express apologies for their inability to attend from Justices McHugh, Gummow and Kirby of the High Court. All are presently attending the annual Adelaide sittings of that Court.

Your Honour developed a busy practice in Equity and Commercial Divisions and you were often briefed in difficult and complex cases, particularly those involving corporate fraud. In many of those cases you were junior to Dan Horton QC who played a large role in the development of your Honour's advocacy skills.

You took silk in 1987 and moved effortlessly into a silk's practice. Again your careful, measured and courteous style of advocacy has won you the respect of your Bench and your colleagues.

Your Honour is devoted to your family. You have always been close to your parents, your sister Sandy and your brother Les, who is also at the Bar. You married Judith in 1969 before either of you had graduated. You have two children, Danielle and David, respectively a psychologist and an engineering student and they are both a credit to you. After a heavy day in court your Honour would regularly devote himself to your children's homework from plasticine modelling in kindergarten to four unit maths at the HSC and, while you accepted your fair share of losses in court, your Honour would never accept the significantly lower marks your children obtained whenever you played a major role in settling their assignments. Your Honour's invariable comment "Don't worry, we'll appeal".

Your Honour is also noted at home for your ability to get handyman jobs done, although not always in the conventional way. For example, on one occasion you and David were sent to the garage to capture and dispose of a rat. He set about baiting and setting a number of traps while your Honour was delegated to perform the more mundane task of moving the car to permit the operations to continue. While he continued rushing around winding back springs and loading rat poison, your Honour calmly pointed out a very squashed and very dead rat which you had driven over. Lateral thinking of this kind will be a significant advantage on the Bench.

In fact, your Honour's use of the car as an instrument of destruction is not uncommon. Like many of us who are beginning to feel the first signs of the onset of senile dementia, your Honour frequently leaves home a number of times in the morning (having returned to collect forgotten items). On a number of occasions you have put your briefcase down to open the garage door and then duly driven over it. Your solicitors and juniors have become used to seeing you work with mangled briefs.

One phenomenon the Bar has learned to live with is the barrister who, on elevation, becomes a true poacher turned gamekeeper, criticising the Bar and dealing harshly with its rare minor foibles. We have high hopes that your Honour will not fall into this category and I have issued to all barristers who may appear before you copies of your article in the 1996 University of New South Wales Law Review entitled "Reining in the Judges" (that is spelt r-e-i-n-i-n-g). I hope that you will remain convinced of the importance of the views it expresses.

Your Honour has wide interests outside the Bar. You regularly compete in the Great Bar Boat Race, although with less than conspicuous success. You are a keen skier and tennis player. You played golf in South Africa but gave it up at the age of 15 - indeed it is to that abandonment that one can attribute your calm and unflappable disposition. You have been unfailingly courteous and considerate as an advocate - fearless without being offensive and firm without being obstinate. These qualities render you particularly fit for the office to which you have now been elevated.

The Bar of New South Wales wishes you well in your new career.

MR PATRICK FAIR, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:

Your Honour, your appointment to the Bench of the Supreme Court this morning is the culmination of a distinguished career. I am pleased to welcome your appointment on behalf of the solicitors of New South Wales.

As Mr Bennett mentioned, you were born in South Africa on 28 September 1947. You attended the Northview High School in that country until you were 15 years of age. Your sister Sandy and your brother Les, who also practices as a Sydney barrister, grew up there.

Your family was headed by your late father, Alf Einstein, who passed away in Sydney in May 1988. Your Honour has described his passing as the hardest thing you've had to bear. Your mother survived your father but she has had to wrestle with illness in recent times. Despite those difficulties she has, I understand, joined us in court this morning.

Your father fought strenuously against the Apartheid policies of the governing National Party. As a boy, your Honour was deeply interested in your father's political career. You remember standing beside your father on a polling booth as he shook hands with voters. Especially vividly do you recall seeing his hand covered in blood after doing so, one of those voters having secreted a knife blade within his palm before extending his hand.

Your father stood for the Orange Grove Federal seat in the 1961 General Election. The foundation plank of his campaign was that no person should be debarred on the grounds of race, religion, language or sex from making the contribution to national life of which he or she may be capable. He only narrowly missed being elected.

You arrived in this country in March 1963. You completed your secondary education in Australia as a pupil of the Vaucluse Boys High School which excelled in debating. Despite being a newcomer to it, you were soon playing a star role in its debating team, assisting it to win the very important and prestigious Hume Barbour Cup. You also became a prefect.

At the end of your secondary schooling you won a Commonwealth Scholarship to Sydney University where you studied Arts and Law, as Mr Bennett mentioned.

You became an articled clerk firstly with Michell and Gee, as the firm in question was then known. Your master solicitor was John McGregor.

After your graduation, on 19 March 1971 you were admitted as a solicitor. Thereafter, from June 1971 till July 1973, you were employed as a solicitor by Minter Simpson & Co. which is of course today known as Minter Ellison. Notably, currently six justices of the Supreme Court at one time worked at Minter Simpson & Co.

When Gary Ulman started with the firm in 1974, he inherited a room full of files maintained by junior solicitors who'd recently gone to the Bar. Relevant initials included CRE (Clifford Einstein) RDG (Roger Giles) and KM (Keith Mason). Mr Ulman reports that each file was kept impeccably.

Your Honour was admitted as a barrister-at-law on 27 July 1973. The following year, you moved into chambers on the 10th Floor, Wentworth Chambers and have remained there ever since.

A foremost characteristic of the 24 years you've subsequently spent in practice at the Bar, mainly in the Equity and Commercial Divisions, was your determination to carry out meticulous preparation.

Your colleagues joke that it's always easy to discern just what lies ahead of you when they see you set off for a morning in court. Seeing you in the lifts with only one trolley load of files and books indicates an adjournment by consent. If you have two trollies it means there is a contested adjournment ahead of you. Three trollies constitute a certain sign that something or other may actually be litigated!

Your Honour took silk on 4 November 1987.

Your Honour has written extensively. Some of the titles of papers written by you include, as mentioned, Reining in the Judges, The Demise of Grant v Downs, Living with the Evidence Acts, The Justiciability of Reserve Powers and Handling Large Scale, Long Haul Commercial Litigation.

All who know your Honour recognise that you have a wonderful teaching talent. During the course of two different years, the Bar Association has sent team members of the Barrister's Advocacy Committee to Bangladesh to teach young lawyers there the fundamentals of good advocacy. You've played a leading part in both of those highly successful missions. You've recently had one of the students who took part staying with you in your home in Sydney for a number of weeks.

On the downside, it is reported that your close friends who were invited to view the video material you brought back to Australia following your trip to Bangladesh tended to show some slacking of interest after the three hours of viewing.

It appears that your Honour has been prepared to tackle practically every leisure pursuit proposed by your children including sailing, you learned to sail from a "How to Sail" book and have since participated regularly in the Bar boat races, tennis which you play vigorously every Saturday and skiing which sometimes takes place in France. However, when it came to abseiling, you went as far as to put on all the requisite gear, go to the edge of the cliff, and look down. Thereafter you took off all the gear, walked back from the edge of the cliff and abandoned the whole project.

One who was a contemporary of your Honour's both at Law School and with Minter Simpson & Co. recalls that both as a student and in practice - as you are today - extremely thorough and meticulous in all you do. It's said of you that you're unfailingly keen always to pour oil on all troubled waters. You always seek to take advantage of whatever scope exists for mediation and compromise. You're described as being dependably thorough and tenacious. Frequent tribute is also paid to the great generosity you display in terms of your readiness to give both your time and your advice to those who need it.

Your Honour, I express the confidence of all the solicitors of New South Wales in welcoming your appointment this morning and as a most fitting addition to the Court. I congratulate you and wish you every success for the years of community service ahead.

EINSTEIN J:

Chief Justice, members of the Court, Mr Bennett, President of the Bar Council, Mr Fair, President of the Law Society, ladies and gentlemen.

My first 15 years were spent living in a country which had turned its back on democracy. South Africa was a country

living a lie. The Apartheid system had come to dominate every aspect of the lives of black and white. Freedom of speech was simply absent. Those who opposed the regime were ever mindful of the risks of running foul of the authorities.

My late father opposed the regime. He did so with every fibre of his being. He brought me up to understand that no matter whether one spoke of a black or white or yellow person, the colour of their blood would always be the same.

Plainly the lessons of one's formative years continue to have a real effect as one grows much older. I am grateful that this is so as I believe that the deep feelings of shame at the Apartheid system which I had during those early years allowed me to really understand the importance of a sense of fairness and humanity.

I believe that a sound appreciation of fundamental fairness informs many of the principles of law applied in the due administration of justice. Hopefully the deeply ingrained outrage at what I saw around me as I grew up will serve to remind me always of the critically important role which the judiciary plays in ensuring a level playing field and in upholding the rule of law.

I have enjoyed my years at the Bar beyond measure. The Bar demands a variety of skills not the least of which is common sense. One is carefully rated by critical solicitors. Those who prove their capacity forge ahead. All of the time one's focus is squarely on protecting one's client's interests within the ethical constraints which obtain.

I have enjoyed participating in the advocacy workshops which led me to some of the most stimulating experiences of my life in Bangladesh. I commend the Bangladesh teaching workshops to those barristers interested in broadening their horizons. The experiences are very, very exciting and the students are very, very enthusiastic.

To leave the Bar is for me a sad occasion.

That sadness is, of course, tempered by the singular honour of joining a court with the proud history and tradition of excellence enjoyed by the Supreme Court of New South Wales, which is charged with upholding the public interest in the administration of justice.

In 1969 I became articled to Kevin McGregor, who I am delighted is here with us today. Kevin took extremely seriously the responsibility of a master solicitor, seeking to bring the fledging young law student with his mind in the clouds down to earth. His method was to throw you into the water, to rescue you, and then to throw you in again. I very soon learned that what one's clients wanted was practical advice, furnished in easy to understand terms.

Kevin introduced me to the first barrister I came across, namely, John Kearney QC, later a Justice of the Equity Division of the Court. John Kearney's considerable intellect, coupled with a deep knowledge of and interest in equity principle, his courtesy and humility, set him apart as a very special person.

I spent two and a half years at Minter Simpson as the firm was then known. The litigation team was headed by David Ferguson to whom I am indebted for giving me immediate independence and real responsibility. The position for which I was employed had originally been known an advice clerk. By the early 1970's the position, still referred to as advice clerk, required one to furnish advice to partners on request. One also took responsibility for a number of litigation files.

Roger Giles, sometimes called "thin Roger", now Chief Judge of the Commercial Division, Keith Mason, now President of the Court of Appeal and I, in succession, occupied essentially the same position.

After my wife finally gave in to my repeated requests to allow me to go to the Bar, I was accepted as a licensee of Michael Kirby's room on 12 of Wentworth,, which was a very strong floor. The names Mahoney, Needham, Powell, McLelland, Rogers, Ireland, Rolfe and Finlay readily spring to mind. I was fortunate indeed to land on my feet on such a floor.

My first clerk, Greg Isaac, helped me enormously. He gave me confidence when the only telephone caller was my mother - "Can't talk now, mum, I'm very busy".

I had taken my secretary with me. She, of course, had nothing to do. After a short time thin Roger began to share in her employment.

I read with Theo Simos QC, now a member of the Equity Division. Theo was arguably the most careful barrister I had ever met. Like Kearney he was an Equity guru and I thank him for his patient advice.

Following my year on level 12, my good friend, Keith Mason, invited me to join 10 of Wentworth. It was also a very strong floor. Morris Byers QC and Ken Handley QC, now a member of the Court of Appeal, were the leaders of the floor. Ken Hall was the clerk. He has been much more than a clerk to me, and I shall always be in his debt for his unstinting friendship, and for his advice and assistance.

Over lunch in recent years I have regularly tested some points of research which I have completed using my CD's, against the prodigious memories of both Justice Handley and Justice McHugh of the High Court. Unlike the expensive

CD subscriptions, the service is free. However, both McHugh and Handley cause trouble because they tend to also recall High Court cases in the older volumes of the ALJ which have never made it into the CD's.

I value the many friendships I have formed on the 10th floor. In my first judicial act I forgive my close friends George Palmer, Tony Bannon and Stephen Finch for furnishing David Bennett and Patrick Fair with ammunition for today.

Dan Horton QC took me under his wing very early. We appeared together in some notable cases, including *United States Surgical Corporation v Hospital Products*, *Brian v UDC* and *Catt v Marac*. Dan was always approachable, always right and a special friend. He was and is a great lateral thinker.

I thank Trish Hoff my clerk for the last few years for her efficient support and friendship.

My secretary of eight years, Olive Toohey, has been my right arm. She joins me as my Associate. I acknowledge her friendship and support.

I thank our close personal friends for sharing this occasion with me and for putting up with my irregular working hours for so long.

It is always difficult to publicly thank one's family for their love and support over the years.

My father's foresight and vision led our family out of South Africa soon after the Sharpeville massacre. All the opportunities granted to his children were realised at his expense.

I am proud to see my brother, Les, who is at the Bar sitting quietly up there with a smile from ear to ear. My sister and mother are in court as are my parents-in law.

My wife, Judith, my daughter, Danielle, and my son, David, have supported and put up with me over a long time. Danielle and David have lately been coaching me on how to remain silent and listen. We are a very, very close family, now joined by my son-in-law Mark.

In 28 years of marriage my wife, Judith, has exhibited patience beyond measure and an ability to steer me along always the right road. But for J Einstein there would not be an Einstein J.

My family know what I want to say and I shall say it privately.

May I finally thank David Bennett and Patrick Fair for their kind words and good wishes.