

**Index to compilation of speeches delivered by  
the Hon. J J Spigelman, AC, Chief Justice of NSW in 2006**

<b>Date speech delivered</b>	<b>Description</b>	<b>Page number reference within pdf compilation</b>
15 December 2006	Address on the Retirement of the Honourable Justice Handley AO	Page 2 of 136
14 November 2006	Lions in Conflict: Ellesmere, Bacon and Coke The Years of Elizabeth	Page 11 of 136
4 October 2006	Occasional Address - Australian Catholic University Spring Graduation Ceremony	Page 41 of 136
20 September 2006	Shanghai and the West: First Contact	Page 44 of 136
16 September 2006	Measuring Court Performance	Page 56 of 136
31 August 2006	Formal Opening Ceremony, Court of Criminal Appeal, Bathurst	Page 68 of 136
22 August 2006	Case Management in New South Wales	Page 73 of 136
10 May 2006	Address to Parole Authorities Conference 2006	Page 94 of 136
2 May 2006	Transaction Costs and International Litigation	Page 101 of 136
28 February 2006	Judicial Exchange Between Australia and Japan	Page 118 of 136
30 January 2006	Opening of Law Term Dinner, 2006	Page 124 of 136
2006	Foreward to Sentencing Manual, Judicial Commission of New South Wales, Sydney, 2006	Page 130 of 136
2006	Foreward to G Winterton (ed), State Constitutional Landmarks, Annandale, The Federation Press, 2006	Page 134 of 136

Print Page

Close Window

## Address On The Retirement Of The Honourable Justice Handley AO

THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT

SPIGELMAN CJ  
AND THE JUDGES  
OF  
THE SUPREME  
COURT

Friday 15  
December 2006

FAREWELL CEREMONY FOR  
THE HONOURABLE JUSTICE K R HANDLEY AO  
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE  
OF THE SUPREME COURT OF NEW SOUTH WALES

1 **SPIGELMAN CJ:** We gather here today to commemorate a significant landmark in the legal career of the Honourable Justice Kenneth Handley who is by force of statute required to retire as a fulltime judge of this court. Over a period of more than thirty years at the bar and seventeen years in this court your Honour has been one of the most accomplished all round lawyers it has ever been our privilege to know. You have been and remain the quintessential lawyer's lawyer.

2 Your Honour's encyclopaedic knowledge of the law is of such breadth as to inspire admiration by lawyers throughout Australia and in England. Perhaps your most notable characteristic, to which anyone who has seen you at work will attest, is your astonishing recall of the detail of cases and of the order of events in times past. This extends not only to the precise volume of the Commonwealth Law Reports, and often enough the very page, on which a principle or a telling phrase is to be found but also to the decisions of the higher courts of England extending to obscure volumes reporting Privy Counsel cases and Indian appeals of the late nineteenth century.

3 No-one who appeared in the Court of Appeal over the last seventeen years was in any doubt of the significance of the single volume with its single place mark of a report, not on anyone's list of authorities, which your Honour strategically placed before you as the case commenced or which your Honour called for with precise reference during the course of a hearing.

4 The breadth and depth of your knowledge of the law is reflected in your articles in learned periodicals both here and abroad and in three books. As Justice Dyson Heydon said recently, when launching your latest book on *Estoppel*, for a sitting judge to have produced three volumes of such high scholarship "is an achievement which must be regarded as unique in the strictness sense".

5 Your legal learning is, of course, also reflected in the judgments your Honour has delivered over the course of seventeen years, many of which will stand the test of time and which as a collective body of work will long remain a monument of your Honour's term of office. Your judgments manifest your prodigious work ethic, your intensity of application to the task at hand, and your unerring eye for the point.

6 According to a computer search during your Honour's term of office you have sat on more than one thousand five hundred published cases over ninety per year. A sample of these cases suggest that well over fifty per cent involve substantive judgments, that is many more than fifty fully reasoned judgments per year. All of the others however required your Honour's detailed attention and received it. The author of the main judgment, as my personal experience attests, almost always benefited considerably from your Honour's suggestions and references, not only, but not least, in errors of grammar and punctuation.

7 Your Honour has always been a strong team player, a quality much appreciated by your fellow

judges.

8 There are too many judgments of your Honour's to summarise on an occasion such as this. They are without exception of the highest order, succinct, to the point and expressed in clear elegant prose. That they are also lawyerly to a fault is not a criticism. That after all is the principal characteristic that an appellate court judgment ought display.

9 There is no area of the procedural or substantive of law to which your Honour did not contribute. You have written significant judgments on company law, equity, insurance, valuation, real property, tort, contracts, and the full range of statutory regimes with which this court is concerned including workers compensation, motor accidents, limitation of actions and, in recent years, building industry security of payments and the Civil Liability Act. Across the entire field of this court's jurisdiction your Honour has manifested a reliable and sure judgment.

10 Your Honour's contribution extended well beyond that of the judgments you wrote. In this Court your Honour served as chair of the Education Committee and as a member of the Policy and Planning Committee, making an important contribution to the quality of the knowledge of your fellow judges, and therefore to the quality of our work, and to the effective administration of the Court. You were always a source of wise counsel to me and I intend that to continue.

11 Consistently with the restraints upon all of us who adopt a judicial life, your Honour has made a major contribution to the community. Most notably as Chancellor of the Anglican Diocese of Sydney for twenty-three years and on the Council of your old school, Cranbrook, from 1974, since 1999 as President. To these tasks you brought the same admirable qualities that you also brought to the legal profession as a barrister and as a leader of the bar, notably as President of the New South Wales Bar Association, and as President of the Australian Bar Association and to your work as a judge.

12 I refer to your capacity for hard work, your conscientiousness, your strong sense of civic duty, your personal loyalty, generosity and trustworthiness. These qualities are all such that association with you in any endeavour is a pleasure. My only hesitation arises from the profound suspicion that must necessarily be held of a person who does not appear to have any enemies.

13 Your Honour's strong sense of responsibility and loyalty has never been better displayed than in your long association, commencing in your youth, with Fiji. It is regrettable that today it is again topical to recall your Honour's service as a member of the judiciary of Fiji after the last attempted coup.

14 You hold a commission on the final Court of Appeal of that nation, together with two other judges of this Court of Appeal. Furthermore, two recently retired judges of this court continue to hold commissions on the Court of Appeal of Fiji, being the intermediate appellate court of that nation, upon which you also served prior to your elevation to that Supreme Court.

15 In February 2001 your Honour sat as one of the judges of the Fiji Court of Appeal to determine whether the 1997 constitution of Fiji had been abrogated by the military appointed government that took over in May the previous year. Together with your fellow judges you arrived at a time of considerable tension in Fiji, personally protected by the army and special branch, amid a high level of security at the airport, at your hotel and in and around the court. This included snipers on the roof of the court building and a personal escort of two special branch officers when out walking, to whom was added a jeep full of soldiers when you went to church, to face the particular hazards of that expedition.

16 The court unanimously held that the Constitution remained in force as the supreme law of Fiji. The military installed government accepted your decision and resigned. The new President dissolved Parliament, called a general election, albeit reappointing the government on a caretaker basis. This was the most dramatic possible affirmation of the significance of the rule of law. It is a contribution you may be called upon to make again and, one trusts, to do so soon. I know from my own direct experience when I myself sat as a judge of the Supreme Court of Fiji, on a constitutional case of considerable significance but with a lower sense of threat than you experienced, just how much your own role was appreciated in that nation.

17 This occasion should not pass without an acknowledgement of the contribution to the collegial life of the court that has been made by your wife Di. Long suffering is an adjective that would come to mind, but for the fact that she has never manifested any indication of suffering at all. She has shared many of your own interests and qualities, including your strong sense of civic duty and a very real

understanding of the life of the profession and the significance of the judicial role.

18 Your Honour, I know I speak on behalf of all of the judges of the court when I thank you most profoundly for your contribution to the law and to this court, and to the way that you and Di have enriched all our lives.

19 I and we look forward to a continued association because of your decision to accept appointment as an acting judge. I could not be more pleased personally that your Honour has agreed to do so. You will I am sure be assailed by tempters and temptresses bearing highly lucrative offers to devote yourself entirely to commercial arbitration. I trust you will respond in your inimitable style: "Get thee behind me Satan".

20 I know you would not be retiring but for statutory compulsion. It would be wasteful, bordering on the ridiculous, if you could not serve as an acting judge for more than three years because of the existing statutory prohibition.

21 The remorselessness of the demographic challenges facing Australia is such that compulsory retiring ages need to be reviewed. Some such age is, of course, appropriate for judges in view of the inability to remove a judge whose decline in powers does not quite reach the required depths. However, as your own energy and mental acuity attests, an increase in the age to seventy-five for judges and seventy-eight for acting judges is now appropriate.

22 At your swearing-in you concluded with a reference to the prophet Micah, explaining that what you would seek to do as a judge was, then quoting from the Old Testament: "to act justly, to love mercy and walk humbly with my God". You have achieved all three in a long and distinguished judicial career and we all look forward to your continued contribution of the same character.

23 **THE HONOURABLE R J DEBUS MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court. Your Honour it is my great pleasure to speak upon your retirement as a member of the Court of Appeal of New South Wales and to express my appreciation for your valued service to the State. It has always been my understanding that you are regarded by your brethren as an exemplar in the role of a judge of the Court of Appeal and I make the observation that I have now been lobbied three times today, once publicly concerning the statutory age of the retirement of judges.

24 This your Honour is my final swearing out in my role as Attorney General and I do not get one of these myself. I, instead, will be the beneficiary of an Australian Labor Party fundraiser where rubber chicken, cask wine and good humour will abound until the bladders within the casks have been wrung dry. Imagine a Barry McKenzie movie and double it. Enough of my own jealousy.

25 Your Honour you were born in Sydney, the child of Claude and Olwen. You attended Beecroft Grammar School in your primary years before embarking upon secondary studies at Cranbrook School and while you were at school your father worked as the private secretary for the Colonial Sugar Refining Company in Fiji, effectively making Fiji your home away from home during school holidays and as his Honour the Chief Justice has just demonstrated, you maintain a fondness that has not dimmed for that place.

26 You were among the top students in your year at Cranbrook. Some say that it was your overwhelming familiarity with the school library and its contents which gave you the edge. You soared to the lofty heights of librarian and were involved, I am told, in a Discussion Group that in March 1951 sponsored the topic "That the Arts have moved away from the Common People". It helpfully included a comparison between the Greek theatre in the time of Pericles and modern motion pictures.

27 It is unclear how the common people profited from this discussion, but it is plain to me that it was less illuminating on a practical and ethereal level than the topic in Term two of 1951 "The effect of Clothes on the World Today".

28 Your Honour reported at the time that the discussion investigated why "showy and unusual clothes are worn with special attention being paid to bodgies, widgees and the wearers of zoot suits. It was said that they were worn to attract attention, raise the wearer's morale and as an escape". Unlike the clothes we are all wearing today.

29 Your Honour went to the University of Sydney when you left school and where you maintained your extraordinarily high academic standards. You are remembered as a tremendously learned and popular student who spent almost every spare minute studying. I say "almost" because you were once seen selling tickets for a Bohemian Bacchanal.

30 It is unfortunate that your friends and associates during this time listened closely to what you said, otherwise we would have missed an expression of your most heart-felt desire when you were reported to have said "I want to be like Sir Edmund Herring, a soldier, a scholar and a saint".

31 Having already taken care of the scholar part you threw yourself wholeheartedly into the University Regiment and you later served with the 17/18th Battalion based on the North Shore.

32 A life long association with the Anglican Church was also kindled during that time.

33 Obviously University life was agreeable for you graduated with distinctions in your Arts Degree and with First Class Honours in Law.

34 The first old Cranbrookian to be appointed as a judge was Bruce Mcfarlan QC, who was appointed to the Supreme Court in July 1959 and you were Justice Mcfarlan's first associate. You later made the leap to the Bar where you were fortunate to read with Sir Laurence Street.

35 Your career at the Bar, over 14 years as a junior and 17 as a silk, was extremely busy and successful and you appeared on numerous occasions in the High Court and the Privy Council.

36 I am advised that you were also extremely fit and preferred walking up the ten or so flights of stairs to your chambers instead of taking the lift. Your former colleague, Justice Meagher, was not known to share your embrace of the stairwell.

37 In one very substantial litigation exercise I am informed involving several prominent banks, you led a team of barristers, including David Bennett, Arthur Emmett and Tony Meagher, vast amounts of work were completed in a dwelling which became affectionately known as "Camp Handley". "Camp Handley" was an egalitarian establishment where everyone did their bit, except David Bennett who took the liberty of having smoked salmon shipped in.

38 You were a talented and quite exceptionally hard-working leader who knew how to get the best out of people. You were known to be a dedicated learned and formidable counsel.

39 You were appointed to the New South Wales Court of Appeal sixteen years ago. I am told by those who have served with you that when you arrived in the Court of Appeal you repeatedly demonstrated an encyclopaedic knowledge of case law.

40 Your only rival in this respect was the now retired Justice Michael McHugh. Whenever a point arose you would name the relevant cases and their citations and most disconcertingly of all, the place on the page where the governing principle was stated. His Honour the Chief Justice has also referred to this characteristic.

41 In an age of Google, mobiles and text messages Justice Michael Kirby reminds me that we will never again see such a sharply focused intelligence and recollection of the case books.

42 I am also told that you were a great talker on the Bench. At least one of your colleagues recalls, I should say fondly, that "Justice Handley added an hour to every case I have heard".

43 You also balanced a heavy judicial workload with some extra curricular work as the author of numerous law journal articles and as the editor of several important works, including the third edition of The Doctrine of Res Judicata and more recently a book entirely on your own entitled Estoppel by Conduct and Election. Neither book threatened the CSIRO Diet book or the latest Harry Potter in sales but they were extremely well received in the legal profession.

44 Your Honour's dedication to writings that others might cruelly describe as obscure came as no

surprise to me. My exposure to your Honour's powers of persuasion was in equal parts memorable and disturbing. The object of your campaign was not a rule stemming from the Magna Carta or international convention but the principle of set-off. You relentlessly pursued me about it as a hound would a fox. I found it easier to crumple at an early stage in this debate and to yield to your insistence that a savings provision should be inserted in the Imperial Acts Application Act 1969 to include a provision similar to the savings provisions included in the Civil Procedure Acts Repeal Act 1879 in the United Kingdom and the Statute Law Revision and Civil Procedure Act 1883 in the United Kingdom. This meant framing a Westbury Savings provision which preserved the doctrines and principles established by the Statutes of Set-off. It was no easy concession.

45 At the end of this process your Honour I felt not unlike Basil Fawlty did at the end of entertaining his German guests at Fawlty Towers, drained and a little emotional.

46 Your Honour's dedication to the Bar and to your Church and your school are demonstrated through your many contributions. For the Bar in your presidencies of the New South Wales and Australian Associations; for the Anglican Church in many roles but particularly as Chancellor of the Diocese of Sydney; for Cranbrook, on the Council of which you have served from 1974.

47 You have a loving wife, Di, four sons, David who is the founder of Sculpture by the Sea, Duncan, John and Mark, and four grandchildren.

48 I am told that your wife has taught you everything you know about art and, what is more, taught you to appreciate it as well.

49 One thing is sure as the Chief Justice has just demonstrated, you will not be idle in your retirement. Your energies will be consumed in further appearances in this Court but also I hope in your interests of trekking, swimming and art.

50 When looking back at your rich career, no objective person could fail to see one thing, you are a good man and a person who believed in the highest standards. You have made a difference to which we all say "well done" and on behalf of the Bar I thank you for your invaluable contribution to this State.

51 **MS J McPHIE, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: MCPHIE:** May it please the Court. On behalf of the solicitors of New South Wales, it is a privilege to be given the opportunity to thank and bid farewell to your Honour in his retirement from the Bench of the Supreme Court of New South Wales.

52 I would like to echo and endorse the tributes made by the Chief Justice and Mr Attorney, and join with them and your colleagues today in remembering and celebrating your long and distinguished career, and to wish you well in your retirement, or what we now learn to be your semi-retirement, but so pleased that your experience and style will not be lost to us at this point in time.

53 More than words I think as the attendance of the well wishers here today is the testimony to the esteem with which you are held within the legal profession and the wider community. We have heard of your early education at Cranbrook and it seems that you enjoyed your educational experience so much that you have continued a long relationship with the school. It has been said that you have been a member of the Cranbrook school council since 1974 and president since 1999. Your Honour and your four sons were also educated there, and you were named Old Cranbrookian of the year in 1998.

54 Your Honour was called to the New South Wales Bar in 1959 and we have heard that you rose to the position of Queens Counsel in 1973. Why I re-state that, I would like to embellish, because during this time you built an imposing reputation across fields of litigation, particularly concentrating on equity and commercial work, intellectual property and industrial relations. You became known as an extremely thorough, fearless, persuasive defender of the law, and a strong leader and mentor for the legal profession.

55 Friend and colleague Justice Heydon recently spoke on Justice Handley's time at the Bar and I would like to quote him by saying, "Ken Handley was feared greatly by opponents not just for his learning, his dedication and his pitiless precision but also for his first rate skills as a cross-examiner of

experts in recondite fields of knowledge.”

56 During his Honour’s seventeen years as silk, you not only excelled in litigation but you worked tirelessly to serve and promote the legal profession, for which I thank you.

57 As we have heard, you were appointed as a Judge of the New South Wales Court of Appeal in 1990, bringing to the Bench a unique mix of knowledge, skill, untiring dedication, and absolute commitment and uncanny recall. Your Honour’s unique mix of skills has not only benefited the Bench but you have been highly committed to the community work.

58 We have heard from Mr Attorney about your work as the Chancellor of the Anglican Diocese of Sydney from 1980 to 2003, but further, you were a member of the Appellate Tribunal of the Anglican Church from 1980 to 2004.

59 It is no surprise that the Australian community thanked you for your community and professional work by appointing your Honour an Officer of the Order of Australia, for which we congratulate you.

60 During your illustrious career, as we have heard from the Chief Justice, you managed to attend Cambridge as a visiting Fellow in 1995 and in 1998, and we have also heard of your work with the Fijian Court of Appeal from 1996 to 2003, and you are still a part time member of that court.

61 Your Honour, on behalf of the many solicitors who have appeared before you, I would like to extend the profession’s gratitude for your contribution which you have made to them and the community of New South Wales. Your retirement will leave a considerable void in the judiciary, but I am pleased that that is not lost to us at this time. I have no doubt when you do have more time that your service to the greater community will continue and your legacy and contribution will undoubtedly make the community a better place for your longer hours that you will afford to give them.

62 We do wish you well, your Honour, and hope that you enjoy your retirement when it finally comes, but for the meantime we are pleased that you will be back on this Bench as an Acting Judge. May it please the Court.

63 **HANDLEY JA:** Thank you, Chief Justice, for your generous remarks. Thank you, Mr Attorney, for your generous remarks and for making time to be here. Your support for the Court over many years is greatly appreciated and you will be missed. Thank you, Ms McPhie, for your speech and the research that lay behind it. I should also thank you, Mr Attorney, for the research that lay behind your speech. I didn’t think when I was misconducting myself at Cranbrook in 1950 or ’51 that I would have it repeated in front of me in 2006. I thought there was a statute of limitations.

64 Everyone is saying good things about me so it must be like this at a funeral. Of course, this is the retirement ceremony you have when you don’t have a retirement.

65 Although I have been here a long time, there are Judges still serving who were on the Bench when I was appointed - Justices Bryson, Grove, Hodgson, Studdert, Sully, Young and Windeyer.

66 Speakers and victims on these occasions avoid the ruthless honesty of Oliver Cromwell who wanted his portrait painted warts and all. The much lamented Harold Glass had a very different view. He said that flattery of the judiciary was so important that it had to have priority over all other Court business.

67 Courts are not the only places where language has layers of meaning. A reference for an incompetent employee who was leaving to pursue fresh challenges stated: “I cannot recommend him too highly or say enough good things about him. I have no other employee with whom I can adequately compare him. The amount he knows will surprise you. You will be fortunate if you can get him to work for you.”

68 There is also a code for school reports which I picked up over the years. If you read that your son is easy going it means he’s bone idle. If you read that he’s helpful it means he’s a creep. If he’s reliable, that means he dobs in his mates. If he’s forging his way ahead, he’s cheating. And if all his work is of a high standard, you know that you and your wife are ambitious, middle class parents.

69 Counsel's increasing irritation with a Judge's inability to see the obvious merit in his or her argument is masked, as we know, by growing obsequiousness which moves from "with respect your Honour" step by step to "with the most profound respect your Honour," which cannot be translated in polite company.

70 A short tempered Judge will be told at his much awaited retirement "your Honour did not suffer fools gladly." I'm glad no one used that expression of me today. Some years ago the Presiding Judge in the Court of Appeal gave a short extempore judgment endorsing in fulsome terms the judgment of the trial Judge and finishing "and there is nothing that I can possibly add." The second Judge immediately said "I agree" and the third Judge said he agreed with the second Judge. It will not surprise you to know that Mr Justice Meagher was the second Judge.

71 My two really important achievements are not in print. Twice I persuaded colleagues to leave things out. A draft judgment in a Family Provision case included the sentence "the deceased left a modest estate of \$800,000." I said to the author that some would kill for less and happily modest came out. In the other case, a family dog charged a bicycle and its rider was injured. His action against the dog owner succeeded and the case came to us, but the Court was divided. Roddy Meagher, whose own dog had a well deserved reputation for ferocity, would have allowed the appeal because the accused was only being playful. His colleagues disagreed, but judgment was delayed for a considerable time until I managed to persuade Roddy to tone down a sentence which read "the accident occurred at X street in Y which the Court was informed was a suburb of Sydney."

72 My great failure has been to persuade colleagues to write shorter judgments. I am a disciple of Blaise Pasquale, the 17th century French philosopher, who once apologised saying he would have written a shorter letter if he had more time.

73 I am about to leave through the front door but, as has been mentioned, next year I sneak in through the back door. By consent of Diana and the Chief Justice I have sentenced myself to three more years of community service at a less intense level, to be served by way of periodic detention with a minimum term of twelve months. The English have a pun for retired Judges who do this sort of thing. We are called retreats.

74 There are some I must acknowledge. Sir Laurence Street and I go back to the early fifties. Gordon Samuels and I go back to the middle fifties. He was coming but unfortunately he has had to go to hospital, but fortunately there is nothing acute. He should be out in a day or so.

75 The solicitors present include John Currie and Nick Carson. They sent me some of the most important briefs I ever received, the first ten. Moreover, they kept sending them. Thank you. I also thank former colleagues and the Judges and former Judges of other Courts who are here. Thank you, Chief Justice Gleeson, for coming today. It's very important that you keep an eye on the major source of your work. I am delighted that Joe Campbell is to be my successor. We also go back a long way.

76 I must thank my three long serving associates: Margaret Anderson, who is here, Jennifer Donaldson, who is in England, and Lynn Nielsen, who is my current associate. Their patience was extraordinary, particularly when retyping the drafts of my books. Fortunately they only had to type one each. They did a hundred and one things for me that enabled me to concentrate on my real job.

77 There are also a number of my former tipstaves here and my current tipstaff of course, and they did a lot for me by way of personal things and also legal research from time to time when I hit a brick wall. They also were able to use this machine called a computer that I am having to come to terms with as I face retirement, or semi-retirement.

78 Although I am past the Biblical three score and ten, not all see me that way. I invited Lady Byers to come, who was going to be present, except Gwen Macgregor's funeral is this morning and she's gone there. When I asked her to come she said "Good Lord, the babies are retiring."

79 I found judicial life fulfilling and did not look back. At the Bar I had years in the scrum which was hard work and I was ready for the quieter life of a referee. If you know most of the rules and are fair most of the time, you don't get booed too often. I have fulfilled my ambition to stay off the front page of the Sydney Morning Herald. It is the old story, if the bridge stays up there's no news. Life in the Court of Appeal is hard work, but we are a happy Court with a great collegiate spirit. We respect our



differences and know that none of us is as smart as all of us. Judicial life gave me the great privilege of long leave, which enabled me to write my books. Senior lawyers build up a lot of intellectual capital, but it becomes a wasting asset. Scholarly articles and books can capture this intellectual capital, preserve it and pass it on.

80 I take pride of the appropriate kind in my long association with the Anglican Diocese of Sydney. It actually believes in the fundamentals of the Christian faith and unlike some Anglican Dioceses it accommodates every shade of Anglican worship within its borders. There is room for legitimate differences of opinion on some questions, but this is not the time and case to explore them. I believe that in this audience, my eyes are slightly misty, there are two of the Archbishops I formerly served, Harry Goodhew and Peter Jensen. Thank you for your fellowship and Godly example. I think Bishop Cameron is also here. He married Di and I in 1963, was at my swearing in, and we stayed in touch.

81 I have not had to apply a Human Rights Act and I am grateful for that. There is no such thing as a free human right. Every one comes at a cost which must be borne by the community or other individuals. The reach of laws against terrorism, the legalisation of the abortion pill, scientific experiments with human embryos and of euthanasia raise political and moral questions which cannot and should not be settled by judicial decision. Most people have opinions on these matters and a Judge's opinion is no better than that of anyone else.

82 Judges do not have democratic legitimacy. We are not elected by the people and, except in extreme cases, we are not accountable to them. We have no business deciding political questions. The statutory text enacted by Parliament has democratic legitimacy, but under the rule of law its meaning and application are proper questions for a Court. The Court seeks to be faithful to the text of ordinary legislation and Parliament is the master. The position is different with Human Rights Acts because of the wide general language in which they are expressed. They are a blank canvas onto which Judges can and do project their moral and political views. The process was described by Humpty Dumpty in *Alice and Wonderland*: "When I use a word it means just what I choose it to mean, neither more or less. The question is who is the master." Under a Human Rights Act the Court is the master.

83 The results are there for all to see. In 1973 in *Roe v Wade* the US Supreme Court decided that States could not criminalise all abortions. It laid down different legal regimes for each trimester, which made it harder to obtain a lawful abortion at later stages of the pregnancy. Whatever one thinks about abortion, and I'm not expressing an opinion on that, one can only marvel at the process of statutory construction which derived the decision and these regimes from the language of the fourteenth amendment which prohibited the States depriving "any person of life, liberty or property without due process of law or denying to any person the equal protection of the laws." The decision of course has not quelled the controversy.

84 In 1998 in *Osman v The United Kingdom* the European Court of Human Rights held that Article 6 of the Convention created a substantive right to sue the police for negligent policing. Article 6 provides that in the determination of his civil rights and obligations, everyone is entitled to a hearing by a tribunal. It says nothing about the contents of those rights and obligations. My last example is the decision at first instance in *Pye (Oxford) Ltd v The United Kingdom* last year. Article 1 provided that no one is to be deprived of property except in the public interest in circumstances provided by law. It had been thought that it was directed to acquisitions by the Government, but the Court held that it was fringed by a general limitation statute which extinguished the title of a documentary owner after twelve years adverse possession.

85 Human rights are the flavour of the month for some, but the public should realise they are a sugar coated pill. An accurate title for such an Act would be The Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act. Politicians and others who advocate a Human Rights Act do so either because they do not understand what would happen or because they understand only too well. The latter hope to increase their power and achieve legal and social change through the Courts that they cannot achieve through Parliament. This is government by litigation and when change occurs in this way no one is accountable, not the Judges and not the politicians.

86 Judges take an oath to apply the law without fear or favour, affection or ill will. At my swearing in I said that the oath probably came from the Law of Moses. Deuteronomy states: "Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both great and small alike. Do not be

afraid of any man.”

87 This of course is not part of the natural order but reflects the higher wisdom of Christ's golden rule that we should do unto others what we would want them to do to us. This he said summed up the Law and the Prophets.

88 I am pleased that three of our four sons, two of our daughters in law and two of our four grandsons are here. Di brought up our sons single handed at times and did a great job. Each of them is pursuing his chosen career and only one, you'll be pleased to know, is practising law. We are proud of each of them and of their wives and our grandsons. Each is a fine human being. Di, well what can I say. You have been and are a fantastic wife, mother, grandmother, and I understand mother in law. You have stuck with me through thick and thin, and there have been too many thins. Di suggested I use my long leave to write law books, and at times she must have regretted doing so. Darling, thank you for everything.

89 As I stand on the verge of seventy two I continue to look forwards and upwards, and when age finally wearies me and the years finally condemn I will still look forwards and upwards. In the words of the old hymn, I nightly pitch my moving tent a day's march nearer home. Thank you for coming and for your presence.

\*\*\*\*\*

Print Page

Close Window

## Lions In Conflict: Ellesmere, Bacon And Coke The Years Of Elizabeth

**LIONS IN CONFLICT: ELLESMERE, BACON AND COKE  
THE YEARS OF ELIZABETH  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE ST THOMAS MORE SOCIETY  
SYDNEY, 14 NOVEMBER 2006**

The four decades from 1580 to 1620 marked a transformation in English history when the political, social and legal systems cast off the last vestiges of medieval forms and created the foundations of one of the most dynamic nations the world has ever known.

As one of the foremost historians of the period has put it:

“It was then that the State fully established its authority, that dozens of armed retainers were replaced by a coach, two footmen and a page boy, that private castles gave way to private houses, and that aristocratic rebellion finally petered out ... then that the British Isles, England, Wales and Scotland and Ireland, were first effectively united; then that political objectives began to be stated in terms of abstract liberty and the public interest, rather than particular liberties and ancient customs; then that radical Protestantism elevated the individual conscience over the claims of traditional obedience in the family, in the Church and in the nation; ... then that the House of Commons emerged as the dominant partner of the two Houses, and actually seized some of the political initiative from the executive ...”[1]

This was also the period when England disengaged from Europe – the last outpost at Calais had been lost by Mary Tudor in 1558, just before Elizabeth’s accession – and began some four centuries of a cult of insularity, perhaps most notably in religion, but not least in the law, where the common lawyers triumphed over the ecclesiastical and chancery lawyers and cut off the latter from Continental influences. The substantial debt to the civil law was forgotten, indeed suppressed. The legal system that emerged has proven singularly effective and remarkably robust.

To a substantial degree, this transformation of the law was the work of three great lawyers: Lord Ellesmere, Sir Edward Coke and Francis Bacon.

Thomas Egerton, to whom I will refer by his later title, Lord Ellesmere – was Solicitor General 1581-1592, Attorney General 1592-1594, Master of the Rolls from 1594, Lord Keeper (as the person acting as Lord Chancellor was called when not a peer) 1597-1603 and Lord Chancellor 1603 until his death in 1617. He was an accomplished statesman, a reforming judge of consummate ability, a patron of artists, a dedicated family man and the founder of a great library, a great fortune and a considerable dynasty – Campbell in his *Lives of the Lord Chancellors*, whilst noting the demise of the male line, traced Ellesmere’s genes to no fewer than 35 noble houses including Montagu, St Helens, Ellenborough, Erskine, Lyndhurst, Redesdale, Brougham, Bruce, Campbell, St Leonards and Wensleydale. Ellesmere has few equals in English history.

Edward Coke, primarily through his writing as compiler of *The Reports*, the most comprehensive and influential compilation of case law in the history of the common law and as the author of the *Institutes*, which remained for centuries the most complete statement of the law, would have a larger impact on the development of the common law than any other individual. Appointed Solicitor General in 1592 and Attorney General in 1594, in both offices succeeding Ellesmere, his natural progression to the bench was delayed by the nine year absence of a vacancy in the senior judiciary. He served both Elizabeth and James as a brutal prosecutor and as custodian of the Crown’s prerogative. He was appointed Chief Justice of the Court of Common Pleas in 1606, moved sideways, on account of signs of insubordination, to Chief Justice of the Kings Bench in 1613, from which he was sacked by King James for gross insubordination in 1616, whereupon he pursued a career in Opposition as a parliamentarian until his death in 1634.

Francis Bacon was the precocious son of Sir Nicholas Bacon, the Lord Keeper of Elizabeth's early years. Francis's talent, obvious but not then recognised as genius, inclined him to the contemplative life, but his father's sudden death meant that he, the second son of a second marriage, had not been provided for financially and had to make his own way in the world. Elizabeth never gave him a formal appointment, other than as "Queens Counsel", the first in history it seems, a title originally devoid of importance, other than as a source of a few Crown briefs, and conferred merely as a token gesture, probably to appease the Queen's most trusted Councillor, Lord Burghley, Bacon's uncle, and to get Bacon's mother, an intelligent and determined woman, off everyone's back. Eventually, Elizabeth's successor, King James would recognise him: Solicitor General in 1607, Attorney General in 1616, Lord Keeper in 1617 and Lord Chancellor in 1618, until his removal in a corruption scandal in 1621. His influence as an essayist and philosopher, especially of science, is of such permanence as to overwhelm his contribution as a lawyer, but the latter was of the highest order, if not, unlike his other achievements, for the ages.

These were formidable men whose contribution and interaction determined many critical features of English legal practice for centuries. The themes of this period are with us still. What is the proper role of the judiciary? Where should the line be drawn between judicial activism and fidelity to the law? What is the basis of the legitimacy of law: custom, representing historical continuity, or the command of a sovereign?

The conflicts between Coke, on the one hand and Ellesmere and Bacon on the other, would be repeated in the next generation in a vitriolic dispute between Thomas Hobbes, who had been Bacon's secretary, and Sir Mathew Hale, Coke's successor as Lord Chief Justice. Similar issues would be engaged between Blackstone and Bentham and between Jefferson and Marshall. They feature in contemporary debates over judicial activism, bills of rights, the scope of judicial review and the principles of statutory interpretation.

Legal history, like all history, always has contemporary relevance. Indeed, perhaps more than any other sphere of discourse, the law can never escape its history.

Coke, invoking Bracton who described the law as "the king's bridle", challenged the contemporary assumption that the monarch retained direct authority over both executive and judicial power. Coke asserted that the exercise of judicial power had been delegated to an autonomous, albeit perhaps not independent, judiciary. Ellesmere and Bacon supported the rights of the Crown in all respects, as Coke had done when he was Solicitor and Attorney. As a judge, Coke also asserted the authority of the common law courts over all other courts, mostly based on an exercise of the prerogative: the equitable Court of Requests, successfully; the ecclesiastical High Commission, also successfully; the court of Chancery unsuccessfully and the High Court of Parliament, also unsuccessfully. Each of these territorial disputes brought him into conflict with Ellesmere and Bacon.

When Bacon came to rewrite his essay "On Judicature", in the 1625 edition of his *Essays*, he propounded, with Coke in mind but, no doubt, still hoping to restore himself to favour, that the role of a judge was subordinate to royal authority. Drawing on the example of King Solomon, universally regarded as a wise judge who personally exercised the judicial power, and on the lion as a symbol of fortitude and wisdom, Bacon wrote:

"Let judges remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."

The sovereignty that Bacon had in mind was that of the king. Today, similar issues are debated with reference to the sovereignty of Parliament.

I have drawn on Bacon's metaphor for the title of this lecture series: "Lions in Conflict: Ellesmere, Bacon and Coke". This first lecture will focus on the last decade of the reign of Elizabeth.

## THE LAST DECADE

The dominant factor of that last decade was the war with Spain, a conflict in part national and in part religious. After the triumph over the Armada in 1588, the English state lost a series of key councillors: the Earl of Leicester, the Queen's greatest favourite, in 1588; Sir Francis Walsingham, her spy master, in 1590; and Sir Christopher Hatton, in 1591. He had caught her eye as a dancer and progressed to Lord Chancellor, performing no more than adequately, Elizabeth resolving not to again appoint a

favourite to an important state office. Of the generation of statesmen who had guided the nation for the first thirty plus years of her reign, only Sir William Cecil, now Lord Burghley, remained. As the Queen refused to fill vacancies, the Privy Council became smaller and older, except for the addition in 1591 of Burghley's exceptionally capable son, Robert Cecil, the future Lord Salisbury and, in 1593, of Robert Devereux, the second Earl of Essex, godson and later stepson of Leicester and the Queen's newest favourite.

The principal characteristic of the older generation was a commitment to stability, which required caution, pragmatism, prudence and a talent for principled compromise. In Burghley's metaphor: "It's a good blade that bends well". [2]

This was a generation born in the shadow of the Wars of the Roses: a generation that had experienced most of the social, religious and political disruption of Henry VIII's search for a male heir; that had witnessed the full blast of the early Reformation and that was personally affected by the fluctuations of fortune as the Crown passed from Henry VIII, to Edward VI, to Mary Tudor and then entered the comparative calm of Elizabeth's early years. Members of this generation understood the precariousness of social harmony.

The family motto of Sir Nicholas Bacon – *mediocria firma, moderation is safest* – reflected the dominant ideology of this generation. This was also the instinctive predisposition of the Queen, who had grown up not knowing when she may be executed, as her mother Ann Boleyn had been, and was naturally cautious, with a real understanding of the risks of action and the advantages of passivity. Nothing of significance could happen without her consent and she, determined to rule and not merely to reign, ensured decisions were thrown up to the top by fostering rivalry amongst her courtiers.

At the beginning of her reign the English political elite was convinced that a woman could never rule: indeed, that it was an unnatural phenomenon. The Scottish Protestant firebrand, John Knox, reflected the universal prejudice in his diatribe: *The First Blast of the Trumpet Against the Monstrous Regiment of Women*, directed against the contemporary Catholic rulers of England, France and Scotland, published with exquisitely bad timing just before the accession of the Protestant Elizabeth. However, even more important than a husband who could direct matters of state, was the need for a legitimate heir and a smooth succession. Her advisors devoted much of their time and energy to marrying Elizabeth off, efforts which she pretended from time to time to take seriously. By the last decade, producing an heir became irrelevant, but the problem of the succession remained.

The preoccupation of the age is reflected in the works of Shakespeare. So many of his plays are concerned with political instability and the legitimacy of succession: most pointedly in the Wars of the Roses series – Richard II, Henry IV x2, Henry V, Henry VI x3 and Richard III – but also in Macbeth, Hamlet, Julius Caesar, King Lear, Coriolanus and even The Tempest.

By the 1590's a new generation had arrived, one that had no personal experience of instability or of the dangers of unrestrained ambition. One historian [3] describes this new generation as a group of "aspiring minds", drawing on the words Christopher Marlowe placed in the mouth of his creation, the most ferociously ambitious character of the contemporary stage, Tamburlaine: "Nature doth teach us all to have aspiring minds", he had said. This generation manifested a preoccupation with the acquisition of power and wealth. It was also the first generation to discover Machiavelli.

It was a generation of extravagant, even breathtaking, ambition driven by a passionate, youthful intensity: Sir Philip Sidney, soldier and poet who died young in battle and on his death bed conferred both his best sword and the chivalric legend on the Earl of Essex; Sir Walter Raleigh with the colonial expansion to Virginia and the quest for El Dorado in Guiana; the literary ambitions of Edmund Spenser, Christopher Marlowe, John Donne (who was Ellesmere's secretary until scandalously eloping with Ellesmere's sixteen year old niece), Ben Johnson and, of course, Shakespeare; the classical scholarship of the men who would compile the King James Bible, the only great work of literature ever written by a committee; the creators of future wealth who established the East India Company, the Moscovy Company and the Levant Company; Sir Edward Coke's project to produce the first full set of law reports and to comprehensively state the law in his *Institutes* – Bacon himself said that before Coke's Reports "the law had been like a ship without ballast" [4]; perhaps most ambitious of all was the soaring intellectual scope of Francis Bacon – "I take all knowledge to be my province" – he wrote to his uncle Lord Burghley, calling him "the Atlas of this commonwealth" and explaining his need for money – "I have as vast contemplative ends ,as I have moderate civil ends". [5]

The energy and ambition of this era continues to inspire awe.

The central power struggle of Elizabeth's last decade was between Cecil and Essex for the role of pre-eminent advisor after Burghley died. He, of course, vigorously promoted the claims of his son, whom he had groomed for the task. Essex had the special claims of an aristocratic heritage. Essex had been Burghley's ward and had grown up with Cecil. The contrast between the handsome, healthy Essex and the stunted, hunchback Cecil, his curved spine was probably hereditary scoliosis [6], whom Elizabeth enjoyed calling "my pygmy", reinforced Essex's sense of natural superiority and was already apparent in childhood.

Later, in his essay "On Deformity", which he only dared publish after Cecil's death, Bacon explained Cecil's drive:

"Whosoever has anything fixed in his person that doth induce contempt, hath also a perpetual spur in himself to rescue and deliver himself from scorn. Therefore all deformed persons are extremely bold".

Rather wistfully he explained how he, and no doubt Essex, had underestimated Cecil because of his deformity:

"In their superiors it quenqueth jealousy towards them, as persons that they may at pleasure despise: and it layeth their competitors and emulators asleep, as never believing they should be in possibility of advancement, till they see them in possession".

Both Essex and Cecil were substantial political figures creating rival factions at court. Historians differ over the role of factions under Elizabeth, but not in her last decade. [7]

Then, the struggle over royal patronage and foreign policy became intense and English politics became polarised.

To a significant degree wealth, as well as political power, was in the gift of the monarch. The offices of state, monopolies over trade and other privileges, were exploited for personal gain. A century of inflation and declining returns from agricultural property meant that even the higher aristocracy needed royal patronage. Access at court was the essential distribution point for patronage. Access was often bought. The courtier's life was one of fawning and flattery in a context of intense rivalry and shifting personal allegiances.

On one estimate Elizabeth's court consisted of some 1700 persons, about 1000 of them below stairs. [8]

The political nation – the aristocrats, upper gentry and clergy who mattered – may have comprised some 3000-4000 persons which number, on one historians estimate, was about twice the number of posts and perks available for distribution. [9]

There was plenty of scope for conflict. [10]

The main players developed a pyramid of supporters, obtaining royal approval in exchange for loyalty and, often, payment from their acolytes. There were many who had access to the Queen but, in her final decade, few had real influence. The spoils system became factionalised, primarily between those who looked to Cecil and those who looked to Essex.

There were also significant policy differences. Essex had inherited from Leicester the leadership of those who advocated a policy of belligerence towards Spain. Cecil, like his father, supported Elizabeth's risk averse policy of minimal engagement and England adopted its long term policy of preserving a balance of power in Europe, relevantly, at the time, the balance between the great powers Spain and France, intervening only to preserve the balance and conserving resources whenever the risks receded. Essex, with grandiose ideas for English engagement, supported every adventure to liberate Europe from what he saw as Spanish tyranny, with modest military success but with an élan and bravado that attracted popular acclaim. He was never conscious, as the Cecils, father and son, were always conscious of how the English state lived on the edge of bankruptcy.

It was in this fractious environment that Ellesmere, Coke and Bacon had to find their way. As Bacon would explain, in his essay "Of Great Place", published after his fall:

“The rising unto place is laborious; and by pains men come to greater pains ... and by indignities men come to dignities. The standing is slippery, and the regress is either a downfall, or at least an eclipse, which is a melancholy thing ... All rising to great place”, he wistfully concluded “is by a winding stair”.

### PARLIAMENT OF 1593

Bacon’s talent was so apparent that he attracted jealousy and suspicion from the start. Promoting him entailed a risk that he could go further than his patron. Moreover, the quality of his intellect engendered doubts about his willingness to show the thanks and loyalty that a patron expected. Perhaps most of all, his transparent combination of conceit and obsequiousness made it almost irresistible for anyone who could frustrate him to do so.

Elizabeth, who had watched him grow up, treated him as a member of the court but the possibility of her patronage was destroyed by Bacon’s performance in the Parliament of 1593. He was returned for Middlesex and was, accordingly, the member for Westminster itself. However he failed to understand what was expected of him as a courtier. He spoke critically of the Crown’s demands in a way that was to prove fatal to his prospects under Elizabeth.

The conflict with Spain continued and a second armada was expected to be launched by the gout ridden asthmatic Phillip of Spain, once married to Mary Tudor when Queen of England, still plotting from his black velvet wheelchair in the Escorial. His daughter, the Infanta, had replaced Mary Queen of Scots, executed in 1587, as the preferred Catholic claimant to Elizabeth’s throne.

Furthermore, rebellion had risen in Ireland again, not for the last time. The English alliance with France against Spain was in doubt and a separate peace between them could only come at England’s expense. Henri IV of France, the Huguenot founder of the House of Bourbon, had succeeded to the throne as the husband of Margot, the daughter of Henri II and Catherine de Medici, after the last of their incompetent and feckless sons, including the husband of Mary Queen of Scots, had died. The logic of Henri’s position was such that he would inevitably reconvert to Catholicism, which he did that July, famously proclaiming: “Paris is worth a mass”.

With a deteriorating international situation and a real chance of a second invasion attempt, the Crown was determined to obtain more than the customary amount of tax, then called the “subsidy”. Lord Burghley, the Lord Treasurer, proposed a triple subsidy. The 1589 Parliament, held immediately after the Armada, had voted a double subsidy payable over four years, then an unprecedented increase in taxation. That was about to expire. Burghley proposed the subsidy be payable each year instead of the normal annual half subsidy and that that continue for three years.

The newly influential Earl of Essex had been unusually active in the elections for this Parliament. He organised seats in the Commons for no less than sixteen dependent servants, relatives and friends. [11]

Other members who did not owe their election to Essex, like Francis and Anthony Bacon, were also attracted to this rising star. Generally, his supporters proved loyal to the Crown. Burghley also had nineteen relatives and dependents in the Commons. [12] However his nephews, the Bacon brothers, were no longer in his camp.

Coke, under the patronage of Burghley, had been appointed Solicitor General in 1592. At that time Elizabeth called Coke to her presence and gave him a dressing down about how, as a barrister, he had vigorously defended the estates of two traitors from confiscation to the Crown. She watched as Coke, in tears, humbled himself before her. She then announced his appointment. The next year, no doubt on Burghley’s advice, she chose him as the royal nominee for Speaker of the House of Commons, which role he was to perform, notably in his opening and closing speeches in the presence of the Queen – ludicrously obsequious to the modern ear – to the complete satisfaction of the court party. [13]

The House of Commons sat in what had once been St Stephen’s church, a royal chapel commenced by Henry III and completed by Edward III as part of the palace of Westminster. It was designed in conscious imitation of Sainte Chapelle on the Ile de la Cite in Paris, where one can still see the dazzling polychrome of gold and crimson and azure, with stained glass and stone tracery. St Stephen’s had frescoes of the Adoration of the Magi and of St George with Edward III, of a character destroyed throughout England by the Protestant iconoclasts, the Taliban of their day. When the Order

of Canons of St Stephen's was abolished by the Chantries Act of 1547, the House of Commons took over the church, placing the Speaker's chair on the medieval dais where the altar had stood, with the members facing each other in the choir stalls. This remained the form of the Commons when reconstructed, in the identical inadequate dimensions, after its destruction in the fire of 1834 and also after the destruction of its replacement by bombing in 1941.

In a tradition established in 1523 by Sir Thomas More and maintained to this day in Parliaments throughout the sphere of English influence, including New South Wales, Coke as Speaker requested full freedom of debate from the Queen. Indeed speeches in the Commons were theoretically secret. The freedom granted was of little account. One Puritan, a collective noun already applied to members of a variety of Protestant sects, wished to raise the taboo subject of the ageing Queen's succession – the topic which most infuriated Elizabeth – and was imprisoned in the Tower. Another Puritan who proposed a bill to regulate the judicial authority of the Church courts was placed under house arrest. When the Commons carried amendments to the government bill which would extend anti-Catholic legislation to Protestants who questioned the Church of England, the government retaliated by hanging two imprisoned Puritans at Tyburn. Freedom and confidentiality of speech were an illusion, as all knew. As she had done in previous Parliaments, Elizabeth conceded "liberal but not licentious speech, liberty but with due limitation". [14] She would decide what was which.

Nevertheless, the Commons retained a sense of independence of great future significance. It took pride in such manifestations of institutional autonomy as it was permitted. In 1593 the members remembered the witty riposte of their Speaker in a previous Parliament, Sir John Popham, when he was Solicitor General, in response to the Queen's impatient inquiry "What has passed in the Commons?" He had replied: "If it please your Majesty, seven weeks". [15]

On the crucial money bill, the leading speech for the Crown was delivered on 26 February by Robert Cecil. His father, like Essex, of course, sat in the Lords. This was Cecil's maiden speech. That he was entrusted with the primary task of obtaining supply from the Commons, indicated his emerging significance. He focussed on the Spanish threat and the related issue of Catholic recusants in England with, for the first time, a similar concentration on the schismatic tendencies of the Puritans. [16]

The parliamentarians – about half of whom were new members [17] – could not be taken for granted. However, it was Bacon, regarded as a member of the court party, who questioned the need for a subsidy of this size and proposed that it be spread out over a longer period. When Burghley proceeded to have the House of Lords declare that only the full subsidy would do, Bacon protested that it had always been the privilege of the Commons to be the first to grant, reflecting the already established practice for money bills to originate in the lower house. [18] When the issue was first put to a vote in the Commons, the Crown lost by 89 votes.

Burghley had become accustomed to getting his way in Parliament, not always successfully. Early in the Queen's reign he had advanced an idea to strengthen the navy by increasing the number of experienced mariners in the fishing fleet. A statute of the 1563 Parliament, had added Wednesday to Friday as a compulsory fish day – the meat eaters of the nation called it "Cecil's Fast". [19] Widespread rejection of official intermeddling with such matters and Puritan objections to the extension of a "popish" practice led to its repeal about 20 years later.

Cecil led the negotiations for the Crown and eventually achieved agreement with a minor compromise. The triple subsidy would be paid over four years instead of three. In accordance with tradition Coke, as Speaker, carried the money bill on a silver tray to the Lords chamber where the Queen thanked her Commons for "the free gift of money". [20]

Elizabeth was full of praise for the Parliament of 1593. Burghley and Cecil had achieved their entire program: the triple subsidy and bills regulating Puritans and, as the title of the bill put it, "popish recusants" whose movement was restricted to a five mile radius from their homes. In her closing address, Elizabeth emphasised her displeasure with those who had questioned the triple subsidy. They had forgotten, she said, "the urgent necessity of the time and dangers that are imminent". [21] She would never completely trust Bacon again.

Coke had successfully manipulated, with considerable legal skill, the procedure of the Commons in the government's interests [22] including, in the ridiculously cramped chamber with inadequate



seating, adroit deployment of the inertia that arose from the rule that any one who wanted to vote Aye had to go outside while the Noes stayed seated. [23]

Coke had proven his loyalty to the Crown. Bacon had advocated the contrary institutional interests of the Commons. Later their roles would be reversed.

## ATTORNEY GENERAL

The post of Master of the Rolls, in effect deputy to the Lord Chancellor, became vacant in February 1593. By April, when Parliament was prorogued, it had become apparent that the post would go to Ellesmere, then Attorney General. His logical successor, well established by his own and his predecessor's precedent, was the Solicitor General, Coke. However, Bacon saw this as an opportunity for himself. He wrote to his cousins, Robert Cecil and his half brother Thomas, Burghley's disappointing son from his first marriage, asking them to intervene with their father on his behalf. He also invoked the assistance of his new patron, the Earl of Essex.

Burghley wrote a non-committal letter to the formidable Lady Bacon; "I am of less power to do my friends good than the world thinketh". [24] No doubt he was not convinced that his nephew was a preferable appointment to the more experienced and legally accomplished Coke, who could also be trusted to be loyal to Burghley, but he spoke the truth to his sister in law. He knew that Elizabeth would not appoint Bacon although, it appears, he believed that she could be convinced to appoint him to the lesser post of Solicitor General, which Coke would vacate.

The twenty seven year old Essex regarded this as a challenge. A patron had to be able to show how highly esteemed he was at court. There was no better way to do that than to achieve the miraculous. In any event it was in his own interests to prevent the elevation of a Cecil nominee. Bacon and his brother Anthony had become part of the earl's circle, a group of well educated, well connected males whose personal interaction displayed a passionate intensity, with distinct homosexual overtones.

Anthony, for many years one of Elizabeth's spies, or intelligencers as they were then called, created a parallel service for Essex, so that he could establish his utility to the Queen by revealing information which Burghley had been unable to obtain.

Francis became an advisor on domestic policy and, particularly, about how the earl should establish himself as an advisor to Elizabeth – "winning the Queen" as Bacon put it, in a remarkably candid letter of advice. It was dangerous, he told the earl, to manifest pride, seek popularity or pursue military glory. It was essential to maintain self control; to avoid tantrums and sulking; to always appear spontaneous and witty; to show proper deference, for example, by promoting a policy or candidate for office unlikely to be accepted, so as to readily give way when rejected; to cultivate a serious image and indicate a degree of independence from her favour, for example, by taking time away from court for unexplained private affairs; to stop pursuing military assignments that may take the earl on risky ventures away from court and stoke Elizabeth's suspicion of martial achievement; to recommend another, but friendly, military figure be added to the Privy Council; to promote another, but not too ambitious, favourite so the Queen felt in control of her court; and never, never to upstage the Queen. [25] It was good advice, of which Machiavelli, not to mention Burghley, would have been proud, but which the mercurial earl did not take. Such dissimulation was impossible for a true aristocrat. He believed political leadership required the same style as military leadership.

Later, Bacon revealed that Essex would gloat when he got his way:

"I well remember, when by violent courses at any time he had got his will, he would ask me: now sir, whose principles be true." [26]

It was Essex's youth, charm, classical learning, looks, energy, flamboyance, candour and even his moods that captivated the aging monarch, but as a court favourite, not as a trusted councillor. His application and skill as a military leader, which he clearly regarded as the principle source of chivalric honour, took him away from the poisonous banalities of court politics, to his cost, as Bacon kept telling him. Nevertheless, it was also his military exploits that the Queen most appreciated and which created an independent political base amongst his associates and in public acclaim.

Coke had fifteen years of experience at the bar and was performing well as Solicitor General. Bacon had never argued a case. Essex got him his first brief to represent one of his retainers. [27]

Essex took full advantage of his access as the current favourite to implore Elizabeth to appoint Bacon. Indeed he launched a campaign that must have bored her and which, eventually, infuriated her. She told him the one thing against Coke was that he was too young at forty one, and Bacon was only thirty two. [28] She delayed the appointment while Essex's entreaties continued. She was probably quite amused by the young earl pleading with her on his knees. She always indulged him, but not in matters of state. "I find her very reserved", Essex wrote to Bacon in February 1594, "yet not passionate against you till I grow passionate for you". [29]

Within a few weeks, on 10 April, she signed letters patent appointing both Ellesmere and Coke. "No man ever received more exquisite a disgrace" Bacon wrote. [30]

## LOPEZ

Today it is difficult to understand just how much turned on the life of the monarch. In about a decade, between 1547 and 1558, the state religion of England had changed three times. In accordance with the rule of male primogeniture, which remains the principle to this day, Henry VIII's only son, succeeded him as Edward VI and established a Protestant ascendancy for five years. He was succeeded, after a ten day interregnum designed to protect the Protestant cause, by Mary, Henry's eldest and indubitably legitimate daughter by his first wife Catherine of Aragon. Mary Tudor practised the traditional Catholic faith and, after a five year reign, was succeeded by Elizabeth who re-established a separate church. The Protestant martyrs of the reign of "Bloody Mary" were succeeded by the Catholic martyrs of Elizabeth's reign. If Elizabeth had died before 1587 she would probably have been succeeded by Mary Queen of Scots and Catholicism could, subject to the outcome of the inevitable turmoil, have been restored as the state religion.

The life of Elizabeth was under threat throughout her reign. There were numerous plots and attempts on her life from Catholic sources – although not as many as those announced to have been thwarted. These threats were legitimised by the 1570 proclamation, *Regnan in Excelsis*, by Pius V excommunicating Elizabeth and denouncing her as "a servant of all iniquity" [31]. The English governing elite was not convinced by the explanation issued by his successor, Pope Gregory XIII, in 1580 that English Catholics were not bound by the Bull until it could be executed. Catholics did assassinate other European leaders: William the Silent in the Netherlands in 1584 and Henri III of France in 1589. Where the religious allegiance of a nation could turn on the life of the monarch, there were always those who would attempt assassination.

This religious tension was a fertile source of rumour and unfounded allegations: never more so than in the trial and execution of Elizabeth's personal physician, Dr Roderigo Lopez, a Jewish convert and refugee from the Spanish Inquisition in Portugal. This was an era when doctors throughout Europe were often politically important, by reason of their access. A doctors plot was the ultimate nightmare. No one was in a better position to administer poison to the Queen and get away with it.

Essex, trying to inveigle himself into the Queen's inner political sanctum, sought to replicate Burghley's intelligence network and had tried to recruit Lopez, who had a range of international connections and had worked for Walsingham and for Burghley in the past. Essex had been furious when the doctor told Elizabeth of his approach. It was, it appears, Anthony Bacon who convinced Essex to have a close look at Lopez. That investigation involved a direct conflict between the Cecils and Essex and coincided with the dispute over the campaign to have Francis Bacon made Attorney.

Somehow Essex became convinced that Lopez's medicines were the cause of the Queen's maladies. At first, with Burghley and Cecil refusing to accept Essex's allegations, they were denounced by the Queen as ridiculous: "A rash and temerarious youth" she called Essex, "to enter into a matter against the poor man which he could not prove, and whose innocence she knew well enough". [32]

Smarting at this initial failure, Essex intensified his inquiries, which eventually bore fruit of sorts. Indeed there are indications that Essex's own intelligence service had encouraged the conduct that later proved compromising. [33] Lopez had led a double life and may well have been a double agent or a triple agent or some further arithmetical progression in this murky world of deception built upon deception. The witnesses against him were so lacking in credibility that it is not possible to say now, or then, where the truth lay.

Lopez had some links to Spain. He may well have originally done that as an agent for Walsingham,

who had since died and whose private papers had disappeared. Lopez, it transpired, had had continued contact with Spanish agents, but in whose interests? It became known that the King of Spain had sent Lopez a valuable ring. Some of Lopez's former associates, who had made a profession of duplicity, proved willing to incriminate him, under threat of torture. They made allegations of a conspiracy to kill the Queen. Whatever it was that Lopez had to hide in his contact with Spain, this allegation makes little sense. The sources were of dubious veracity, but paranoia about Spanish conspiracies meant that no risks could be taken. The result of the Lopez affair was that talk of peace with Spain ceased, as may have been Essex's real objective.

The Cecils, perhaps to hide their own contact with some of those sources or their overtures for a peace with Spain, switched sides and supported Essex's campaign. Lopez, after lengthy interrogation, confessed, in the face of a threat of torture, he subsequently alleged. [34]

Officially, there had not been any Jews in England since they were expelled by Edward I in 1290, not to return until Oliver Cromwell lifted the prohibition in 1656. Some migrants from Portugal, called marranos, covertly practiced their faith. Lopez may have been one, although he denied it. This was the era when the Spanish Inquisition was at it height. It had originally been established for the explicit purpose of determining whether the conversos – Spaniards of Jewish heritage, whose ancestors had converted when the Jews had been expelled from Spain a century before – were secretly still practising Jews.

Only a few years before, Marlowe had produced *The Jew of Malta*, perhaps the most vicious piece of anti-semitic literature in the English canon, whose central character, Barabbas, had commenced a life of iniquity by studying medicine in order to poison Christians. [35] Marlowe was well aware of Lopez as a celebrity doctor with a highly profitable business administering enemas to the rich and powerful. In his *Dr Faustus*, when Faustus tricks a horse dealer, the dealer complains: "Doctor Lopus was never such a doctor, He has given me a purgation, he has purged me of forty dollars." [36]

Shakespeare's Shylock emerged from the Lopez affair, which had made Jewish perfidy the talk of London. At least Shakespeare allowed for some nuance in his character – "If you prick me, do I not bleed?" and the like. Neither Marlowe nor Shakespeare would ever have met a Jew.

The character Shakespeare created is so powerful that he takes over the play, in which he appears in only five of twenty scenes. The central character was intended to be Antonio, for he, not Shylock as is often assumed, is actually the "merchant of Venice".

The Lopez connection with Shylock appears in a play on the words *Lopus*, the name by which Lopez was known in England, and "lupus" Latin for wolf. Shylock is accused during the trial scene of being possessed by an executed wolf:

"That souls of animals infuse themselves  
 Into the trunks of men; thy currish spirit  
 Govern'd a wolf, who hang'd for human slaughter-  
 Even from the gallows did his fell soul fleet,  
 And whilst thou layest in thy unhallowed dam  
 Infus'd itself in thee: for thy desires  
 Are wolfish, bloody, starv'd and ravenous".

The prosecution of Lopez was a triumph for Essex. He had now displayed real influence. Elizabeth took him more seriously and everyone knew it. Shakespeare had good reason to put a spin on the Lopez case. Shakespeare's principal patron and, some believe, the young man in the sonnets, the Earl of Southampton, was Essex's closest friend and ally.

The Lopez trial, conducted in London's Guildhall, was typical of its era – the presentation of a prosecution case as a *fait accompli*. Such testing of the evidence as occurred was done during the investigation phase. However, as that was often conducted, in cases of treason, with actual torture or under the threat of it, the information obtained was, as everybody involved must have known but never acknowledged, of dubious veracity unless capable of independent confirmation, which was rarely the case.

As Portia, Shylock's prosecutor, put it:

"I fear you speak upon the rack  
Where men enforced do say anything".

Ellesmere, as Attorney General, opened for the Crown denouncing Lopez as "a perjured and murdering villain and Jewish doctor, worse than Judas himself". [37] Coke, as Solicitor General, took over and quickly displayed the vituperative, hectoring style that would mark his prosecutorial career. Lopez, he declaimed, planned to "raise insurrection and rebellion, and overthrow the established religion and government". [38]

He proceeded to make a series of extravagant, unsupported claims about an intention to undermine the religious and social foundations of England. The "evidence " presented was carefully edited, omitting all of Lopez's involvement on behalf of the state, and his close links to the Cecils.

"Lopez", as one historian has observed, "was charged in a vacuum ... A skeletal frame of narrative remained gutted of all context. The twin spectres of Catholic rebellion and Spanish conspiracy were summoned to fill it". [39] Coke managed to portray the conspiracy as a plot at once Jewish and Papist.

Just before he was hung, drawn and quartered, Lopez cried out: "I love the Queen as well as I love Jesus", to the laughter of the crowd that took this to be an unintentional confession of treason by the Jew.

A revival of Marlowe's *The Jew of Malta* was the hit of the theatrical season.

## **SOLICITOR GENERAL**

There is a detailed record of a direct confrontation between Robert Cecil and Essex when travelling together in a coach on January 30 1594, after a frustratingly inconclusive interrogation of Lopez. Cecil asked, disingenuously, whom Essex favoured for the vacant post of attorney general. Essex angrily replied that his support for Bacon was well known.

"Good Lord" Cecil declared, "I wonder you Lordship should ... spend your strength in so unlikely or impossible a matter" and asked him to identify a single precedent for a mere 33 year old to be appointed to such a post.

"I could name" the Earl retorted, one younger than Francis Bacon, of less learning, and of no greater experience, who is suing and shoving with all force for an office of far greater importance than the Attorneyship." This was a pointed reference to Cecil's ambition to be appointed Secretary of State, the Queen's voice in the Privy Council, an office he had been performing for some years and to which he would be formally appointed in 1596, when Essex was abroad on a military expedition and had annoyed Elizabeth by failing to follow her instructions.

Cecil defended his candidature on the basis of the training he had received from his father. That training was immediately manifest in his successful goading of Essex. He asked him to consider Bacon for a lesser post: "If your Lordship had spoken of the Solicitorship, that might be of easier digestion for Her Majesty". Nothing could be more infuriating for Essex than to have Cecil propose that he back down.

"Digest me no digestions." Essex exploded, "It is the Attorneyship that I must have for Francis, and in that I will spend all my power, my authority and amity and with tooth and nail defend and procure the same for him". He proceeded to threaten anyone who stood in his way. Cecil, who had in abundance all of the virtues of a councillor that Essex lacked, quickly reported the latest threats, bordering on the bumptious, to his father and to the Queen.

Essex's petulance and lack of judgement were never displayed more clearly. His proclivity to escalate every exchange into a matter of personal honour, in which his own pride was engaged, often made his counsel useless. He was quite incapable of setting aside personal relations for tactical advantage. Such conduct, which came naturally to the Cecils, was alien to Essex's code of aristocratic honour. Elizabeth would never have taken seriously Essex's ambition to replace Burghley as her principal confidante and advisor.

Nor was Bacon any kind of threat. Attempts to cast Cecil as some kind of Salieri to Bacon's Mozart, accepted by many historians, reflect an academic's overestimation of the capability of an intellectual in politics.

As this coach exchange suggests, Cecil and Burghley did support Bacon for the vacant solicitor position and it seems likely that if Essex had sought that from the outset it could have been achieved. However in April, just after Coke had been made Attorney, Essex sought the Solicitorship for Bacon, the Queen reacted angrily. It is quite likely that she blamed him for the recent conviction and imminent execution of Lopez, of whose guilt she was probably and properly sceptical.

“The Queen bade me go to bed if I could talk of nothing else,” Essex told Bacon. “In passion I went away”. [40]

Essex took the rebuff as a personal humiliation. It was, however, only one of many. Elizabeth frequently rejected Essex’s nominees for placement. [41] She knew how the patronage system worked and she knew how to keep her courtiers in their place. For the great positions of state she knew whose advice was valuable and whose was not. In court politics there are those who are honoured, those who are humoured and those who are heeded. Essex was always in the first category, often in the second. He was rarely in the third.

Delay and prevarication was a standard tactic deployed by Elizabeth. It kept everyone unsure of her intentions. The rivalry this engendered prevented alliances consolidating which might remove her discretion. It took almost eighteen months for Elizabeth to fill the post of Solicitor General. Bacon missed out again. This time he blamed Coke, probably with reason. [42] Coke had applied himself as Attorney with energy and manifest loyalty. He would have had some influence on the appointment of his junior.

Understandably dejected, Bacon wrote to Essex:

“I am proposed not to follow the practice of the law...it drinketh too much time, which I have dedicated to better purposes.” [43]  
Nevertheless he did practice. He needed the money.

## **MONEY**

It is difficult today to accept the old concept of an office as a form of property. We are accustomed to the Roman idea of an office – only fully established in England in the mid 19th century – as a bundle of powers and duties. For that reason what we would now deride as corruption was regarded in the time of Elizabeth and James as routine, the natural order of things. As the Earl of Essex once told an aspirant for office; “I think your best friend will be your thousand pounds”. [44]

Officeholders were paid little. Bacon estimated the value of the Attorney’s office at 6000 pounds a year, but the official salary was only 81l 6s and 8p. [45] There were well established practices by which an office holder had access to the flow of funds associated with the office. Payments were regarded as fees for services. The boundary between reasonable remuneration and abuse of power was always unclear.

The patron client relationship, which constituted the primary bond of court politics, had a well established tradition of gift giving. The line between a gift and a bribe was inexact and rarely enforced. When a senior, and notoriously venal, lawyer found his expectation for appointment as Master of the Rolls disappointed, when Ellesmere kept that office in addition to the post of Lord Keeper, he promptly asked Ellesmere to repay the “loan” of 400 pounds he had advanced. [46]

Judges kept the filing fees of their courts, with established rates for each step in the process, like sealing a writ. The Chief Justice, whose annual salary was about 225 pounds, [47] could also sell subordinate offices, like that of the prothonotary, with its own right to keep certain fees. That was how judicial officers were paid until the mid 19th century. Judicial office was very lucrative and judges had a vested interest in attracting work to their courts, not an unknown, albeit no longer lucrative, phenomenon even today. This will be a significant theme of a future lecture in this series.

In 1552, a new statute on bribes and sale of offices expressly exempted the office of chief justice from its scope. It was observed of one chief justice: “He was a very honest man, for he left a small estate”.

[48] That could not be said of Sir John Popham. According to the author of the *Lives of the Lord Chief Justices*, Popham “left behind the greatest estate that had ever been amassed by any lawyer. [49] The records do not permit a comparison, but it seems likely that Ellesmere outdid his mentor in this, as in most other, respects.

Ellesmere, Coke and Bacon each commenced life without any financial advantage. All developed lucrative practices at the bar. However, then as now, personal exertion was no way to acquire capital. An office was capital. It could be exploited directly, within uncertain bounds, to create a flow of income. When King James assumed the throne, there were the customary coronation pardons, available on the Attorney’s advice, for which a fee of five pounds each could be charged. On one estimate Coke made 100,000 pounds that year. [50] One can safely assume that the succession was worth more to Ellesmere. It was worth nothing to Bacon.

Ellesmere led a full public life, albeit one pursued with a keen understanding of the independence which considerable wealth brought. As one contemporary said of him, in an age when everything important was executed under seal and everything of public importance was executed under the Great Seal, of which he was the custodian for twenty one years, Ellesmere could not live without “the smell of yellow wax”. [51] The fees he could charge for affixing the seal were, no doubt, partly the cause of this addiction.

Each of my three subjects commenced in the office of Solicitor General. Ellesmere’s case can serve as an example of what was then regarded as proper conduct. The Solicitor General had a right of private practice. The Earl of Derby retained him as “standing counsel” and paid him with an appointment as Master of Game at one of his estates with a right to one buck, one doe and five marks a year. Lord Paget conferred on Ellesmere the right to hunt and take game at a number of estates and took pains to instruct his keepers that “he be very well served.” [52]

When Bacon missed out on both the Attorney’s and Solicitor’s office, he naturally turned to the other traditional way of establishing wealth: marry a wealthy widow. One soon became available: Lady Elizabeth Hatton, young, intelligent, extremely well connected as a daughter of Burghley’s eldest son, and the owner of a number of major properties, including Ely House, formerly the London residence of the bishop of Ely until Elizabeth forced him to give it to her favourite Sir Christopher Hatton, whose nephew and heir had married the Lady Elizabeth.

Bacon raised the matter with his patron Essex – “touching a fortune I was in thought to attempt” [53], as he delicately put it – asking him to intercede with Lady Hatton’s parents. Essex did so in glowing terms – saying this is whom he would chose if he had a daughter of his own [54] – but to no avail. In November 1598 Lady Hatton married one of the most talented members of the Cecil faction, in need of consolidation because Lord Burghley had died that August. Indeed the match was arranged with Sir Robert Cecil at Burghley’s state funeral. [55]

Of all people, from Bacon’s perspective, Lady Hatton married the then recently widowed Sir Edward Coke. He had acquired a fortune of 30,000 pounds with his first wife, [56] whom he had only buried in July. Coke had the cash flow to support the asset rich but cash poor estate. The widow’s father and powerful uncle found the match politically convenient.

The haste of the match was reflected in a tinge of illegality. The marriage occurred without a posting of banns or a license and in a private house – all in defiance of the Archbishop of Canterbury’s rules. Archbishop Whitgift had been Coke’s tutor at Cambridge, as he had been Bacon’s and Essex’s. Nevertheless, Coke was prosecuted in the Archbishop’s court. He had to plead ignorance of ecclesiastical law, no doubt to the delight of the clergy, and ask forgiveness for his sins. His ignorance was duly recorded in the dispensing order filed at Lambeth Palace. [57] They were married again at St Andrew’s church, with all due formality observed.

Lady Hatton, as she insisted on being called for the remainder of her life, proved to be as combative as Coke. Macaulay would describe her as having “eccentric manners and a violent temper (which) made her a disgrace and a torment to her connections”. [58] This sounds like a jaundiced Victorian view of a high spirited woman. Macaulay was unremitting:

“The lady was kind to (Bacon) in more ways than one. She rejected him; and she accepted his enemy. She married that narrow minded bad tempered pedant, Sir Edward

Coke and did her best to make him as miserable as he deserved to be.” [59]

Give me opinionated historical narrative like this any day. Objectivity is so boring.

Financially, Coke was now well established. As one jealous observer commented, within a decade he had moved from being worth 100 pounds a year to 14,000 pounds per year. [60]

Bacon was still without capital. Burghley had secured for him the reversion of a registry office in the Star Chamber, but the life tenant was proving stubbornly healthy. Bacon, incapable of thrift, was always borrowing money, convinced that one day his station would equal his promise. His debts mounted. In the summer of 1597 he was even arrested for debt when leaving the Tower. He wrote to Ellesmere asking him to intervene on his behalf. [61]

In one of their few recorded direct clashes Coke, appearing as Attorney against Bacon in the Court of Exchequer, later gloatingly referred to Bacon’s imprisonment for debt. “I said”, Bacon complained to Cecil in writing “he was at fault for he hunted on an old scent”.

Coke had been quite splenetic:

“Mr Bacon, if you have any tooth against me, pluck it out for it will do you more hurt than all the teeth in your head will do you good.”

“Mr Attorney,” Bacon replied, “I respect you; I fear you not and the less you speak of your own greatness, the more I will think of it”.

Unleashing a torrent of abuse, Coke continued, arrogantly:

“I think scorn to stand upon terms of greatness towards you, who are less than little, less than the least”.

Bacon’s riposte was pointed:

“I have been your better and may be again, when it please the Queen”. [62]

His day would come.

It was some years before Bacon married. “I have found an alderman’s daughter,” he wrote to Cecil, “a handsome maiden, to my liking”, asking him to get him a knighthood, which would help convince the father. [63] With a dowry of 220 pounds a year, the prospect was not in the class of Lady Hatton. Furthermore, she was 11 years old at the time. They married in 1606, when Bacon was 45 and she was 14. It was, at least and unlike Coke’s, an uneventful union.

## **TORTURE**

Coke’s term of office as Attorney under Elizabeth was a period of considerable social tension. One harvest after another failed. The war with Spain was a constant drain on resources. The state flirted with national bankruptcy. Domestic religious divisions, from Catholics to Puritans, always threatened to erupt. There was much prosecuting to do. There was a wide range of royal prerogatives to protect. There were numerous royal grants and commissions to be drafted.

Coke’s commitment to whatever he was doing was always total. He never displayed any capacity for introspection. His own motives never seemed to interest, let alone concern, him. There was never a manifestation of self doubt. As his career moved from representing one set of institutional imperatives to another, he embraced each with the same combative enthusiasm, bordering on the self-righteous, and devoted to each the same relentless energy, learning and mental acuity. Coke was always an advocate. His was one of those minds that was sharpened by being narrowed. He expressed contempt for poetry [64] and never displayed the breadth of intellectual interests of Ellesmere or Bacon.

As a prosecutor he was aggressive to the point of vitriol, with an arrogant and hectoring style, often unproductive, that deployed a violent rhetoric – describing an accused as “the vilest viper”, as a “monster”, as a “vile and execrable traitor”. Later, Ellesmere would privately call him “foolish and frantic”. [65] In his monumental history of the English criminal law, Sir James Fitzjames Stephen described him as one of the most brutal prosecutors in English history. [66]

However, the protection of the state was the principal task of the Attorney General and Coke's long term of office coincided with real threats to the state. In the view of the elite, internal subversion was as significant as external invasion. They believed that the principal source of internal subversion came from Catholic recusants and, especially, from the Jesuits who, for almost two decades had secretly come as missionaries for their faith or, from the perspective of the domestic elite, had infiltrated as agents of the Pope and of Spain. Bacon said of the Jesuit education system, invoking a classical author: “They are so good I wish they were on our side.” [67].

Although there were recusants who simply wished to be left alone to practice their religion and advocated some form of tolerance, this was not the dominant belief of the era. The significance of religion was such that it formed a core element of national identity. In the French aphorism of the time – un roi, un loi, un foi, one king, one law, one faith. The attempt within France to tolerate a Huguenot minority had proven a failure.

In what became known as the Archpriest Controversy, the traditionalist English Catholic priests appealed to Rome, thereby becoming known to historians as the Appellants, against the covert activities and emerging dominance of the Jesuits, whom they blamed for the stringency of their repression. [68] The Appellants probably represented a majority of English Catholics at the time, but in the white heat of the militant Counter Reformation, with the Jesuits in the front lines, their appeals to Rome were futile. In an event, their hope that they could achieve a level of toleration, which would enable them to practice their faith in peace was, in the spirit of that time on both sides, impossible of achievement. It would take over a hundred years of warfare and millions of lives, to establish the virtues of coexistence.

To the English political elite, the perceived, and in part real, threat was from those whose religious belief was the most fervent. Amongst such, as is often the case with intense religious conviction, there were those who were prepared to resort to violence. The prevailing opinion was that the Jesuits posed the greatest danger, second only to invasion by Spain. They were seen, with reason in the case of their leaders in exile but not in the case of the missionaries themselves, as the prime instigators of plots against the life of the Queen and the promotion of a Catholic successor, first Mary of Scots and then the Infanta of Spain.

Coke interrogated and prosecuted numerous Catholic and some Puritan suspects. Perhaps most revealing is the interrogation of Father John Gerard about which, because Gerard was one of the few to escape from the Tower and lived to write an autobiography, we have basically consistent versions from both sides.

A cultivated and well educated English gentlemen who, as a Jesuit priest, had returned to a life of covert pastoral work requiring movement from one recusant home and priest hole to another, Gerard had invented an original riposte to the ultimate interrogator's invitation to self incrimination – known at the time as “The Bloody Question”, a literally accurate description.

“Should the Pope send an army to England for whom would you fight, the Pope or the Queen?”

Gerard replied, refusing the invitation to chose between his body and his soul:

“I am a loyal Catholic and I am a loyal subject of the Queen. If this were to happen, and I do not think it at all likely, I would behave as a loyal Catholic and as a loyal subject.” [69]

In April 1597, Coke's first interrogation of Gerard, who had been active amongst the recusants of Norfolk, many of whom Coke knew from his youth, proceeded with a tone of intellectual respect that was far removed from his courtroom histrionics.



From whom had he recently received letters from abroad? “If I have ever received any letters from abroad at any time”, Gerard replied, “they have nothing to do with politics. They were concerned merely with the financial assistance of Catholics living on the Continent”.

“You say” Coke proceeded, “you have no wish to obstruct the Government. Tell us, then, where Father Garnett is”, referring to the Jesuit order’s Superior for the English Province. “He is an enemy of the state.”

“He is not an enemy of the State,” Gerard retorted. “But I don’t know where he lives, and if I did, I would not tell you.” [70]

Coke then produced a warrant for Gerard’s interrogation under torture which named the Lieutenant of the Tower, Coke and his Solicitor General as interrogators. Bacon was also present.

Gerard recalled the procedure at the Tower in his autobiography:

“We went to the torture room in a kind of solemn procession, the attendants walking ahead with lighted candles. The chamber was underground and dark ... It was a vast place and every device and instrument of human torture was there.” [71]

After refusing to confess again, he was handcuffed and hung from the manacles, as the English called the Italian strappado, suspended by his wrists for hours, both that day and the next. The questions were not answered.

Coke returned the next month to conduct another interrogation in a form to be tendered at trial. Gerard readily admitted that he was a Jesuit priest and that his mission was to convert Englishmen from the church established by English law. When asked to affirm whether he had ever met certain named individuals, Gerard adopted the same answering technique: he did not know them and even if he did he would not acknowledge names.

Coke engaged him in a philosophical debate about the form of Gerard’s answers, known at the time as the Jesuit doctrine of “equivocation” – answering in so evasive a way as not to constitute an actual lie. Gerard denied Coke’s assertion that such answers were tantamount to lies and that equivocation was a “most wicked and horrible doctrine”. Gerard asserted that equivocation, did no more than “withhold the truth in cases where the questioned party was not bound to reveal it”, just as an accused in a criminal trial was entitled to plead not guilty. [72]

When, perhaps going further than required, Gerard accepted that “A man cannot deny a crime if he is guilty and lawfully interrogated”, Coke pounced. “What do you mean be lawful interrogation?” Gerard answered that the questioner must have authority to ask. The philosophical discussion had come back to the critical political issue: Was Elizabeth’s government legitimate or not. [73] On this basis, equivocation was shown to be ineffective. It had what could be legitimately regarded as a basis in treason.

Much later, without reference to his own prior history, Coke asserted in the third volume of his posthumously published *Institutes*: “There is no law to warrant tortures in this land”. He invoked Sir John Fortescue as authority. Fortescue was correct when he wrote in 1470 that England, unlike the Continent, had no tradition of torture. Fortescue was resisting the advocates of the adoption of civil law, a system with a firm base in England: in the ecclesiastical courts, in Chancery, at the Court of Requests and in the academy at Oxford and Cambridge. [74] The Duke of Exeter, who sought to have the Continental civil law adopted in England at that time, was Constable of the Tower and introduced the rack to England, which instrument was thereafter known in English slang as “the Duke of Exeter’s daughter”. [75]

After the Lateran Council of 1215 abolished trial by ordeal, in general terms, England turned to the jury and Europe turned to torture. The Continental tradition, which persisted until the eighteenth century, emerged from the Roman law of proof, which rejected circumstantial evidence as a basis for

conviction, requiring either a confession or two eyewitnesses. Such proof, it had come to be accepted, was unlikely to be obtained without torture. As a result torture had become the common mode of investigation in most of Europe, even for routine crime. In England torture was never systemic, but exceptional.

Between 1540 and 1640, detailed records of the use of torture were kept. It was used for public offences such as treason and sedition, which included heresy, although sometimes for lesser offences. Torture only occurred pursuant to a warrant, issued in the name of the monarch and often under royal signature, specifying the subject, the alleged offence, the permissible mode of torture and the identity of the interrogators. There are 81 known warrants, a handful under Henry VIII and Edward VI, more under Mary, and only a few in the early years of Elizabeth's reign. Later, Burghley would publish a defence of the use of torture, saying that it only came into use after the Pope had excommunicated Elizabeth in 1570 and the record generally supports him. Of the 81 recorded cases 53 occurred in Elizabeth's reign.

It appears that torture was accepted as an exercise of the prerogative. Although it was not lawful as such at common law, as the House of Lords has recently reminded us, [76] the prerogative was supported by that law and, accordingly condoned, if it did not permit, the use of torture. President Bush would understand this.

Coke was, at best, disingenuous when he failed to refer to his own direct involvement in torture when later declaring it was not lawful. His name appears on seven warrants as Solicitor or Attorney, applying torture to both Catholics and Puritans. Ellesmere's name appears on four as Solicitor General. Bacon's name appears on four warrants before he held any office and on one as Attorney. This was what a prosecutor did in what was still an inquisitorial system of criminal procedure. When Macaulay [77], and later Lord Denning [78], no doubt reared on Macaulay's *Essays*, attacked Bacon for his involvement in torture, they were influenced by Coke's distortion of the historical record.

## THE LORD KEEPER

In April 1597, when Lord Keeper Puckering succumbed to his obesity, Elizabeth had no hesitation about his successor. On this occasion, factional influence was irrelevant. Within three days she delivered the Great Seal in its silken purse to Ellesmere who would hold it as Lord Keeper and, after being enobled, as Lord Chancellor for twenty one years. Under his guidance, as reinforced by his successor Francis Bacon, the Court of Chancery was preserved and reformed and the doctrines of equity protected and developed in a manner parallel to and, not least in New South Wales, of an influence similar to that which Sir Edward Coke would have on the common law.

Ellesmere's appointment was universally acclaimed. Anthony Bacon wrote to a friend in Venice at the time:

"With extraordinary speed her Majesty has advanced [Ellesmere], with a general applause both of court, city and country for the reputation he hath of integrity, law, knowledge and courage. It was his good hap to come to the place freely, without competition or mediator." [79]

Born a bastard, Ellesmere was raised by foster parents. His natural talent was recognised early and he received a good education attending Brasenose College in the last years of Queen Mary, later becoming Chancellor of Oxford. He pursued a successful career at the bar as a member of Lincoln's Inn, including a period in its associated Inn, which specialised in Chancery. Even before his call to the bar, he published a treatise on statutory interpretation in 1565, one of the first ever written. In this tract, rejecting the ideology of common lawyers like Coke, Ellesmere asserted the priority of the enactments of the sovereign Parliament. He covered many of the perennial issues of this area of the law: such as a focus on the mischief to be remedied (twenty years before Heydon's case), the use of preambles, parliamentary debates and subsequent application by the courts. In this, and other respects, his scholarship was formidable and the publication, no doubt then as now, was a polite form of touting for work, in his case successfully.

Throughout his career he displayed intellect and energy of an extraordinary order, together with the best English country gentleman virtues: earnest practicality, tough mindedness, uncomplicated dedication to duty, preference for the spartan rural life and dislike of pomp, rich food and excessive drinking, not to mention novelties like tobacco. One prominent lady later complained, "Your lord

keepeth not the table nor the part honourable and fit for your place.” [80]

Early in life he was a Catholic and retained a covert affiliation into maturity, being twice suspended from Lincolns Inn for this offence. His first wife remained a recusant until her death in the Armada year, 1588. Gerard said of him in his autobiography:

“ He had been a Catholic once, but he was a worldly person and had gone over to the other side.” [81]

Indeed he did.

Ellesmere’s entry to government occurred when Elizabeth, after hearing reports of one of his victories at the bar against her interests, declared: “He shall never plead against the Crown again” [82]. He became Solicitor General when Sir John Popham moved from that office to become Attorney General in 1581. Ellesmere’s first brief for the Crown, as Popham’s junior, was in the trial, including the interrogation under torture, of Edmund Campion.

Popham and Ellesmere prosecuted all of the large number of treason trials during this troubled and dangerous period. His style as a prosecutor is well displayed in his riposte to one of the accused in the Babington conspiracy, the amateurish attempt on the life of Elizabeth which finally implicated Mary of Scots and led to her demise. When the accused said that a Catholic priest called Ballard, alleged to be one of the instigators of the conspiracy, did not arrive in disguise to instigate treason, Ellesmere, always on top of his brief, responded:

“You say true; he came not disguised; but I will tell you how he came, being a popish priest, he came in a grey cloak laid on with gold lace, in velvet hose, a cut satin doublet, a fair hat of the meanest fashion, the band being set with silver buttons; a man and a boy after him, and his name, captain Fortescue.” [83]

As the master of the detail in the trial of Mary Queen of Scots, Ellesmere, who had appeared as Popham’s junior, was asked by Burghley to write the official report of the course of the trial, calling him the lawyer “best acquainted with the matters” [84]

In 1592 Ellesmere succeeded Popham as Attorney when the latter was appointed Lord Chief Justice, probably the only former highwayman ever to fill that post. Popham atoned for his early life of alcohol, gambling and crime by the merciless enforcement of the criminal law over the next fifteen years. [85] In 1594 Ellesmere was promoted to the newly vacant office of Master of the Rolls and in 1596 became a Privy Councillor.

Upon his appointment as Lord Keeper, Ellesmere’s influence and reputation for competence was further manifest in the fact that, for the first time, the post of Master of the Rolls which served as a deputy to the Lord Keeper or Lord Chancellor, was not to be filled by another. Ellesmere kept the office and its revenues.

He had already stamped himself as a reformer as Master of the Rolls, seeking to control the venal excesses of the Masters in Chancery. As Lord Keeper he manifested the same intent when he spoke for the Queen in the House of Lords although, not yet a peer, he could not participate in debate. At the opening of the Parliament of 1597-1598, after explaining how submission to the Queen should proceed with an anatomically challenged metaphor – “on the knees of our hearts” – Ellesmere urged the Parliament: “To enter into due consideration of the laws and where you find superfluity to prune, where defect to supply and where ambiguity to explain, that they not be burthensome but profitable to the commonwealth”. [86]

Throughout his official career [87] Ellesmere was concerned with the substantial increase in the number of lawyers and the explosion in litigation. He sought to control court costs and lawyers fees. He advocated what we would call mediation. He objected to institutional turf wars amongst the courts and to the legal fictions this spawned. He reorganised the operations of the Chancery court and supervised the prolixity and excessive conduct of the legal profession. He published detailed

schedules of the fees that Chancery masters and clerks could charge, leading to protests from the incumbents who had no doubt paid well for their appointment. [88] Even Bacon, trying to preserve the value of his reversion of the post at the Star Chamber, wrote to complain about such reforms.

Ellesmere had one practitioner, responsible for an unnecessarily verbose replication at a time when the lawyers and the registry clerks were paid by the word, paraded around Westminster Hall with the document shoved over his head down to his chin. [89] Today we would have to order him pushed around Queens Square on a trolley. On another occasion, when asked to execute an unacceptable petition, Ellesmere declared: "What, you would have my hand to this now? Nay, you shall have both my hands to it." [90] And tore it up. He once referred to lawyers in open court as the "caterpillars of the commonwealth." [91]

There were, however, limits to his reforming zeal. When Bacon succeeded him as Lord Chancellor he said that he inherited about 3000 cases, some of them 20 years old. [92]

Ellesmere was engaged in continual tensions with the common law judges. Their status was affected by their subjection to injunctions from Chancery. However, this involved more than just status. As I have noted above, the number and nature of suits in a court determined the income of the judges. This was a tension that would be resolved in a dramatic manner during the reign of James, when Coke and Ellesmere engaged in a jurisdictional conflict that proved to be final.

## ESSEX REBELLION

Essex was a popular military hero, obsessed with his breeding, absolutely dedicated to a code of honour, convinced that he knew what was right and whose attempt to pursue a policy inconsistent with that of his government had been thwarted. In all this he was like Coriolanus, to whom the earl, no doubt to Shakespeare's knowledge, was often compared. He would also follow Coriolanus into open treason.

In 1599, Essex was finally undone in Ireland, that graveyard of reputations, as it has often been described. The same had occurred to Essex's own father who, after a campaign of singular butchery, had died in Ireland. While Essex was in Ireland his paranoia about Cecil was stoked by a further rebuff. Burghley had died and left vacant the post of Master of Wards, an office which supervised noble estates that were held by minors. This was the key to Burghley's fortune. Although the salary was only 133 pounds a year, the profits were very large. For arranging eleven grants of wardship, for which the Crown received 906 pounds, as duly revealed in the official record, Burghley took 3301 pounds, as set out on an attached piece of paper, which he had annotated: "This note to be burned". [93]

Appointment as Master would have solved Essex's perennial financial difficulty. A contemporary historian dated Essex's conversion to sedition to Cecil's appointment as Master. [94]

Commanding the largest expeditionary force that Elizabeth had ever deployed, Essex was comprehensively outmanoeuvred militarily and negotiated a truce with Hugh O'Neill, second Earl of Tyrone and paramount chief of the clans. The truce would have left the Irish in control of Ireland, in complete defiance of his instructions. Elizabeth was furious and told him so. "If we had meant that Ireland be abandoned", she fulminated, "then it was superfluous to have sent over a personage such as yourself." [95]

Essex abandoned his command and rushed back to England in an effort to restore his position by that direct appeal to Elizabeth that had worked for him so often in the past. No one knew he was coming until, on 28 September at 10 am, he burst unannounced into the Queen's bedroom at Nonsuch Palace. Elizabeth had not been prepared for the day. Wigless, almost bald, with a few tufts of grey hair, without the cakes of makeup to hide her wrinkled, aging skin and not having placed, as was her habit before meeting others, a perfumed handkerchief into her mouth to quash the smell of her rotten teeth, the vain monarch, who still wore low cut dresses and whose court ritual demanded all males maintain a bizarre charade of expressions of romantic love for her, could not accept such conduct from her former favourite.

However, her main reaction was probably fear. Throughout her long reign Elizabeth had always

understood that the male aristocracy regarded a female ruler as an unnatural phenomenon and that they could, as their forebears had done so often, engineer a successful rebellion.

At first she comforted the tired and clearly distraught earl, but as soon as she was satisfied that he had travelled with only a few retainers and that his army was still in Ireland, Elizabeth's attitude changed to fury. She turned on one of his accompanying officers, her own godson, Sir John Harrington, one of the many whom Essex had knighted in Ireland: "What, did the fool bring you too? ... By God's son I am no Queen, that *man* is above me." [96].

Essex was placed under house arrest. He was to be kept in York House on the Strand, then Ellesmere's residence, but formerly Bacon's birthplace and childhood London home. Suffering from ill health, including dysentery, called at the time "the Irish looseness", [97] Essex was eventually allowed to return under house arrest to his own home, Essex House.

After several months of debate in the Council about what to do, Elizabeth was talked out of taking the hard line she preferred. Essex was brought before a specially convened commission of eighteen privy councillors, earls and judges assembled at York House with an elite audience of some two hundred. The formality of proceedings in Star Chamber had not been invoked. The suspicion that his deal with Tyrone harboured treason could not be proven. Neither incompetence nor insubordination was a crime and Essex retained a high measure of public and elite support. He was accused of derelictions of duty: ignoring orders, creating an unseemly number of new knights, negotiating a truce with the enemy and desertion of his command.

Coke addressed the Commission, and warning to his brief but probably contrary to his instructions, suggested that the earl had been disloyal. He was quickly corrected from the bench. There was no such charge. [98]

The Commissioners found Essex guilty as charged. Ellesmere, then Lord Keeper, pointed out, as they were not sitting in the Star Chamber, the commissioners could not impose imprisonment or a fine. They recommended he be stripped of his offices and confined to Essex House at the Queen's pleasure.

Elizabeth enforced the recommendations and went further. Elizabeth, who had allowed the number of knights to about halve during her reign, de-knighted those Essex had created in Ireland, requiring dozens of men to go home and tell their wives that they could no longer be called "Lady". Elizabeth also stripped Essex of his source of financial independence, her grant to him of a monopoly on the importation of sweet wine. This was devastating. Essex was virtually destitute.

As his string of obsequious entreaties to Elizabeth remained unanswered, the disgraced earl was plunged into a corrosive melancholy, driven by wounded pride and desperation, not least financial. His sense of self was derived from a noble lineage of fifteen generations in the male line descended from a cousin of William the Conqueror, or so the records suggested. His female line apparently had higher claims to nobility, but he didn't emphasise it. [99] His personal identity was a combination of his commitment to a code of chivalric honour, a sense of destiny for leadership, the pursuit of the noble virtue of altruistic public service and an absolute conviction of his own integrity. Essex had no way of coping with failure. He turned his energies to rebellion and, probably without intending to harm Elizabeth, to replace the government dominated by Robert Cecil.

The frequency with which significant numbers of the well do to in 16th century England manifested irrational conduct including erratic mood swings, infantile irritability, abandonment of self control and paranoia – which Ben Johnson called "the black poison of suspect" – has led historians to seek medical explanations. One suggests that a social wide vitamin C deficiency caused scurvy, which has mental as well as physical effects, [100] another suggests that clinical paranoia was an endemic disease amongst Tudor traitors. [101]

Essex's paranoia was directed against Cecil and Elizabeth's other Councillors, who had come to positions of influence without the inheritance of the blood, which he and his aristocratic supporters believed conferred upon them a natural talent for leadership and a natural right to dominance. As the number of parvenus with new wealth and power expanded, those whose expectations were disappointed developed a sense of being under siege. [102]

The marginalisation of men of honour was what such men expected in a nation ruled by a woman, where the so-called male virtues of courage, frankness and constancy of purpose were not fully appreciated. Essex once told the French ambassador, that the failings of the English governmental decision making – which he identified as delay, inconstancy, timidity and an inability to pursue a grand plan – arose: “Chiefly from the sex of the Queen.” [103] Essex had a private nickname for Elizabeth. He called her Juno, after the Roman goddess who attempted to frustrate the heroic exploits of the great Trojan hero Aeneas, said to be the ancestor of the first Roman emperors, and with whom Essex clearly identified. [104]

Indeed, as Lytton Strachey points out, Elizabeth’s triumph was based on the most unheroic of policies:

“She succeeded by virtue of all the qualities which every hero should be without – dissimulation, pliability, indecision, procrastination, parsimony. It might almost be said that the heroic element chiefly appeared in the unparalleled lengths to which she allowed those qualities to carry her ... She found herself a sane woman in a universe of maniacs, between contending forces of terrific intensity – the rival nationalisms of France and Spain, the rival religions of Rome and Calvin. For years it seemed inevitable that she should be crushed by one or other of them, and she had survived because she had been able to meet the extremes around her with her own extremes of cunning and prevarication.” [105]

The theme of “evil advisors”, who had undermined the reputation of those whom a leader has come to ignore, is one of the traditions of court politics. In Essex’s case, the paranoia does show signs of being neurotic. It must, however, be remembered that even paranoids have enemies. Cecil must have regarded him as a threat to his own power and wealth, although he always acted on the basis that he would have to deal with Essex in the long term.

Essex House became a rallying point for an unseemly gaggle of disaffected aristocrats, disappointed place-seekers, unemployed soldiers and assorted malcontents, described by one historian as “the idiot fringe of the indebted gentry”. [106] As Essex’s overtures for support to the army in Ireland and to James in Scotland had proven fruitless, this desperate band concocted a bizarre plan to somehow create a disturbance in London which would enable the group to despatch Elizabeth’s guards and advisors and have her accept a new government, with Essex as Lord Protector. As one historian has described it, this was “a selfish and irresponsible conspiracy that stood no chance.”[107]

On February 7 1601 Essex and a number of his supporters, no doubt attempting to curry favour with the London crowd, attended the Globe theatre where they had commissioned Shakespeare’s theatre company to put on a special performance of *Richard II*. The actors at first protested that the play was “old and long out of use”, having been first performed in 1595. Shakespeare himself may well have still been embarrassed about the line in *Henry V*, first staged when Essex was in Ireland, which predicted victory in the reference to a general returning from Ireland “with rebellion broached upon his sword”.

*Richard II*, a play about an ineffectual, self-indulgent monarch, more solicitous of his favourites than of the national interest, inclined to an absolutist theory of monarchy and who was deposed by an assertive aristocrat, contained a suspect message for Elizabeth. The author of a book about *Richard II* and *Henry IV*, which he had dedicated to Essex in February 1599, and which Elizabeth had branded a “seditious prelude”, [108] was still imprisoned in the Tower. [109] When Bacon was asked by the Queen whether that book contained treason, he had replied he could find only felonies. The author, he said, was a thief, having stolen many lines from Tacitus. [110] The idea of Essex as Bolingbroke was obvious, perhaps it appealed to his disaffected entourage. However, Essex was no Bolingbroke. He was a Hotspur.

Storming into the Queen’s bedchamber was only the most recent of a litany of petulant conduct by Essex. He had often responded to Elizabeth’s rejection of his proposals with tantrums and sulking. At a Privy Council meeting, when he felt his personal honour had been affronted by the Queen, when she boxed him around the ears, Essex had done the unpardonable: he reached for his sword. Seeking to restore him to favour after that incident and urging him to return from his self imposed exile from court, Ellesmere, who was not a member of either faction and had always been friendly towards

Essex, had said: "The difficulty my good Lord, is to conquer yourself". He received the insolent, self righteous reply; "What cannot princes err? Cannot subjects receive wrong?" [111] These were seditious thoughts, uttered just before Essex was recalled for military duty in Ireland. Elizabeth knew of the exchange and the words were not forgotten. As one historian has put it:

"[Essex] had joined together the arrogance of male superiority and the pride of aristocratic lineage with a far worse evil – the sin of doubt. He was questioning the divinely ordered nature of government". [112]

For some months Essex had been talking about a coup. Aware that Elizabeth had become aware of the activity around him, he advanced his plans and on 8 February about three hundred of his supporters gathered at Essex House. When Popham, Ellesmere and two Councillors arrived to inquire what was going on they were told that he feared he was to be murdered. They suggested he attend on Her Majesty, guaranteeing his safe conduct. It was too late. Amidst cries from his supporters: "Kill them! Kill them!", Essex ordered the councillors be detained.

The amateurish rebellion, commencing with no more than a lightly armed procession, received no support in the streets of London, upon which the earl had staked his all on no firmer basis than his popularity. After one brief but bloody skirmish, it was quickly subdued. Essex and his key supporters were imprisoned before midnight.

This was the last time in English history that the feudal aristocracy would attempt to overthrow a monarch. This long tradition, often enough successful and almost always involving considerable bloodshed, ended in farce – no military strategy, just pathetic bravado and a lot of shouting in the streets about plots to kill Essex and to sell out the succession to Spain. Only three dead and half a dozen wounded.

It had really been all down hill since the introduction, just a decade or two before, of the lethal but somewhat effete rapier – the first fencing school was set up in Blackfriars in 1576. The rapier led to matters of honour being determined by duel in one to one combat, rather than in the traditional English way of a mass assault on one's enemies with a violent mob of retainers wielding broad swords. Unlike in France, group duels never became fashionable. Standards really did slip when, under the code of the duel, a mere gentleman could challenge a nobleman to meet on equal terms. [113] Aristocratic rebellion had become technologically obsolete.

After burning incriminating documents, when preparing to surrender, Essex had turned to Sir Robert Sidney, younger brother of his dead idol Phillip, and whom he had unsuccessfully urged on Elizabeth as Lord Warden of the Cinque Ports, then still a military posting. [114] Essex called on their mutual martial calling, probably realising that he might be able to explain everything, except the day's bloodshed:

"You are a man of arms, you know we are bound by nature to defend ourselves against our equals, still more against our inferiors." [115]

Perhaps Essex remembered the Council meeting when, in response to Essex's advocacy of war, Burghley had passed him a copy of Psalm 55 with his finger on verse 24: [116]

"Men of blood and deceit shall not live out half their days."

At the end, Essex revealed the innate snobbery and arrogance that had brought about his destruction, when he said to Sidney:

"Judge you whether it can be grief to a man descended as I am, to be trodden underfoot by such base upstarts." [117]

He was especially referring to Cecil: hunchback, son of a mere gentlemen and, to that time, no more than a knight. As it so often does, self righteousness had transmogrified into self pity.

Essex would also invoke the law of nature at his trial. Nature, he believed, required him to act in accordance with the instincts of his blood, including a right to lead, to dominate and to act in accordance with a traditional code of honour. Such codes of honour were recognised, as part of the

natural law, by the civil law applicable on the Continent. Until the French Revolution such codes were used to justify numerous abuses by nobles. No such code was recognised by the common law.

Later, Sir John Harrington, the earl's associate who had recognised the madness of the Essex House environment and stayed away, and who is best known as the inventor of the water closet, but much admired by contemporaries for his epigrams, expressed the inevitable denouement pithily:

“Treason doth never prosper, what's the reason?  
For if it prosper, none dare call it treason.”

Essex had failed to prosper. As Macaulay later observed: “(Essex) had neither the virtues nor the vices that enable men to retain greatness long”. [118]

## ESSEX TRIAL

On 19 February 1601 Essex, dressed in black, standing defiantly with his closest companion, the long haired dilettante Earl of Southampton, best known as the patron of Shakespeare, was put on trial for treason in Westminster Hall, before their peers – literally – Lord Buckhurst as Lord Steward of England presiding, twenty five earls, viscounts and barons, who sat with their legal advisors, the judges of all three common law courts, Common Pleas, Exchequer and Kings Bench – Elizabeth never permitted the appellation “Queens Bench”. A number of the peers had longstanding grudges against the accused, indeed one had tried to kill Southampton a few weeks before. Knowing the answer, but appealing to the selected public gallery and, no doubt, to the crowd of Londoners who thronged the approaches to Westminster that day, Essex asked whether challenges for bias were permitted. No, replied Popham and Coke cited a precedent in support. Both earls pleaded not guilty.

A criminal trial of the era – before the emergence of the adversary system – consisted of a series of confrontations: declamations by the prosecutors, presentation of the evidence, of which the accused had no prior notice, and calling upon the unrepresented accused to answer the evidence. By the time a prosecution was launched, often after consultation with the judges, a trial was generally a public inquiry where the judges assumed the guilt of the accused. In the entire course of the sixteenth century, only one nobleman who stood trial was acquitted, for which unexpected indulgence the jury of twelve had been imprisoned. [119] An accused was not permitted to call witnesses.

At the Essex trial, the brief formal opening for the Crown by the Queen's Serjeant compared Essex to Catiline, whose similarly futile rebellion against the Roman Republic was, according to Cicero and Seneca, also the work of a band of indebted aristocrats and assorted malcontents. Coke, as Attorney, bore the principal burden for the prosecution. He commenced with an outline of his philosophy of the common law, to which he would remain consistent throughout his career:

“The laws, that by long experience and practice of many successions of grave learned and wise men, have grown to perfection are grounded no doubt upon greater and more absolute reason than the singular and private opinion or conceit of the wiseth man that liveth in the world can find out or attain unto. Therefore the law shall stand for reason”. [120]

Coke summarised the relevant law;

“He that raiseth a rebellion or insurrection against a settled government doth, in construction of law, imagine the death and destruction of the Prince and is therefore guilty of treason. For the law doth intend that where a man doth raise power and forces to reform anything in the government of the commonwealth, he doth usurp upon the prince and take upon himself his authority.” [121]

Coke's long address now appears tedious, full of classical allusions and historical examples, but his summary of the evidence would have come as a surprise to everyone, except to those of the judges privy to the investigations. A number of detailed confessions by some of the earls' collaborators had been obtained the day or two before the trial, without the use of torture, Coke was careful to emphasise. The conspirators, Coke alleged, intended, by force of arms, to take the City of London, the Tower, the royal palace and the royal person. The ultimate objective, he said, was clear: “Robert, Earl of Essex, had thought to be King of England, Robert the First. Let him rather be declared, of his race and blood, Robert the Last, attainted to posterity and all his generation.” [122]



Addressing a jury of his peers, Essex was confident, even impudent bordering on the supercilious: “Mr Attorney”, he said, “playeth the orator and abuseth your Lordship’s ears with slanders against us. These are the fashions of orators in corrupt states and such rhetoric is the trade and talent of those who value themselves upon their skill in pleading innocent men out of their lives.” [123]

The witnesses were called, each to be challenged by Essex in turn, but without notice of what they would say. Popham and Ellesmere acting as both legal advisors and witnesses, testified about their imprisonment at Essex House. It was for their protection, Essex claimed, unconvincingly. Other witnesses gave evidence of conspiratorial meetings over a period of some months, where the details of the strategy had been worked out. There was talk, Essex said, with nothing decided. Other witnesses testified to the burning of letters and documents at Essex House on the day of the rebellion, when its failure was clear, particularly the contents of a black bag which Essex always kept on his person and which contained his closest secrets, particularly correspondence with James in Scotland. “A black bag, meet for so black a cause!” Coke had melodramatically exclaimed in his opening. [124]

The principal defence emerged in the course of examination of witnesses. This was action taken in self defence against threats to Essex from the cabal of advisors that had misled Elizabeth, particularly Cecil and Raleigh. This was what he had meant by his reference to “corrupt states”. He alleged that Raleigh had threatened to kill him, but the person who Essex said had told him that did not confirm Essex’s version of their conversation and Raleigh convincingly denied it.

Cecil, Essex alleged, was in league with Spain and had agreed to support the claims of the Infanta to the English throne. Appearing from behind a tapestry, where he had been covertly observing the proceedings as a mere knight, Cecil, the leading “base upstart”, denied the allegation, also convincingly, accusing Essex of having “ a wolf’s head in a sheep’s garment”, probably the origin of that cliché. He asked that Essex’s uncle, who Southampton said was the source of the story, be brought to testify, without being told what Essex had alleged Cecil to have said. He came and gave a version quite contrary to that of Essex. His conspiracy had collapsed.

The events of the day – of armed men who gathered together and attempted to incite others to support them, about which there were numerous witnesses – really spoke for themselves. It was all an attempt to get access to the Queen, Essex claimed, for the sole purpose of pleading his case. Could that be treason if there was no actual intention to harm the Queen, the peers asked the judges. Yes it could, was the reply. “Our law “, Coke submitted, “judgeth the intent by the overt act”. “Well”, the earl replied, “plead you law and we will plead conscience”. [125]

Coke also said: “To surprise the court or take the Tower by way of defence from private enemies is plain treason”. [126]

Coke had a dramatic exchange with Southampton:

“Coke: My Lord of Southampton, is this no treason, to force the Queen in her own house, to set guards at her gates, in her chamber and in all parts of her house to the end that having her in your power you might do what you listed?

Southampton: Good Mr Attorney, let me ask you what, in your conscience, you think we would have done to her Majesty if we had gained the court?

Coke: What would you have done to her Majesty? ... How long, my Lord, lived King Richard the Second after he was surprised in the same manner”. [127]

Bacon, who appeared as part of the prosecution team, submitted that treason had been committed on the earl’s own version. If he only intended to be “a suppliant to her Majesty”, why were his “petitions to be presented by armed petitioners?” By itself this interfered with the Queen’s liberty. Bacon continued “... to take secret counsel, to execute it, to run together in numbers armed with weapons ... Will any simple man take this to be less than treason”. [128]

Perhaps nothing did more damage to Bacon's reputation, at the time and over the subsequent centuries, than the fact that he turned on his patron at this trial. Ellesmere, who was also a longstanding supporter of Essex, although never in need of any favours from him, suffered no such criticism. Nor did Essex regard Bacon as one of his inner circle. Bacon, who had given Essex much advice over the years was never consulted about the high level intrigue which Essex conducted with other nobles and with James. A degree of distance was always manifest. When Bacon had published the first edition of his *Essays* in 1597, he dedicated it to his brother not, as was the custom, to a sole patron, because he didn't have one. Bacon never cut his ties with the Cecils. He could never have become merely a member of a faction and didn't. His critics, like Macaulay, who describe Bacon and Essex as "friends", are just preparing the way for slander.

I can see no reason why Bacon should have felt much gratitude. Other than bountiful displays of support, Essex had never actually achieved anything for Bacon. [129] His support for Bacon was not an act of altruism, nor merely a display of personal loyalty. It was, at least in part, the self-interested conduct of a patron seeking to build up his own political power base and using Bacon's learning and intelligence for his own advantage. Essex never gave any indication that he believed Bacon had let him down. This is characterised as an indication of his nobility, by those of a romantic bent overcome by his image of heroic chivalry. It was, more likely, an honest acceptance of the conduct expected of a Renaissance courtier. Not even a timeless intellectual hero like Bacon can be entirely removed from his own time.

It is difficult to see what else Bacon could have done. Essex had never consulted him about his ludicrous scheme. It may have been opportunism to appear for the Crown at the earlier inquiry at York House. By the time of the Guildhall trial, however, Bacon was entirely justified in acting on the basis that his duty to the state prevailed over personal loyalty, such as it was. It borders on the naive to use these events as proof that Bacon had a "coldness of heart and meanness of spirit" – as Macaulay was to do [130], on the basis of a caricatured version of Bacon's conduct at the trial, probably explicable by the fact that Macaulay was writing in Calcutta without access to most of the relevant material. [131]

In riposte to Bacon's submissions against him, Essex dramatically exclaimed: "I call forth Mr Bacon against Mr Bacon". He then revealed how Bacon, from whom he had sought advice after the York House proceedings, notwithstanding Bacon's appearance for the Crown on that occasion, had drafted two letters: one to be sent by Essex to Anthony Bacon and the other a reply from Anthony. This contrived correspondence contained assertions consistent with Essex's claim that he was primarily concerned with the machinations of Cecil and others against himself. This exchange between intimates was intended to be intercepted by Elizabeth's agents and, because of its apparent veracity, to be accepted as true.

Bacon declared there was nothing in the letters of which he was ashamed and added: "I have spent more time in vain in studying how to make the earl a good servant of the Queen, than I have done in anything else." [132]

Both earls were found guilty of treason and sentenced to death. Elizabeth signed Essex's death warrant, but reprieved Southampton. Just before his execution, Essex, convinced by his personal chaplain to confess his sins before facing his maker, called a group of councillors and admitted the substance of the case against him and that he had lied at the trial. "The Queen", he confessed, "could never be safe as long as I lived". He implicated a long list of fellow conspirators, not all of whom had then been caught, including his own sister. At the very end he abandoned his code of honour and any pretence of personal loyalty. Cecil thought he was just getting revenge against those whose evidence had condemned him. [133] I think it more likely that he still thought it was possible that Elizabeth would spare his life. Macaulay ignores all this. Had Bacon continued to support Essex to the end, as his critics like Macaulay suggest, he should have looked like a fool. However, Essex's public image of gallantry survived.

The 33 year old earl was executed at the Tower on 25 February, still proclaiming that he never intended to harm the Queen. That was probably correct. He needed her to remain as a figurehead, while he exercised his natural right, as a man and as an inheritor of noble blood, to rule. He died as a man of honour should die: after full confession, penitent and accepting his fate without fear.

Bacon, whose conception of honour was one of civic virtue, not one of chivalric will, deserves the last word. In his later essay "On Vainglory", he said:

"They that are glorious must needs be factious, for all bravery stands upon comparisons. They must needs be violent, to make good their own vaunts", by which he meant "boasts". After acknowledging that such characteristics may be useful in the military, he concluded: "Glorious men are the scorn of wise men, the admiration of fools, the idols of parasites and the slaves of their own vaunts."

He probably had Essex in mind.

## ROYAL SUCCESSION

Essex had been in correspondence with James, the details of which were lost when he burned the contents of his black bag. After the execution, Cecil covertly received James' ambassadors and offered his support to James, who was suspicious, probably because Essex had told him that Cecil was committed to the Infanta of Spain. Gradually a mutual confidence developed over a long period of encoded correspondence.

When Elizabeth died in March 1603, Cecil immediately implemented the agreed plan to declare James VI of Scotland as James I of England. In retrospect, he seems the only choice. That was by no means clear at the time. Elizabeth had refused to name a successor. She knew if she had done so, she would have become a lame duck. Led by Cecil, the political leadership of England believed that James was the only safe choice. On her death bed, in the presence of Cecil, Ellesmere and the Lord Admiral, Elizabeth had said, according to them: "Who should succeed me but a king?" [134] They proclaimed this to be her endorsement of the prearranged choice.

In theory all offices became vacant on the death of the monarch. Assurances had been given that most of the existing officeholders would stay, although no one could be confident about the whims of a king. In the event, Coke, Ellesmere and Bacon continued in their existing roles.

In April, on his regal progress to London to claim the Crown, when his entourage discovered a pickpocket, James ordered that he be hung on the spot, without a trial. Elizabeth had never done anything like that. The legal community would have to adjust to a king with distinct ideas about how the law worked. As Sir John Harrington put it:

"I hear oure new King hanged one man before he was tried; `tis strangely done: Now if the winde bloweth thus, why may not a man be tried before he hath offended?" [135]

## END NOTES

1. Stone, Lawrence *The Crisis of the Aristocracy: 1558-1641* Clarendon Press, Oxford, 1965 pp 15-16 (check later edition).

2. Bowen, Catherine Drinker *The Lion and the Throne: the Life and Times of Sir Edward Coke* Atlantic-Little Brown, Boston 1957 p16.

3. Esler, Anthony *The Aspiring Mind of the Elizabethan Younger Generation* Duke Uni.P. Durham, N.C. 1966.

4. Campbell, John Lord *The Lives of the Chief Justices of England* Vol.1 John Murray, London 1849 p239.

5. Spedding, James (ed) *The Life and Letters of Francis Bacon* London, 1861 vol i pp 108-109.

6. Croft in Elliott, J.H. and Brockliss L.W.B (eds) *The World of the Favourite* Yale Uni P.New Haven 1999 p94n.

7. See Hammer, Paul "Patronage at Court, Faction and the Earl of Essex" in Guy, John (Ed) *The Reign of Elizabeth 1: Court and Culture in the Last Decade* Cambridge Uni.P 1995 Chapter 3.

8. Guy 1995 op cit n7 p1.
9. Smith, Lacey Baldwin *Treason in Tudor England: Politics and Paranoia* Pimlico, London 2006 pp 146-147.
10. See generally Stone 1965 op cit n1 Chapter 8; Adams, Simon "The patronage of the crown in Elizabethan politics: the 1590's in perspective" in Guy 1995 in op cit n7 pp22ff.
11. Handover, P.M. *The Second Cecil: The Rise to Power, 1563-1604 of Sir Robert Cecil* Eyre & Spottiswood, London 1959 pp 92-92.
12. Bowen 1957 op cit n2 p29.
13. Bowen 1957 op cit n2 Chapters 3 and 4; Boyer, Allen D. *Sir Edward Coke and the Elizabethan Age* Stanford Uni P. Stanford.2003 pp 218- 241.
14. Bowen 1957op cit n2 p21.
15. Bowen 1957 op cit n2 p12.
16. Handover 1959 op cit n11 pp 94-95
17. Neale, J.E *Elizabethan 1 and her Parliaments 1584-1601* St Martin's Press, New York 1958 pp 245-246.
18. Neale 1958 op cit n17 pp 303-305; Boyer 2003 op cit n13 pp 227-228; Jardine, Lisa and Stewart, Alan *Hostage to Fortune: the Troubled Life of Francis Bacon 1561-1626* Phoenix Giant London 1998 p141-143.
19. Neale 1958 op cit n18 p88.
20. Bowen 1957 op cit n2 p34.
21. Bowen 1957 op cit n2 p320.
22. See e.g. Boyer 2003 op cit n13 pp 233-238.
23. Bowen 1957op cit n2 pp 27-28,35.
24. Read, Conyers *Lord Burghley and Queen Elizabeth* Alfred Knopf New York1960 p 496.
25. Spedding 1861 op cit n5 vol iii pp 226-231;Jardine & Stewart 1998 op cit n18 pp 184-186; Smith 2006 op cit n9 pp207-208.
26. Hammer Paul E. *The Polarisation of English Politics: The Political Career of Robert Devereux,2nd Earl of Essex, 1585-1597*Cambridge Uni.P 1999 p 328.
27. Boyer 2003 op cit n13 p243n.
28. Boyer 2003 op cit n13 p244.
29. Bowen 1957 op cit n2 p80.
30. Bowen 1957op cit n2 p81.
31. Dunn, Jane *Elizabeth and Mary: Cousins, Rivals, Queens* Vintage, New York 2003 pp 343-344.
32. Greenblatt, Stephen *Will in the World; How Shakespeare became Shakespeare* W.W Norton New York 2004 p 274.

33. Hammer 1999 op cit n26 pp159-160.
34. Green, Dominic *The Double Life of Doctor Lopez Arrow*, London 2003 p 281.
35. *The Jew of Malta* Act II scene iii lines 86-89.
36. Green 2003 op cit n34 p5.
37. Knafla, Louis.A. *Law and Politics in Jacobean England: the Tracts of Lord Chancellor Ellesmere* Cambridge Uni.P Cambridge 1977 p 20, Boyer 2003 op cit n13 p248n. This quote is sometimes wrongly attributed to Coke.
38. Green 2003 op cit n34 p278.
39. Green 2003 op cit n34 p281.
40. Handover 1959 op cit n11 p129.
41. See e.g. Hammer 1999 op cit n26 pp 294 ff, 323ff.
42. Spedding op cit n5 Vol. iii p4.
43. Spedding vol I op cit n5 p372.
44. Esler 1966 op cit n3 p139.
45. Campbell, John Lord *Lives of the Lord Chancellors* Vol 2 John Murray, London 1856 p68.
46. Collier. J.Payne (ed) *The Egerton Papers:A Collection of Public and Private Documents* The Camden Society, London 1840 p 314.
47. Campbell 1856 op cit n45 p68.
48. Campbell 1849 op cit n4 p200.
49. Campbell 1849 op cit n4 p 229.
50. Boyer 2003 op cit n13 pp295-296.
51. Knafala 1977 op cit n37 p181.
52. Collier (ed) op cit n46 pp 95, 96-97.
53. Spedding op cit n5 Vol II p 55.
54. Campbell 1849 op cit n4 p254.
55. Boyer 2003 op cit n13 p213.
56. Foss, Edward *Biographia Juridica: A Biographical Dictionary of the Judges of England* John Murray 1870 p 174; White, Stephen D. *Sir Edward Coke and the Grievances of the Commonwealth* Manchester Uni.P. Manchester 1979 p4.
57. Campbell 1849 op cit n4 pp255-256.
58. Macaulay, Thomas Babington "Lord Bacon" in *Critical and Historical Essays* Longmans, Green London 1877 p360.
59. Ibid.

60. Boyer 2003 op cit n13 p292.
61. Spedding op cit n5 vol ii pp 107-108.
62. Spedding op cit n5 vol iii pp 2-3.
63. Jardine and Stewart 1998 op cit n18 p289.
64. Rowse, A.L. *The England of Elizabeth* Uni. Wisconsin P.Madison, Wisc 1978 pp 381-382.
65. Boyer 2003 op cit n13 p204.
66. Stephens, James Fitzjames *History of the Criminal Law in England*, MacMillan & Co London 1883 vol 1 at 333.
67. Coquillette, Daniel.R. *Francis Bacon* Stanford Uni.P.Stanford, 1992 p80.
68. See Pritchard, Arnold *Catholic Loyalism in Elizabethan England* Uni. of Nth Carolina P.,Chapel Hill, N.C. 1979 especially Chapter 10.
69. Bowen 1957 op cit n2 p98; Boyer 2003 op cit n13 p 267; Gerard, John *The Autobiography of a Hunted Priest* Pellegrini & Gudahy, New York p98.
70. Bowen 1957 op cit n2 p99; Boyer 2003 op cit n13 p268; Gerard op cit n69 pp106-107.
71. Gerard op cit n69 p108.
72. Boyer 2003 op cit n13 p269.
73. Bowen 1957 op cit n 2 pp 100-101; Boyer 2003 op cit n13 pp 269-270; Gerard op cit n69 125-127.
74. The description of the history of torture is based on Langbein, John H. *Torture and the Law of Proof:Europe and England in the Ancient Regime* Uni.Chicago P., Chicago 1997 and Hall, Clifford "Some Perspectives on the Use of Torture in Bacon's Time and the Question of his "Virtue".1989 18 *Anglo-American Law Review* 289.
75. Hall 1989 op cit n74 pp 296, 301-302.
76. *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 61.
77. Macaulay 1877 op cit n58.
78. Denning, Lord Alfred Thompson *Landmarks in the Law* Butterworths London 1984 pp32-34.
79. Campbell 1856 op cit n45 p316.
80. Knafla 1977 op cit n37 p58.
81. Gerard op cit n69 p66.
82. Rowse 1978 op cit n64 pp 375-376.
83. Knafla 1977 op cit n37 p17.
84. Collier (ed) op cit n46 p120.
85. Campbell 1849 op cit n4 vol I pp209-211,219.
86. Campbell 1856 op cit n45 pp319-320

87. See Knafla 1977 op cit n37 Chapter 5; Campbell 1856 op cit n45.
88. Collier (ed) op cit n46 pp 208-209.
89. Holdsworth, William *A History of English Law* (2nd Ed) Vol 5 Methuen London p 233n7; Campbell 1856 op cit n45 pp318-319.
90. Knafla 1977 op cit n37 p62.
91. Ibid.
92. Mathews, Nieves *Francis Bacon: the History of a Character Assassination* Yale Uni P. New Haven 1996 p123.
93. "Introduction" in Guy (ed) 1995 op cit n7 pp 8-9.
94. Willian, Camden referred to in Smith 2006 op cit n9 pp236f
95. Weir, Alison *Elizabeth the Queen* Pimlico, London 1999 p446.
96. Smith 2006 op cit n9 p256.
97. Wernham, RB *Return of the Armadas* Clarendon Press, Oxford 1994 p347
98. Cadwallader, Laura Haynes *The Career of the Earl of Essex* Uni of Pennsylvania P. 1923 p70
99. Hammer 1999 op cit n26 pp18-19.
100. Smith 2006 op cit n9 pp 34-35, p 282n 94.
101. Smith 2006 op cit n9 passim.
102. See James, Mervyn *Society, Politics and Culture: Studies in early Modern England* Cambridge Uni P., Cambridge 1986 Ch 9.
103. James 1986 op cit n102 p444.
104. Hammer, Paul E. *Elizabeth's Wars* Palgrave Macmillan London 2003 p2.
105. Strachey, Lytton *Elizabeth and Essex: a Tragic History* Oxford Uni P, Oxford 1981 pp 9-10.
106. Hugh Trevor-Roper quoted in Boyer 2003 op cit n13 p272.
107. Elton quoted in Loades, D.M. *Politics and the Nation 1450-1660: Obedience, Resistance and Order* Fontana, London 1974 p313.
108. Boyer 2003 op cit n4 p278.
109. See Kermodé, Frank *The Age of Shakespeare* Modern Library, New York 2004 pp 53-55.88-89.
110. Jardine and Stewart 1998 op cit n18 p211.
111. Weir 1999 op cit n95 pp435-436.
112. Smith 2006 op cit n9 p222.
113. See Stone 1965 op cit n1 pp 242ff on the effects of the rapier.
114. Hammer 1999 op cit n26 pp 296-297, 325.

115. James 1986 op cit n102 p432.
116. Shapiro, James *1599: A Year in the Life of William Shakespeare* Harper Perennial, New York 2006 p46.
117. James 1986 op cit n102 p423.
118. Macaulay op cit n58 p360.
119. Bowen 1957 op cit n2 p142-143.
120. Bowen 1957 op cit n2 pp144-145.
121. Bowen 1957 op cit n2 bp145.
122. Bowen 1957 op cit n2 p138.
123. Bowen 1957 op cit n2 p148.
124. Bowen 1957 op cit n2 p147.
125. Jardine and Stewart 1998 op cit n18 p245.
126. Bowen 1957 op cit n2 p154.
127. Bowen 1957 op cit n2 pp153-154.
128. Jardine and Stewart 1998 op cit n18 p245.
129. The oft repeated statement that, after his failure on the Attorney's post, he gave Bacon his property at Twickenham has been shown to be false.
130. Macaulay op cit n58 p362.
131. See generally Mathews 1996 op cit n92 Chapters 4 to 6.
132. Jardine and Stewart 1998 op cit n18 p244.
133. See Levy, Fritz "The Theatre and the Court in the 1950's in Guy ed 1995 op cit n7 p291.
134. Handover 1959 op cit n11 p295.
135. Fn 135 Bowen, above n 2, p 178.



## Occasional Address - Australian Catholic University - Spring Graduation Ceremony

**OCCASIONAL ADDRESS  
AUSTRALIAN CATHOLIC UNIVERSITY  
SPRING GRADUATION CEREMONY  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
SYDNEY, 4 OCTOBER 2006**

Today is an important anniversary. On 4 October 1582, Pope Gregory XIII implemented the Gregorian calendar. Accordingly, in nations such as Italy, Poland, Portugal and Spain, 4 October was immediately followed by 15 October. We have become accustomed to rapid change over recent decades, but nothing quite as dramatic as that.

I grew up in a country in which the Prime Minister, Sir Robert Menzies, was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return, taking another six weeks to do so. Such conduct is inconceivable today.

I hold the belief, which many of you probably regard as illusory, that this was not that long ago. The technological changes over this period have been extraordinary and are continuing. For many years, all aspects of Australian life was dominated by what was aptly described as the *tyranny of distance*. In some respects we have substituted the tyranny of distance with the tyranny of immediacy. This tyranny, at least, we share with everyone else.

All aspects of life have speeded up. Olympic sports like luge, cycling and canoeing are now measured in milliseconds. Other sports have changed their rules or reinvented themselves to provide a “fast-food” alternative. One thinks of the introduction of tie breakers in tennis. Sir Robert Menzies would never have approved of one-day cricket.

Anyone using contemporary telecommunications or computer technology has experienced a curious phenomenon: a sense that a particular delay in some processing functions was quite intolerable, even though that length of delay was perfectly acceptable, indeed regarded as miraculous, only a year before.

Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button – in a digital format, so that the replay is accelerated without the high pitch of a Disneyfied chipmunk. In Tokyo there is a restaurant which charges by time. You clock in, you clock out and your bill is computed at a certain number of yen per minute.

Indeed it is necessary for us to create the illusion that we are saving time, even when we cannot do so. On most elevators, the “door close” button is in fact a placebo. It has no function other than to placate those who measure their life in seconds.

Every discipline and profession has been transformed over recent decades by information and communication technology. The practice of law is in large measure an information retrieval business and the new technology has revolutionary implications for it. Electronic communications and the accessibility of legal information online is the most dramatic technical change in my legal lifetime. Yours is the first generation to have been brought up with computers and mobile phones and to regard the internet as a fact of life, rather than as a miracle. The transformation has really only just begun.

There are some who doubt, even those who fear, the implications of the internet, particularly insofar as it may threaten traditional mechanisms of publication in print form. There is nothing new in this. The previous great revolution in communication, the invention of printing, was greeted with the same doubts and fears.

Before the upstart entrepreneur and goldsmith turned printer, Johann Gutenberg, transformed

publishing, it had been conducted for millennia by scribes who, in Europe, were controlled by the Church. A limited form of mass production was able to be achieved in large scriptoria contained in monasteries. Printing was clearly a threat to this business.

As Filippo di Strata, a Dominican friar from the convent of San Cipriano in Murano, an island of Venice, proclaimed in the late 15th century:

“The world has got along perfectly well for 6,000 years without printing and has no need to change now.”[1]

Unlike scribes, persons who were involved in printing were crude and untutored – frequently German interlopers taking work from Italian scribes. Fra Filippo thought that they vulgarised intellectual life, did not really understand what they were doing, made spelling mistakes and typographical errors. The great educational value of having to write things out in long hand, at a pace which enabled a monk to absorb and contemplate the text, was being lost in the speed of the printing process.

What was worse, printers produced enormous quantities of books. Fra Filippo complained that it was hardly possible to walk down the streets of Venice without having armfuls of books thrust at you “like cats in a bag” for two or three coppers. An early form of information overload.

Lascivious Roman love poetry, such as the works of Ovid, were titillating the young and impressionable. Most significant, however, was the threat to the authority of religion. Cheap printed versions of the Bible, distorting what Fra Filippo saw to be the subtlety of the Latin text, were now becoming available to individuals without the intermediation of a priest.

This same process is underway today. A good example is the study of the hundreds of crypto Catholic websites devoted to the Virgin Mary, which operate without any supervision by the Church and consist of a range of cults proclaiming miracles and wonders. They overlap imperceptibly into New Age sites [2].

We must all now face the problem of information affluence. How can each of us make our way through this extraordinary profusion of available information, so that we can make the most effective use of our talent and our time. Each of us must develop our own self-consciously determined process of selection, otherwise mere chance will determine what we learn and what we do. I speak as one who wishes to remain in control of my own intellectual development.

The scale of the problem can be represented by one figure. If you search the words “information overload” on Google, as I did yesterday, you get 3,180,000 hits. That has a certain self-satirical quality. It does, however, reflect the broader problem, which has been called “data asphyxiation”.

On this occasion, I thought I might tell you how I have come to deal with the burden of information overload. It is not a coping mechanism that will suit everyone, but some of you may find it useful. A maxim I have found compelling is: Live as if you will die tomorrow, but read as if you will live forever. An insight that I have found useful in my own journey is that if you try to learn too much, you may end up learning nothing.

I decided long ago that if I kept reading as widely as I had been, and in an unsystematic fashion, I would acquire a lot of information in the short-term, but the depth of my understanding of anything would not improve.

My technique for adapting to information overload was to choose one area of intellectual inquiry about which I could read in-depth, preferably an area not directly connected to my daily activities.

I first chose the history of western Shanghai. This was the early eighties when China was still a totalitarian State and the possibility of the extraordinary change in the People’s Republic, and the re-emergence of Shanghai as a major international city, was not within the realms of contemplation. That project ceased after a few years when I realised that I really couldn’t do it properly unless I learned how to read Chinese. That, at the time, seemed a daunting project albeit, in retrospect, I wish I had had the courage to proceed. Nevertheless, last month, at the invitation of Warrane College to choose whatever topic I wished for the annual Warrane Lecture, I was able to dust off and deliver the first few chapters of the draft I had prepared twenty years ago.

When I abandoned the Shanghai project, the substitute was far removed in time and place. I read in depth into medieval history, concentrating on the life of Thomas Becket. This was a subject on which I was tolerably confident that there were no new documents to be discovered. My schoolboy Latin was probably enough. Becket had attracted a large, but finite and apparently manageable, body of historical writing.

This became my intellectual hobby. It was a disciplined way of organising my ignorance. It had a purpose and a finite end. Instead of acquiring a glib understanding on a wide variety of subjects, I could come to understand a particular subject in-depth and eventually, perhaps, write about it. My overseas travel acquired a purpose. There were places to be visited, such as Canterbury itself. In those pre-Amazon days, books had to be discovered, often by chance, in second hand bookshops. I recall well the thrill of finding a definitive biography in a Paris bookshop of the contemporary French king, Louis VII. I did not experience anything like the same sensation when, in order to check whether this was still the definitive biography in french, I conducted a thirty second check on Amazon France, to find that it was.

Eventually I was able to organise this research in the form of a draft during a sabbatical I gave myself from the Sydney bar in 1992. Nothing more was done until 1999, when I was asked to address the St Thomas More Society.

Over the course of five years, this little obsession transformed itself into a series of lectures to the Society on the life and death of Thomas Becket and his relationship with Henry II. It has been a wonderful journey and when the lectures were published last year by the Society as a book, this journey was over.

In 2003, when I finally killed Becket, I began the search for another intellectual hobby. I have now signed up for another five years of lectures with the St Thomas More Society to cover the conflict amongst the great lawyers of late Elizabethan and Jacobean times, roughly from 1590 to 1620. These lectures will cover the interaction of Francis Bacon, Sir Edward Coke and Lord Ellesmere, against the background of one of the most significant transitional periods in British history. The first lecture will be delivered next month. As with the Becket project, I will be engaged with Catholic martyrdom. However, on this occasion, having jumped four centuries, there will be Protestant martyrs too.

This has been part of my journey. I thank the Australian Catholic University for the recognition you have given me by this award of an honorary doctorate. It is awarded for my services to the law. I indulge the conceit that my work on Becket could have entitled me to a real doctorate. In my own mind I will privately extend your testamur to cover it.

I congratulate each of you on your graduation and wish you well on your journey.

#### END NOTES

1. This and the following quotations are from Martin Lowry, *The World of Aldus Manutius: Business and Scholarship In Renaissance Venice*, Basil Blackwell, Oxford, 1979 at pp26-35; and Vernon J Hibbetts "Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews", 1996, 30 *Akron L. Rev* 267 at 268-271.
2. See Paolo Apolito *The Internet and the Madonna* University of Chicago Press, 2005.

[Print Page](#)[Close Window](#)

## Shanghai And The West: First Contact

**Shanghai And The West: First Contact**  
**THE WARRANE LECTURE**  
**BY THE HONOURABLE J J SPIGELMAN AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**WARRANE COLLEGE**  
**THE UNIVERSITY OF NEW SOUTH WALES**  
**SYDNEY, 20 SEPTEMBER 2006**

For several hours, virtually every day, over a period of six months in late 1606 and early 1607, father Matteo Ricci, the pioneer Jesuit missionary to China, sought to convey the precise meaning of Euclid's *Elements* to Xu Guangqi, a convert to Christianity, known as Paul Xu. Laboriously, he read and explained the contents of one of the seminal books of Western civilisation so that Xu could translate it. The axiomatic style of *The Elements* was difficult to convey in Chinese, which had no copulative verb, linking complement to subject, in the affirmative. Furthermore, China had no mathematical tradition of definition.

After many years of study and struggle with the Chinese examination system, Xu had passed the *jinshi* examination two years before. He was appointed to the elite Hanlin Academy, from whose ranks the most important positions in Chinese administration were filled.

Xu was a member of a wealthy gentry family from Shanghai, a background without any tradition of scholarly attainment, but which had an estate just outside Shanghai at Xujiahui, which would become a Jesuit sanctuary. Eventually Xu would hold the rank of Grand Secretary in Beijing – in effect Prime Minister to the Chinese Emperor – probably the highest post that any native of Shanghai has held in China. It is definitely the highest post ever held by a Christian.

Shanghai was a natural harbour safely tucked away 12 miles south of the mouth of the Huangpu River, the last tributary before the 50 mile wide Yangzi pours into the East China Sea. The Yangzi basin is a vast deltaic plain, created over the millennia by the eternal pulse of the muddy Yangzi, sweeping down over 3,000 miles of China and depositing hundreds of millions of tonnes of rich alluvial soil each year. "Earth", an ancient proverb said "destroys water" just as, in the symbiotic circular antagonism of the Five Elements of Nature, "water destroys fire"; "fire destroys metal"; "metal destroys wood"; and "wood destroys earth". Shanghai sat on several hundred feet of thick alluvial loam – earth that had displaced water – on the edge of a dense network of waterways created by hydraulic engineering.

It was, probably, his personal background in a family concerned with practical affairs in a region preoccupied with and dependent on the control of water that had attracted Xu to what the West had to offer. Early in his career he had produced a detailed proposal about the control of water which displayed a knowledge of Chinese mathematics and its practical application in the surveying of land and the drawing of maps.

Ricci had received a rigorous training in mathematics and astronomy at the *Collegio Romano*, the Jesuit University in Rome where he was taught by Christopherus Clavius, one of the great Renaissance mathematicians. He brought a detailed knowledge of Euclid's text on his mission to China.

Xu would later explain his fascination for Euclid: "Western mathematics is more valuable as it supplies explanations which show why the methods are correct". This was in contrast with the Chinese mathematical tradition, which had always concentrated on how to solve a problem, rather than upon the proof to explain why the solution worked. Rigorous proof had never been a goal of Chinese mathematics. However, such proof was of pivotal significance to the practical application of mathematical knowledge. Scorned by the scholarly class, which emphasised learning the humanities, Chinese mathematics had, to a significant degree, become the reserve of magicians who propounded geomancy and chose lucky days.

Ricci wrote in his Introduction to the Chinese edition of Euclid:

“My remote western country, though small in size, is unique among all other nations in the analytical rigour with which its schools examine natural phenomena. For this reason we have many books that investigate such phenomena in the fullest detail. Our scholars take the basic premise of their discussions to be the search for truth according to reason and they don't accept other people's unsubstantiated opinions. They say that investigation using reason can lead to scientific knowledge, while someone else's opinions lead only to my own new opinions. A scientific knowledge is absence of doubt, opinion is always accompanied by doubt.”

When Xu and Ricci published *Euclid*, the level of Chinese technological development was still considerably higher than that of the West. Ricci in his *Introduction to Euclid* correctly prophesied the change to come. He summarised the practical utility of geometry, including in the design of mechanical devices for lifting weights or moving goods, the application to irrigation and drainage mechanisms, for the design of locks in waterways, the development of optical devices, the accurate geographic representation in maps and, with particular emphasis, the effectiveness of weapons such as the cannon, together with the calculation of military logistics and manoeuvres and the construction of fortifications.

In the years to come, the influence of the translation of *Euclid* waned as Chinese mathematics reverted to a myth of a golden past when Chinese mathematics had once been highly developed but destroyed by an ignorant Emperor. Indeed, in his Preface to the translation Xu had felt obliged to refer to this Chinese loss. There developed a belief that *Euclid* had in fact had access to these now lost Chinese sources and, therefore, had nothing to say which could not be discovered within China itself.

In the centuries ahead new scrolls would be discovered. They indicated that Chinese mathematical knowledge had had just such a regression. Chinese mathematics became about *finding* rather than *creating* and the view developed that Western mathematics, like everything else from the West, had nothing to offer.

One of the reasons why *Euclid's Elements* was treated with suspicion was the question raised by later mathematicians as to why it was that only the first six books of *Euclid* had been translated into Chinese. Xu had wanted to translate the whole but Ricci, in accordance with the actual curriculum of the *Collegio Romano* that he had studied, knew that it was the first six books that mattered.

The later Chinese mathematicians wanted to know what it was that Western scholars were trying to hide from them, perhaps it was the original Chinese sources. Books 7 to 15 of *Euclid* would not be translated until the mid 19th century when, in the Shanghai compound of the London Missionary Society, a technically trained evangelist called Alexander Wiley would each morning, together with the corpulent Chinese mathematician Li Shan-Lan, go through the same painstaking process that Xu Guangqi and Matteo Ricci had undertaken two and a half centuries before.

By then, however, the advances of Western technology, determined in large measure by Euclidian methodology, had returned and enforced a new technological superiority, notably at Shanghai itself.

\* \* \* \* \*

On 20 June 1832, with symbolism bordering on the vulgar, two English sailors from *The Lord Amherst* shouldered open the locked entrance gates of the major public building in Shanghai so that their commander could present a petition demanding that the city be opened to British trade. As the commander, Hugh Hamilton Lindsay, reported to his superiors in the British East India Company: “They shook them off their hinges and brought them down with a great clatter”. However, conscious of British standards of proper behaviour, he took pains to report that, of course, he *had* knocked first.

Inside the compound, the Chinese officials, who had spent the morning sending polite messages of prohibition to Lindsay, finally accepted that the visitors were incapable of civilised behaviour and invited them for tea. None of these mandarins, as members of the official class were already called by Europeans, had ever had direct contact with the fortress community of Western traders at Guangzhou, then called Canton, so they assumed that a soothing example of proper decorum would lead to the cessation of this brash disruption.

“You cannot trade here”, the second ranking official in Shanghai told Lindsay. “You must go to Guangzhou”.

However, Lindsay's covert mission for the East India Company – whose monopoly on the China trade was under threat and would be removed two years later – was precisely to test how strictly the rule that Western trade had to go through Guangzhou would be enforced. He demanded an audience with the senior official in the City, the Daotai. The message from the Daotai was the same: "It is an unheard of thing for any ship to come to Shanghai", he told Lindsay, and what was without precedent was plainly impermissible. "Conform to the established laws of the Celestial Empire", he continued, "and don't trouble us with your presence".

From the first cup of tea, the Chinese engaged Lindsay in detailed negotiations about his departure. Would he stand or be permitted to sit in the presence of the Chinese officials? Eventually he sat. Would he take back his original petition once it had been read and copied? He wouldn't. Would he accept a reply to his petition which used terminology of rejection not just refusal? No, he wouldn't. Most of all, so far as the later folklore on the China coast was concerned, he was the first to reject the use of the word translated as "barbarian", which Chinese officials had hitherto used to describe Europeans.

Two days before Lindsay's arrival, the Daotai, warned of the approach of *The Lord Amherst*, had issued a public proclamation stating: "All commercial intercourse with the barbarian ship is strictly forbidden".

Reacting to the use of the word "barbarian", Lindsay protested: "The affront is intolerable, for by such conduct the respectability of my own country would suffer. The great English nation has never been a barbarian nation, but a foreign nation".

A document was produced which referred to him as an "English trader". Even though the Shanghai public never saw it, Lindsay was placated. However, his conduct was not calculated to convince any Chinese that the term was inappropriate.

Lindsay could neither buy nor sell without official connivance – approval being out of the question. The Daotai offered Lindsay the supplies he needed as gifts. Lindsay, perhaps perversely for a trader, refused to accept. He was determined to buy them, if only to establish some slight precedent for trade. The Chinese officials eventually relented the prohibition, when it became clear that Lindsay's refusal would delay his departure.

Lindsay stayed for 18 days. The official report to Beijing explained that the length of the stay was only due to the inability of the barbarian ship to travel in the inclement weather. The barbarians, it said "came only to plead for trade, but since they had now been enlightened by proclamations (about the Imperial law) they perceived and repented and did not dare ask for trade again". Once the wind had changed, of course, the barbarians "dared not loiter". Most significantly, it was formally reported, there were no "clandestine dealings" in Shanghai.

The Governor of Jiangsu Province at this time was Lin Ze-Xu, a strong-willed vigorous and unusually incorruptible Confucian official with the appropriate nickname of "Blue Sky", representing his stainless character. He suggested that *The Lord Amherst* be searched for opium, and if any was found, that it should be burned. He was reprimanded for this suggestion from Beijing. He had failed to appreciate the barbarian's misfortune in not knowing how to behave properly. He had forgotten that indirect action and economy of effort were basic principles of good government, the objective of which was to re-establish harmony, not to ensure that some abstract principle were satisfied. The task of a good official was frequently stated as: "To reduce big matters into small matters and small matters into nothing".

At this stage opium could still be regarded as a small matter capable of control. Eventually Lin was promoted to the Governor-Generalship of two inland provinces and vigorously enforced the law against opium smoking. However, as the problem grew, he was appointed as the Imperial Commissioner at Guangzhou and there took steps to eradicate the poison from Chinese society that would lead to the first Opium War and the creation of Shanghai as a Western treaty port.

The visit of *The Lord Amherst* was described, in the formal report from the Shanghai officials, in terms of the restoration of harmony by the skilful management of the local officials. However, by the time those reports reached Beijing it was known that *The Lord Amherst* had continued its voyage by travelling, impermissibly, to the north. The Shanghai officials were then chastised for their failure in "soothing and controlling the outlandish foreigners".

Lindsay and Gutzlaff also made their reports which were published in England and became very influential. Lindsay was particularly critical of the deceptive conduct of the local officials referring to their "petty and degrading duplicity". He said this without a trace of embarrassment about the fact that, in order to hide his association with the East India Company, Lindsay had given a false name and claimed to be a private trader blown off course on a voyage from Bengal to Japan. Gutzlaff, who had also given a false name and translated everything that Lindsay said, had spent some of his time distributing Chinese language excerpts from the Bible and certain religious tracts with such titles as "A Tract against Lying"; "A Tract against Gambling" and "A Tract in Praise of Honesty".

Lindsay was adamant as to the model of effective European conduct. "Compliance" he reported, "begets insolence; opposition and defiance produces servility and friendly professions". It apparently never crossed his mind that he was simply being humoured in order to speed his departure.

In his report, Lindsay's strongest contempt was reserved for his assessment of Chinese military prowess. He dismissed the war junks he saw as "wretched and inefficient". He thought the army, with its antiquated and decrepit armaments, would be despatched by one-tenth the number of European troops.

Gutzlaff, the missionary, plainly shared the low value placed on military virtues by the Chinese scholar gentry and its difficulty in accepting the proposition that great skill in the art of killing others was a mark of a superior civilisation. He seemed to understand the Chinese position when he said: "From the long peace which China has enjoyed, all their military works have fallen into decay. They even seem anxious that all should crumble into dust and that wars should be blotted from remembering ... They detest bloodshed and have generally made the greatest sacrifices to prevent it. We attach no blame to their cowardice", a word he clearly used bearing his European audience in mind, "but hope that while they continue to be pacific they will cease to be overbearing towards other nations who have power to humble their arrogance".

The Shanghai that Lindsay visited was a great trading port. On his first approach, just beyond a protective bend in the river where the Huangpu veered north and the Suzhou Creek came in from the west, Lindsay had seen a forest of masts. During his stay his sailors had counted the junk traffic reporting, in one week, the arrival of about 400 trading and fishing junks, ranging from 100 to 400 tonnes in size.

The city, Lindsay would report, "possesses extraordinary advantages for foreign trade. One of the main causes of its importance is found in its fine harbour and navigable river by which, in point of fact, Shanghai is the seaport of the Yangzi and the principal emporium of Eastern Asia".

Shanghai was also surrounded by an extensive productive region, particularly of cotton. As Gutzlaff reported: "As far as the eye could reach over this extensive plain, there was no spot bare of cultivation or of exuberant vegetation".

All of this was the product of massive construction projects which had built protective seawalls, drained marshes, created canals, established flood control systems, redirected and dredged rivers, which infrastructure had largely been created at a time when Lindsay's and Gutzlaff's ancestors were being called "barbarians" in Latin.

Indeed, it was engineering that created the safe haven of Shanghai harbour by diverting the original flow of the river towards the north, so that it became a tributary of the Yangzi and no longer flowed directly to the sea and the perennial need to dredge silt was removed.

The advantages of Shanghai's natural location were, however, not sufficient to ensure its mercantile role. By Imperial edict, as far as I am aware, of unknown purpose but typical of the detailed political interference with commerce, junks from the south were not permitted to go beyond the Yangzi and junks engaged in trade from the north were not permitted to go further south. Reorienting the river to become a tributary of the Yangzi established Shanghai as an entrepot where junks from both north and south could call. Shanghai merchants acting as commission agents, jobbers or brokers, accumulated supplies from small producers or broke down bulk shipments from both the south and the north, dispatching the repackaged goods on their way. They also traded in the considerable agricultural and manufactured produce of the region.

Shanghai junks of brown oiled wood with four masts, engaged in trade with the northern coastal provinces, exchanging the products of the south and of the Yangzi basin, notably silk and cotton, for

northern products such as the Shandong peninsula's soya beans, a versatile source of numerous food forms which, even after being fed to animals, returned 80 percent of their fertilising value to the land on which cotton was grown in the region. Through the port flowed an endless stream of food stuffs – rice, sugar, fungi, fish, tea, fruit and gourmet delicacies like birds nests – as well as timber, bamboo, shoes, paper, leather goods and cotton or silk products in every form.

The goods carried north had been brought to Shanghai on the flat bottom sand junks of Jiangsu Province or on the round bottom junks from the southern province of Fujien with their high elaborately painted sterns or on the black hulled Ningbo junks from the adjoining province of Zhejiang or on a flotilla of varied designs from the places permitted to trade in Shanghai including Thailand, Malaya, Taiwan, Vietnam and Japan, but not Westerners.

Every week hundreds of junks with their high sterns, outthrust bows, watertight compartments, massive rudders capable of performing as keels, square lug sails with separately manoeuvrable panels each stiffened by bamboo battens, would discharge and collect goods directly from the wharves along the deep river frontage. Other junks made up the large fishing fleet based in Shanghai. All of these junks were extremely efficient vessels, of great structural rigidity, able to sail very close to the wind. The centuries old Chinese technological superiority with respect to sailing ships had only recently been surpassed in the west. The Huangpu River and its surrounding network of creeks and canals teemed with countless sampans transporting material within the river port.

The owners of the junks and sampans, like the crew of the East India Company on its ships, found it expedient to permit their crews to engage in trade on their own account. An entrepreneurial spirit was alive in Shanghai, within the confines of an inhospitable political system.

Perhaps the most notable aspect of the Shanghai trade was the fact that the largest single item of China's internal trade was diverted elsewhere. This was the grain tribute, a national system of taxation by which the Qing Emperors, descendants of the conquerors from the northern province of Manchuria who expelled the Han Ming Dynasty, fed their northern provinces by means of the Grand Canal, an internal man-made transportation route, safely distant from the pirates who had, in the past, attacked the coastal provinces.

In 1824, when the canal had completely silted up just north of the Yangzi river, urgent alternative arrangements had to be made. Over 1500 privately owned junks were chartered to carry the grain from Shanghai to Tianjin in the north. The success of this alternative route and its superior economic efficiency should have been apparent. However, Chinese commerce was not capable of adapting in this way. The dominant Confucian ideology, based on centuries of experience and contemplation, emphasised the preservation of social harmony. Economic productivity was not highly regarded.

Accordingly, the grain tax from the Yangzi Basin did not come through Shanghai but went inland into the interstices of a debilitating bureaucratic machine, the Beijing controlled Grain Tribute Administration, for transport by the specialist Grain Transport Service through the Grand Canal, which was the particular preserve of these corrupt conglomerates.

Tens of thousands of hereditary boatmen, who sometimes assigned their rights to vagrant labourers, poled and hauled grain barges along the 1,000 mile, flood prone, frequently silting Grand Canal, past hundreds of overland inspection points, protected by a specialist constabulary, directed by ever increasing layers of official sinecures, on all of which numerous communities were reliant. The euphemistically styled "inspection fees", payable at each of the superfluous inspection points, almost trebled between 1800 and 1821 as the venality of the officials was given free reign. Every effort to divert even part of the transport to the swifter, cheaper coastal route had been stymied by the strength of the vested interests dependent on the trade.

Officials who advocated the permanent adoption of the alternative coastal route were rebuffed. Indeed, they in fact received no support from the Shanghai junk owners who apparently had most to gain. However, the Shanghai maritime merchants had prospered on the periphery of official China. They had no desire to engage in a trade which necessarily involved bureaucratic supervision that would inevitably attach itself, like barnacles, to their fleet. For much the same reasons they were not excited, at first, by the prospect of trade with the Europeans.

The Shanghai of 1832, when *The Lord Amherst* arrived, was a city of some quarter of a million with an equivalent number in the immediately surrounding region. It bore no resemblance to the Chinese urban ideal, based on cosmological principles, of a square, walled city containing a precise grid of



north south and east west intersecting avenues. This was never an official city. It was always a mercantile city. It had never been a capital of anything – not of a province, or of a prefecture. Eventually, it had become a city of the lowest possible official status, well below its economic significance.

Shanghai was oval shaped, with an attempt to create some order by 12 to 15 foot wide streets, located in a dense cobweb of six-foot wide alleys. It was surrounded by a 27 feet high, three-mile long wall, beyond which the city spilled in a compressed clutter of wooden houses, which congested the area between the wall and the riverside warehouses and piers where the junks, anchored in tiers, housed a floating population of unknown size. Such sense of urban design in the old city as had survived from the time of the Ming was entirely absent in the suburban sprawl to the east and south of the city wall.

The wall had been built during the Ming dynasty about 300 years before, ostensibly as a protection against marauding Japanese pirates. Old maps suggest that the Ming city had a gracious urban design with many gardens and temples. Under the Qing dynasty, real estate developers had obliterated most elements of grace.

By 1832 the city spread back gracelessly from the embankment rampart against the wall – an expanse of black tiles over tightly packed one storey buildings with weathered, grey-dull brick walls interspersed with temples, which provided a contrasting curved roofline of glazed tiles and the traditional upturned corner eaves, described in a Chinese poem as “bird’s wings spread out ready for flight”.

The serpentine street layouts slithered around a network of internal canals, theoretically cleansed twice a day by the tidal Huangpu through the city wall gates, but more frequently clogged by refuse and silt, stagnant and unsuitable for personal use without the liberal application of alum, a hydrated salt which served as a flocculent, aggregating the contents into removable sediment.

There was no street lighting, no sewerage, no water reticulation and no system of garbage disposal. The streets were cleaned by the rain, the mud was dried by the sun and the dust was swept by the wind. The collection of night soil was a private business enterprise with daily pickups from dwellings for sale as fertiliser to surrounding farms. Everything else went into the streets or the cloacal canals.

The inexplicable hierarchy of streets and alleys – some impressively paved with flagstones, others merely with bricks or tiles – which was only tangentially related to destination or function, were all slippery with water, carried from wells and canals in buckets swinging on bamboo poles to homes for drinking and to the numerous bathing establishments where a steam room and hot water baths, 30 feet by 20 feet, were available at a price, in November 1843, of 6 copper cash or 1 British farthing – or 18 cash for first class treatment with private room, a cup of tea and a puff of tobacco.

The water carriers were an omnipresent feature of the bustling treadmill of daily life, a kaleidoscopic congestion of intense activity: bamboo pole coolies, jugglers, storytellers, fast food vendors, barbers, beggars with every conceivable human injury – often self-inflicted, storekeepers behind scarlet and gilt signboards, hotfooted sedan chairs and cumbersome wheelbarrows. Invariably there was a clamorous procession for either a funeral, a wedding or some religious observance, jangling and clinking towards one of the hundreds of temples and shrines individually dedicated to Gods with separate responsibility for wind, thunder, lightning, rain, agriculture, plague, pestilence, drought, literature, war, fire – the God of fire had two shrines, one of which was conveniently juxtaposed with a shrine for the God of water.

In the cacophony of deities that constituted Daoist religious practice, each separate trade had its own God from whom practitioners sought protection, harmony, salvation and prosperity for themselves and their community. Tea merchants had Luiu, beancurd traders had Liuan, rice dealers had Jiangxianggong, with other Gods for cooks and carpenters, barbers and butchers, cake makers and calligraphers, fishermen and financiers, printers and potters, dyers and diviners. Even the mandarin scholars, after many years of invoking the assistance of Kuixing, the God of Examinations, eventually graduated to Wenchang, a brilliant scholar of the Tang Dynasty immortalised as the God of Literature who, understandably, also served double duties as the patron God of stationers.

However, in Shanghai the greatest number of temples and shrines were dedicated to Tian Hou, the Queen of Heaven, the patron God of sailors. Her image was carried on every junk. She was a fisherman's daughter from Fujien province and became Shanghai's most popular selection from the Chinese pantheon of specialist gods. This, after all, was a major port.

Within the walled city, the temple of the city god, Chenghuan Miaou, was the place where the city magistrate, with his full entourage of chair bearers, militia, runners and secretaries, came to perform essential rituals on the 1st and 15th of each month. It was, like all the public buildings of Shanghai, an undistinguished structure.

Behind the temple, however, lay a significant element of civic virtue: a garden and a magnificent one at that. The Yu Yuan garden – the only remaining large garden of the Ming city – would not have been out of place in one of the great cities of the Empire, even in the provincial capital of Suzhou, 150 miles away, traditionally known for its magnificent gardens and as a centre of style, learning, art, grace, elegance and beautiful women – everything that a tawdry port and mercantile city could only envy.

The Shanghai garden was a labyrinth of snaking paths, of curving walls capped with undulating dragons, of grotesque rockeries – including a 25 foot high artificial mountain and a nine foot high single piece of perforated grey/green limestone, gnarled, porous and craggy, known as the Exquisite Jade Rock, originally selected for the Imperial collection by the rock convoys of the eccentric, art loving 12th century Emperor Hui Zong, but its transport had sunk near Shanghai. There were pavilions, courtyards, stairs, zigzag corridors, winding balustrades, terraces, wood carvings, stone statuary, moulded tiles, lattice windows, moon doorways, semi-circular bridges, pebble patterned pavements, benches, sculptured reliefs, poetry inscribed panels, flowers, shrubs, bamboo groves, contorted trees, waterfalls, streams and ponds, all intricately sequestered and creatively intertwined to adduce surprise, to intrigue, to charm, to pacify, to salve or to relax the viewer through nature's cycle of birth, growth and decay in the changing seasons.

There was no expanse of green grass and symmetrical flowerbeds of the Western garden tradition, which manifests a determination to conquer nature, rather than to rejoice in its lack of discipline. "Grass" as one Chinese gardener languidly and dismissively observed "while no doubt pleasing to a cow, could hardly engage the intellect of human beings".

A Chinese garden such as this is a work of art, transforming and transcending its constituent elements into a total enveloping work requiring the skills of a painter, a sculptor, an architect, a naturalist, a landscaper and a poet, the combination of diverse talent creating an enfolding, changing art form of a kind not hitherto attempted in Europe, with the partial exception of the medieval cathedrals.

It had been the wealthy merchants of Shanghai who had originally bought the privately owned Yu Yuan garden and donated it to the City Temple as a public space. Major merchant guilds, including those for banking, the bean trade, hats, shoes, flowers, jewellery, firewood, butchery, copper utensils, and the beggars had their meeting places in the 30 pavilions of the Yu Yuan garden. Each guild accepted responsibility for the maintenance and development of its portion of this public facility. Far from the Daoist ideal of a scholar recluse seeking serenity by communing with nature, which the original garden designer – Zhang Nanyang, who built some of the great gardens of Suzhou – sought to invoke, the new owners superimposed intense commercial activity, organising and directing the flow of goods and services to and from the surrounding region and for the entrepot trade of the port.

Near the Exquisite Jade Rock, and its special viewing pavilions, was a small rectangular lake with a nine turn zigzag bridge. The irregular form would prevent the entry of evil spirits which were, according to universally accepted superstition, conveniently low flying and travel only in straight lines. Here stood the Mid Lake Pavilion, headquarters of the blue cloth trade, the major local cottage industry, with carding, spinning and weaving performed not in separate factories, but in the peasant homes of dozens of hamlets surrounding Shanghai. Cotton goods were the leading local export.

Later the Mid Lake Pavilion would become a teahouse, perhaps the most famous amongst western residents of Shanghai who, desperately seeking confirmation of their sense of significance, adopted a story that this was the very same teahouse that featured on the willow pattern plate – the most famous western image of China during the 18th century *chinoiserie* fad, which passed into Western operatic folklore. In fact the pavilion was not even built until 1784 and its original regulations expressly forbade its use as a teahouse or for medicine and fortune telling. Its function changed only at the end of the 19th century, when the blue cloth guild collapsed under a flood of cheap textile imports.

\* \* \* \* \*

On 5 September 1832, after a six-month voyage *The Lord Amherst* returned to Macau, a Portuguese settlement at the mouth of the Pearl River estuary below Guangzhou. All of the Western merchants were required to stay there, except during the trading season of November through March.

No one treated the news from the expedition with greater interest than a 40-year-old doctor turned trader called William Jardine. Single-mindedly pursuing the creation of a fortune, which would eventually enable him to return to Great Britain in baronial style, Jardine was a shrewd and determined merchant. To ensure that visitors kept to the point, his office only contained one chair, for himself. His Chinese nickname seemed appropriate. They called him the "Iron Headed Old Rat".

Jardine saw considerable value in the commercial intelligence brought back by Lindsay and his party. To exploit the opportunities, however, he needed the assistance of Gutzlaff, both as guide and as interpreter. Obtaining the services of a missionary may be difficult, however. Jardine sold opium.

With his partner, James Matheson a fellow Scot 12 years his junior – and like himself a second son, who had to make his own way in the world – Jardine had become one of the major suppliers of opium to China. The narcotic was a key link in the triangular British-controlled trade by which tea was shipped from China to England, paid for by opium shipped from India to China, which in turn paid for exports from England to India.

Opium formed a significant part of the revenues of the East India Company, known in Asia as "The Honourable Company", at the time without irony. The company controlled the production of opium in Bengal and organised annual auctions at Calcutta.

Because the consumption of opium was illegal in China, the Honourable Company did not handle it directly. Doing so could jeopardise its enormously profitable monopoly on the tea trade between Guangzhou and England. Accordingly, it felt obliged to maintain that surface propriety so beloved by both Chinese mandarins and the English upper classes. Even in his covert mission pretending to be a trader, but in fact representing the East India Company, Lindsay had not carried any opium on board, to the surprise of many Chinese he met.

The company's abstention from the distribution end of the market created an opening for merchant adventurers like Jardine and Matheson. They could act as commission agents for the Indian traders, who bought the drug at the Calcutta auctions, exporting it to China with the encouragement of the Honourable Company, which intended to buy their silver proceeds from opium sales with negotiable bills of exchange payable in London.

Jardine had come to Asia 20 years before as a surgeon in the employ of the Company. At that time only 2,000 chests of opium were exported to China, most of it Patna and Benares opium from Bengal. The distinctive packaging and trademark used by the East India Company had become a hallmark of quality for Chinese consumers. Each clearly recognisable mango wood chest comprised 40 compartments arranged in two layers, every compartment containing a trademarked three pound spherical cake of opium, protected by an inch thick layer of poppy leaves.

The Honourable Company had displayed a fitting concern for the promotion of its illegal product. "We had opium sent to us in small quantities", Jardine would later reveal, "packed in different ways, with a request that we would sell it and ascertain the kind of package that suited the Chinese market best".

At first the trade grew slowly, reaching 4,000 cases in 1820. Then it erupted, tripling within the decade and tripling again in the next. The new supplies included a considerable quantity of Malwa opium from the western Indian states, not yet controlled by the East India Company. Although regarded as inferior in quality, Malwa opium did compete in price. Independent traders sought access to production beyond the strict quotas monopolistically imposed by the East India Company in Bengal. When Jardine returned to Guangzhou to stay in 1822, he came as the agent of Parsi traders from Bombay who dealt in Malwa opium.

The Parsis of Bombay, abiding by the faith of the monotheistic Persian prophet Zoroaster, were refugees from Muslim persecution in Iraq and Iran. They had prospered in the comparative religious freedom of Company controlled Bombay. By successfully avoiding the efforts of the Honourable Company to restrict exports from Bombay, and therefore limit independent production in the western states, the Parsis caused an explosion in the availability of opium in China. They were the owners of the opium which was distributed on a commission basis by partnerships like Jardine Matheson and Co. The risk of piracy and price collapse was borne by the owners. As Jardine put it, "the opium commission business was by far the safest trade in China".

The marketing of opium turned on a range of commercial considerations about which up-to-date

intelligence was essential. Information was required about the full range of factors that could affect supply and demand: crop conditions in India, the latest auction results, the level of stocks held by rival traders, the timing and intensity of the periodic attempts by Chinese officials to suppress the trade. Agents like Jardine and Matheson controlled the final wholesale distribution point. That required the maintenance of fully armed ships and the systematic bribery of Chinese officials, designed not just to permit Jardine Matheson to trade but also to interfere with the activities of their rivals.

In 1830 Jardine, when encouraging a friend to invest in opium, asserted: "Opium is the safest most gentleman like speculation I am aware of". Jardine later exclaimed at a dinner of Guangzhou traders, "We are not smugglers gentlemen! It is the Chinese government, it is the Chinese officers who smuggle and who connive at and encourage smuggling, not we".

English law at that time prescribed that a national boundary did not extend beyond the high watermark. The three-mile limit rule came later. Jardine was satisfied that it was impossible to "smuggle" in international waters. If the Chinese had a different rule, or even a rule similar to the principle of accessory before the fact of the English criminal law, that would not justify calling someone a "smuggler" in English.

Jardine was much concerned with his status as a gentleman, and with reason. A growing body of opinion in England regarded the narcotics trade with distaste. He did not wish to return to Great Britain with a fortune, only to be shunned by British society. Nevertheless, he and other Britons, notably Scottish, together with a few Americans and significant number of Indians, more often than not of middle eastern extraction, particularly Parsis and, later, Jews, were the Colombian drug barons of their day. They founded a number of family fortunes and major corporations which are still of great significance.

Opium would remain legal in England until the first *Pharmacy Act* in 1868. Notwithstanding its literary glorification, by Thomas De Quincy and Samuel Taylor Coleridge, the main use of opium in England was as an infant quietener for the phalanx of harassed English nannies. Druggists sold large quantities of opium-based elixirs under such brands as "Mrs Winslow's Soothing Syrup" and "Godfrey's Cordial", especially to the baby-minders employed by working mothers.

The British and American traders were wholesalers, rather than retailers. They sold to Chinese merchants who visited the heavily armed opium store ships situated, with the connivance of the bribed local Chinese mandarins, off Lingding Island near Macau. There were fortunes to be made, which could be laundered through East India Company bills of exchange.

Matheson had attempted to create a direct coastal trade some years before. The reports brought back by Lindsay and Gutzlaff indicated that the time had arrived to try again. Indeed, it was on 1 July 1832, while *The Lord Amherst* was actually in Shanghai, that the trading house of Jardine Matheson & Co, destined to be the most enduring firm on the China coast, was formally established under the name which continues to this day. Its first major enterprise as such, in the wake of the return of *The Lord Amherst*, was to dispatch a ship full of opium to trade along the coast, including at Shanghai.

On such a journey, the traders could not rely on the gibberish pigeon English in which staccato negotiations were haltingly conducted in Guangzhou and on Lingding. Few westerners had had the determination or the motivation to flaunt the Imperial ban on the teaching of Chinese to foreigners. Only one – Karl Gutzlaff – had managed to master the dialects of a number of different provinces, whose languages were as closely related, but also as mutually incomprehensible, as French, Italian and Spanish.

A pioneer of the contemporary Protestant religious revival, which emphasised the value of evangelical preaching of the Gospel with the Scripture as the only basis for a personal faith, Gutzlaff had a motive for understanding the Chinese people which no merchant could share. Unlike the merchants, he and his fellow missionaries had come to help the Chinese, rather than themselves.

"My love for China is inexpressible", he wrote to a friend, "I am burning for their salvation. I intercede for hundreds of millions which do not know the Gospel, before the throne of grace". Gutzlaff was never short on hyperbole.

"I would give a thousand dollars", one English trader wistfully stated "for three days of Gutzlaff". Jardine and Matheson were willing to pay what it took.

In the previous year, the monopolistic East India Company, acting in retaliation for the new competition from West Coast opium which it did not control, had doubled production in its Bengal region. An oversupply threatened and, accordingly, new markets had to be found.

Jardine, no doubt, stifling his irritation with Gutzlaff's aura of Teutonic omniscience and his evangelical fervour, which he probably regarded as humbug, approached Gutzlaff with care.

"It is our earnest wish that you should not in any way injure the grand object you have in view by appearing interested in what many consider an immoral traffic", he wrote engagingly. "Yet such traffic" he continued, "is so absolutely necessary to give any vessel a reasonable chance of defraying her expenses that we trust you will have no objection to interpret on every occasion when your services may be requested".

Of course Jardine also offered to support the propagation of the faith by underwriting Gutzlaff's Chinese language magazine for six months. He added a further incentive:

"The more profitable the expedition, the better we should be able to place at your disposal a sum that may hereafter be employed in furthering your mission and for your success, in which we feel deeply interested."

Gutzlaff had lost his original sponsorship from the Netherlands Missionary Society, when he decided to work in China, too far afield from the Dutch colonial sphere of interest in the East Indies. He had supported his mission on the inheritance from the first of his three English wives, but that would not last indefinitely. He needed the money.

Gutzlaff had experienced the ravages of opium at first hand. Dressed in Chinese garb, he had once travelled along the coast in a Chinese junk. At times on the voyage he was the only person aboard who was not stupefied by the drug. He had no illusions about the effect of opium on addicts as it ruined their digestion, sallowed their complexion, separated their gums, blackened their teeth, rotted their minds and induced constant trembling. These were the souls he had come to save. God, however, works in mysterious ways.

A zealot like Gutzlaff, who had studied medicine in order to better equip himself for his mission, can convince himself of just about anything. In his published memoir, recording how he accepted the Jardine offer, he said: "After much consultation with others and a conflict in my own mind, I embarked on *The Sylph*".

*The Sylph* was one of the first opium clippers, specifically designed for, and dramatically increasing the productivity of, the opium trade. A barque rigged, square-sterned vessel of 300 tonnes, *The Sylph* had been designed in London by Sir Robert Sebbings, then surveyor of the Royal Navy, to the order of a consortium of Calcutta merchants. Sleek, elegant, functional and devoid of ornament, *The Sylph* did not have the rakish lines of the later clippers, yet it proved to be particular swift.

The so-called "country trade" in opium between India and China had hitherto been conducted in the slow, corpulent, "country wallahs", constructed of Malabar teak in the shipyards of Bombay and on the Hooghly River near Calcutta. The wallahs were generally mere replicas of caravels, carracks and even galleons, with a projecting bow, a high narrow roundhouse at the stern, heavily leaded windows in gilded, sumptuously carved quarter galleries, with intricately carved cannons poking out from ports surrounded by gilt carvings.

The lack of commercial urgency associated with the East India Company's monopolistic routines had established this wasteful model. The country wallahs, like the equally cumbersome old East India frigates that carried tea, could only make one round trip to China per year. These ships could not sail into the monsoon, which dominates the China Sea between October and March. They generally took two or three months between India and Lingding Island, proceeding gently before the southwest summer monsoon, returning with the assistance of the stronger northeast monsoon of winter.

For the whole of maritime history size and speed had been inversely related. Large vessels designed to carry bulky cargoes were slow. The clippers were the first major attempt to reproduce the lines of speed in a large vessel. They were modelled on American privateers, built to avoid the trade restrictions imposed by Britain on the American colonies. This was smuggling in the grand manner, with private enterprise driving technological improvement and increased productivity.

Speed was the essence of commercial success in this trade. It reduced the transport costs per case of opium. The clippers would take less than three weeks, instead of three months, and could, by sailing into the monsoon, do three round trips a year. Speed also gave the trader a head start: he received the latest commercial intelligence and supplies from the annual crop could arrive in advance of rivals, with additional flexibility to direct them in the most lucrative way.

*The Sylph* had just arrived on its maiden voyage from India on 1 September 1832 in a record 18 days, just a few days before the return of *The Lord Amherst*. On 20 October with a 70 man fully armed crew, it set sail from Macau into what Gutzlaff later described as "furious gales and a tremendous sea". Its main cargo was opium.

After sailing as far north as Manchuria, *The Sylph* returned to the mouth of the Yangzi in mid December. In high seas it saved the crew of a demasted junk. "The first thing which they handed to us", Gutzlaff recalled with disgust, "was an image of the Queen of Heaven". Piously rejecting what he called a "heathenish delusion", Gutzlaff bellowed "Let the idol perish", which it did by being thrown overboard. Nevertheless, saving the crew stood *The Sylph's* party in good stead during their two-week stopover near Shanghai.

Gutzlaff's memoir recalls with pride the urgent demand for the religious tracts he had brought in such large number on his return to the city. Gutzlaff boasted "Most joyfully did they receive the tidings of salvation". He failed to mention to his British readers the fact that the extraordinary Chinese respect for learning led the population to treasure all writing, irrespective of its content. This was not a reaction that his contemporary British audience would naturally understand.

Gutzlaff's memoir is silent on the opium sales for which he acted as an interpreter. The work must have been quite intensive at times. A Jardine Matheson captain recorded in his journal for another voyage: "Dr Gutzlaff distributing religious tracts from one side of the vessel, at the very time that opium was being delivered over the other side". Another captain wistfully recorded: "Employed delivering briskly, no time to read my Bible".

The opium trade was conducted at Wusong, where the Huangpu entered the Yangzi, a convenient distance from Shanghai and just out of sight of official recognition. As a Western treaty port, the opium barges would be hypocritically parked there for the best part of a century.

The captain of *The Sylph*, unlike Lindsay, accepted the offer of free provisions from the Shanghai mandarins. This was after all a purely commercial venture. And a staggeringly successful one. Six months after its departure *The Sylph* returned to Lingding Island and disgorged \$250,000 of silver into the Jardine Matheson and Co receiving ship.

The future was also assured. The number of new addicts probably numbered in the thousands. Opium was the perfect consumer commodity. The very act of consumption created demand for more.

\* \* \* \* \*

During the visit of *The Lord Amherst*, John Rees, captain of the ship, prepared detailed charts of the navigable approaches to Shanghai by following the Chinese junks and by taking detailed soundings. He carefully recorded his route and named certain features – Amherst Passage, Gutzlaff Island – as if for the first time, without inquiry about any existing name. These were the first accurate European maps of the area. They would be of crucial significance for future smugglers and traders, as they were for *The Sylph*. Within a decade they would also direct a British military expedition to the walls of Shanghai, which fell without resistance on 19 June 1842, ten years less one day after Lindsay had ordered his sailors to force entry to the Daotai's yamen.

When the ships arrived, their cannon first destroyed the forts of Wusong. Amongst the hundreds of ineffective brass cannon they captured, one was pretentiously engraved "Tamer and Subduer of Barbarians".

About 250 years before, Xu Guangqi had successfully introduced cannon cast in the Western manner to Ming military equipment. He and other converts had also applied Euclidean geometry, adopting the idea of ballistics as a science. In astronomy, the Jesuit influence had continued in China, but in military science it had long been forgotten. The idea that a trajectory of a cannon ball could be plotted had been lost.

Without an understanding of Euclid, China could not understand the West or the threat it posed. When

the Western cannon subjugated the fortifications at Wusong in 1842, Euclid had returned to Shanghai.

[Print Page](#)[Close Window](#)

## Measuring Court Performance

**MEASURING COURT PERFORMANCE  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE ANNUAL CONFERENCE OF THE  
AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION  
ADELAIDE, 16 SEPTEMBER 2006**

In mid 18th century London a mathematical prodigy called Jedediah Buxton was taken to see David Garrick perform in Shakespeare's *Richard III* at the Drury Lane theatre. When asked whether he had enjoyed the play, his reply was that it contained 12,445 words. His analysis did seem to miss some significant things: the sarcasm of "Now is the winter of our discontent, made glorious summer by this sun of York" and the desperation of "A horse, a horse, my kingdom for a horse".

The purpose of my address is not to deny the beauty of numbers. Nor their utility. My purpose is to emphasise, as Jedediah Buxton's reaction manifested, the inability of numbers to always identify what matters. Today Jedediah would be diagnosed as autistic. What I will be discussing could be called the autistic school of management.

However, as that will, no doubt, offend somebody, I will revive a word that has fallen into disuse: pantometry, which means universal measurement – the belief that everything can be counted.

At the time of my appointment as Chief Justice over eight years ago I became aware of a range of proposals for performance measurement of courts, in accordance with the managerialist ideology that has come to dominate so many aspects of the public sector. Furthermore, statutory tribunals responsible for judicial salary determination were indicating an interest in linking salaries to performance. I regarded these developments as a challenge to judicial independence and potentially corrosive of the rule of law.

I was concerned about proposals to apply to the legal system the kinds of performance indicators that had, in my opinion, significantly distorted policy and administration in areas such as education and health, where the indicators had been entrenched in funding formulas, budget processes and remuneration decisions. Over a period of two or three years, I delivered a number of published speeches on the subject [1].

As it turned out my fears were not realised. The pantometry school did die down. The statutory tribunals responsible for judicial salaries, which had proposed to develop some kind of measure of performance in the course of deciding changes in judicial salaries, realised that that was nonsense and, perhaps, realised that it was pernicious. In any event they stopped talking about it. Other public sector pantometrists, who appeared to entertain expansive notions of the capacity of performance indicators and national benchmarking to drive changes in court practices, also seemed to have their ambitions tempered. Perhaps they realised that the principles underlying the institutional heritage of the judiciary and the operation of the rule of law were in conflict with their proposals.

The focus turned to the compilation and publication of statistics – key performance indicators in the argot of the trade – relating to matters such as delay and costs. These are matters which are both capable of assessment in quantitative terms and which provide information that is useful to the courts and the publication of which serves to enhance the accountability of the courts.

I have left these issues alone for some years now. However, I have become aware that the idea of developing a so called "quality indicator" has re-emerged both in the AIJA and in the Court Administration Working Group, which oversees the preparation of material relating to courts that is published by the Productivity Commission in the annual *Report on Government Services*.

One of the themes of the speeches I used to give on this subject was the limited significance that could be attributed to the matters that were capable of quantitative measurement. I did not doubt the importance of measurement of such matters as delay or cost. However, I emphasised that the most important aspects of the work of the courts are qualitative and cannot be measured.



My central proposition was really quite a simple one, not everything that counts can be counted. Some matters can only be judged – that is to say they can only be assessed in a qualitative way. Most significantly there are major differences between one area of government activity and another in the importance of those matters that are capable of being measured. In some spheres of governmental decision making the things that can be measured are the important things. In other spheres the things that are important are simply not measurable. The law is at the latter end of the spectrum.

I was aware from the managerial literature on performance measurement that many things, particularly with respect to quality of a product or service, were difficult to measure. I was also aware that in the Productivity Commission reports, there was a standard form template which required the development of quality indicators for all sectors of government. However, that remained an empty box in the template with respect to courts. Indeed, in the annual *Report on Government Services*, on one count, it remains an empty box for seven of the thirteen different sectors surveyed. In those where this box was not empty, the indicators appear to me to be of tangential significance, bordering on the trivial. They are, at best, proxy indicators which bear no necessary or even direct relationship to what matters.

Seven or eight years ago there was a proposal for what was called a national Client Satisfaction Survey of the Australian court system with a view to what was then described as “measuring the quality of court services”. The proposal was put before the Council of Chief Justices where, to some degree it received a bemused response. Questions such as “Precisely who is a client of the criminal justice system?” were asked. An assurance was given that there was no intention to survey satisfaction with judicial decisions.

The Chief Justices Council nominated Chief Justice Nicholson of the Family Court, Chief Justice Miles of the ACT Supreme Court and myself to pursue discussions on this proposed survey. In the event, the proponents did not speak to anyone other than Chief Justice Nicholson. The Family Court is, so far as I am aware, the only Court that has ever shown much interest in performance indicators.

The detail of the survey then proposed was in large measure unexceptionable. The matters were of a character which have been the subject of surveys undertaken by a number of courts, including my own. I refer to matters such as the performance of counter staff, the utility of signage, the adequacy of facilities such as toilets and telephones, discussion and preparation rooms, and the standard of access for people with physical disability. A proposal that the survey extend to satisfaction with court processes, beyond matters such as availability of interpreters, was rejected by the Council of Chief Justices.

No Chief Justice thought the terminology of “client” satisfaction was in any way appropriate. However, the Council of Chief Justices approved the general structure of the survey directed as it was to matters that were administrative, without trespassing on the judicial function. Nothing was proposed which involved “satisfaction” with what could be called judicial administration as distinct from court administration. I include case management in judicial administration.

One of the documents provided to the Council of Chief Justices said that data about “client satisfaction”, to be derived from the survey, was not intended for purposes of comparisons between jurisdictions but to track changes in a particular jurisdiction. It is not possible, however, to prevent inappropriate comparisons, whatever the intention.

There the matter has rested for some five or six years until this year. The development of a quality indicator for what is called “court administration” is back on the agenda. Past expressions of concern, which may well have included my own, are said to have been based on an incorrect assumption that measurement related to the quality of judicial decisions. However, previous suggestions for possible “quality” indicators have included reference to appeal rates, which obviously involves judicial decision-making.

It is by no means clear to me that the pantometric ideology that is dominant in the contemporary public sector will draw a boundary between judicial administration and court administration at the same place that judges would determine that boundary. Accordingly, it is appropriate to return to this subject.

Some of you will have either heard or read me on these matters before. I apologise for the repetition. That’s the problem with fundamental principle, it doesn’t change over time.

Persons responsible for organisation in the public sector used to refer to their vocation as “public administration”. Most of the university courses and academic journals were so entitled. For some decades, however, this sphere of discourse has referred to itself as “public management”. The change in terminology is significant. It represents a development in which “managers” have made a claim, of a professional character, to the universal applicability of their vocation to all spheres of organised activity, whether in private corporations or in the not for profit sector or in the public sector.

At the time when the focus was on “administration” there was validity in the proposition that the skill set required for administration was similar from one sphere to another. The same claim of universality has however been carried over when “administration” became “management”. The “managers” purport to be able to determine a much wider range of organisational conduct than they did when they were “administrators”. This claim to institutional territory extends to the way in which the objectives of an organisation are determined and how they are to be achieved. With respect to such matters, however, the “one size fits all” approach is simply a conceit. More significantly it is a conceit which, in my opinion, can undermine fundamental values in many spheres of discourse, including the administration of justice.

As it emerged over about the last two decades, public management turned on a requirement for a hierarchy of documentation. At the highest level of generality or abstraction is a document described variously as a strategic plan, a corporate plan, a charter or mission statement. I have even seen references to a “vision statement”. Below that level is a document focused on the process of annual implementation, variously called a business plan or a performance plan or the like. These plans are required to contain goals, objectives, targets or standards at a level of generality that is implementable and, preferably, capable of measurement and stated in quantitative form. The next level down in the hierarchy is what is frequently called performance indicators, which are required to be measurable, concrete, collectable at reasonable cost and comparable, either between institutions or over time for the one institution. Finally, the process must be capable of independent evaluation, both within the unit of public administration and by investigatory and regulatory bodies, such as finance departments, auditors general and parliamentary committees.

At the level of strategic plans, mission statements, charters and the like, one generally finds the broadest platitudes, unlikely by their nature, to have any effect on actual behaviour. No doubt there are some areas of public administration for which clarification of objectives at this level of generality performs some useful function. I do not myself accept the proposition that one cannot plan for the future or know what one is doing unless one writes it down. However, in the immortal words of an English footballer: “If you have the courage to look far enough ahead, you too can see the carrot at the end of the tunnel”.

I detect a significant decline in the enthusiasm for strategic plans, charters and mission statements. I have never seen one that wasn't a waste of time and paper. That seems to be quite widely accepted today. However, in the not too distant past, the desirability of such strategic plans was advanced as if it constituted the only rational way of approaching organisational activity.

Management is, and has manifestly been for some considerable time, a fashion industry. For example, in the United States, with respect to budgeting processes, there has been a succession of passions each stated with complete certitude at the relevant time: in the 1950s there was “performance budgeting”; in the 1960s it became “programme budgeting”; in the 1970s there was “management by objectives”; and in the 1980s, the current approach for the hierarchy of documentation to which I have referred, came to be required by statute. Each of the previous approaches was accepted, on each such succession, to have been a failure.

To similar effect, one American author identified a range of consecutive management fads which were applied in higher education in the United States over the course of the last two or three decades: the Planning Programming Budgeting System was replaced by Zero-Based Budgeting, which was replaced by Management by Objectives which was replaced by the emphasis on strategic planning and benchmarking and which has since had competition from Total Quality Management and then Business Process Re-engineering [2]. Since then we have moved to the Triple Bottom Line and, no doubt, other transient enthusiasms of which I am not aware.

These are simply the more abiding of the managerial fads of recent decades. As any visit to the burgeoning management sections of bookshops will show, these fads come and go as rapidly as the equally large and burgeoning sections on personal diets. Scarcely a week goes by without some new volume proclaiming the abiding utility for managers of the insights to be found in an obscure author whose work is available, if at all, only in the Penguin Classic series, or from some other set of insights

which are to be deduced from a catchy aphorism.

The one thing that appears to be stable is the emphasis on measurement and on its universal applicability – pantometry. There is little recognition that what is capable of measurement is not necessarily what matters. Nor that this capacity varies considerably from one sphere to another. Furthermore, experience in many spheres of discourse now establishes that the processes of measurement often has significant dysfunctional, indeed perverse, effects. An important reason for this is that it is very difficult to measure the quality of governmental activity.

Measures of quality are available in many spheres of conduct. For example, quality can be calculated in terms of defect rates in manufactured goods. Customer complaint statistics may also prove indicative. However, there are significant areas of public decision-making, and the law is one of them, in which there is no measurable indicator of quality, even at the level of defect rates or numbers of complaints. There is simply no escaping qualitative assessment for purposes of evaluation. What this means is that decision-making processes which are based only on quantitative measurement are so defective as to be irrational.

At the heart of managerialism is the assumption that something called “management” is universally applicable to all areas of organised life. This is not a neutral assumption. Nor is the belief in pantometry. The managerialist focus is on matters capable of measurement, like efficiency and effectiveness. This does not, however, represent the full range of values which are of significance for public decision-making. Other values such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality are also of significance. They are not capable of measurement, not even by proxy indicators.

Our system for the administration of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision-making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of government decision-making in order to ensure that the government operates with the consent of the governed.

Managers, especially those who believe in pantometry, of course accept that considerations of “quality” matter as well as quantity. Indeed it is obvious that these two dimensions are often inversely related to each other.

Experience suggests that these incantations about the importance of quality often do not rise about the ritualistic. Quality considerations receive lip service and the matters capable of quantification more often than not determine the actual outcome. The search for a measurable indicator of “quality” is, to a significant degree, a recognition that the claim to universal applicability of managerialism is contestable.

Quantitative measurement, by reason of its very concreteness acquires a disproportionate and inappropriate influence over considerations of quality, which appear to be amorphous.

Decisions that plainly call for judgment are now often made in various areas of the public sector on the basis of partial, purportedly objective considerations, with dramatic consequences which, probably, no-one would have chosen in a more comprehensive decision-making process. Measurement is implemented in the name of rationality. However, it is often, by its very nature, partial and incomplete. It confers no more than a pseudo scientific precision. Such partial rationality, by reason of the incompleteness, often proves to be fundamentally irrational.

At the heart of these issues is a power struggle between the proponents of the “new public management” like Treasury officials, departmental finance officers and auditors (to whom I find it convenient to refer as “the managers”) and persons like teachers, doctors or lawyers involved in public decision-making processes (to whom I will refer as the “professionals”). Professionals involved in public sector decision-making tend to emphasise the significance of qualitative considerations. Managers tend to emphasise measurable indicators and objective formulae.

It is perfectly understandable why this should be so. To the extent to which qualitative considerations, that cannot be reduced to numbers, are given weight, the professionals will have the greater say. Unless matters can be reduced to measurable standards and indicators, the managers will not be able to exert significant influence. Managers do not have the capacity to make qualitative judgments. Accordingly, they have an inbuilt institutional bias to downgrade the significance of quality or to

attempt to measure it by some kind of proxy indicator. As a regrettably anonymous pundit once put it: "Where you stand depends on where you sit".

Public managers have an image of themselves as the custodians of the objectives of an organisation and, often, as the representatives of the taxpayer in the interests of ensuring accountability minimising expenditure and maximising efficiency. They sometimes resent the high degree of autonomy of professionals – like teachers, doctors and lawyers – and categorise their pre-occupation with matters of quality as rent seeking activity. They tend – sometimes with reason – to regard professionals as particularly liable to engage in self-serving conduct and to manifest no capacity to prioritise or to regard professional standards as anything but absolute. In a world where choices have to be made about the allocation of resources, there are no such absolutes.

This power struggle can be a creative tension with positive effects. There is however, a very real possibility, based on experience in areas such as education and health, that the managerialist approach will force its one size fits all template on the administration of justice. I think that would be disastrous for the quality of our legal system.

The experience of the collapse of Communism should have taught us, if we did not understand it before, that a society which is organised on a single institutional principle is fundamentally unstable. A diversity of organising principles for social institutions is as significant for the health of our society as biodiversity is for our ecology. A monoculture is inherently unstable.

A major defect of managerialists who believe in pantometry is that their approach tends to reduce citizens to consumers.

A person's interest as a consumer is only one part of the person's status as a citizen. The consumer analogy has become, in many respects, a feral metaphor that has acquired a disproportionate degree of prominence.

Consumers have desires or needs. Citizens have rights and duties. The perspective of citizenship is of greater significance for many areas of public activity than the perspective of consumerism. This is the case with the administration of justice.

The proposal for a "quality indicator" designed to elicit "client satisfaction", to be applicable to what is called "court administration", manifests this problem in the very choice of terminology. Courts do not have "clients". Litigants are not consumers. Litigants have rights. They come to court to assert their rights, not to exercise some form of consumer choice.

There is nothing new about a focus on citizens as consumers. Such a focus is inherent in utilitarian philosophy. This philosophy requires, when one assesses the value of institutions in any sphere of conduct, that nothing matters but the state of mind of the persons who will be affected by that conduct. Utilitarianism focuses only on the calculation of pleasure and pain. This is an exceptionally impoverished view of human nature.

Utilitarianism is a moral philosophy based upon the calculation of consequences. This approach has always involved mechanical and quantitative thinking. It has no place, although some have tried to argue the contrary, for any other moral rule or for the idea that some conduct by its very nature is immoral. Nor does it have any place for the idea that justice must be administered in accordance with law, irrespective of the consequences in the state of happiness or otherwise of the persons who are involved in the administration of justice. Jeremy Bentham famously described inalienable human rights as "nonsense on stilts". Rights, he correctly understood, were inconsistent with pantometry. Bentham was the world's first pantometrist. Indeed, pantometry acquired a religious quality for utilitarians. It still does.

Two centuries ago Bentham and his acolytes went around England measuring everything they thought could manifest the state of happiness of the population: they counted the number of cesspits (which was an indicator of ill health); they counted the number of pubs (an indicator of immorality); and they counted the number of hymns that children could recite from memory (then regarded as a form of educational attainment). The Benthamites spent an enormous amount of completely unproductive time trying to identify the precise way in which pleasure and pain could be measured.

Their direct successors are still with us, still searching for proxy indicators of quality.

A critical reason why a consumer focus is inadequate, indeed borders on the irrelevant, for the administration of justice is because courts are not merely a publicly funded dispute resolution service. To treat them as if that is all they are is far too narrow. Indeed, in my opinion, it is potentially subversive of the rule of law. It sets at nought the constitutional function of the courts to preserve the integrity of institutions, especially the mechanisms of governance. It sets at nought the role of the courts to protect society. It sets at nought the role of the courts to prevent abuse of power.

Courts do resolve disputes. However, they do so as an arm of government which manifests the *public interest* in the peaceful and fair resolution of private disputes. Court processes are not, and have never been, a facility that the government makes available to serve a private purpose.

I have no doubt that the courts serve the people. However, they do not provide services *to* the people. This distinction is not merely semantic; it is fundamental. The courts do not deliver a “service”. Courts administer justice in accordance with law. They no more deliver a “service” in the form of judgments and decisions, than a parliament delivers a “service” in the form of debates and statutes.

This is perhaps clearest in the context of the criminal justice system or the civil enforcement, whether by a public authority or by a private litigant, of publicly proclaimed standards. Such standards have been developed by the common law, although increasingly they are expressed in statutory form. These standards manifest a public statement of proper behaviour. Individuals employ such standards to resolve their private disputes, but they remain *publicly* proclaimed standards designed to serve *public* purposes.

There are some judicial contexts in which the primary objective is the actual resolution of a dispute, e.g. litigation involving families. Generally, however, the objective is not merely to resolve the dispute as such, but to serve public purposes by the process of resolving disputes. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes – these are all public purposes served by the courts in the resolution of private disputes.

The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a broadly similar character to one of the functions performed by a parliament. This has no relevant parallel in most other spheres of public activity, let alone in private activity. That is why, whatever its relevance to other sectors, a consumer perspective is inapplicable to the administration of justice.

It is important to recognise that measurement has consequences. It is not neutral in its effects. As some have put it: “What gets measured gets managed”. Where what is capable of measurement is not the only thing that matters, the results are often malign. I am concerned that if courts come to be judged by something called “client satisfaction”, then the administration of justice could be perverted in a search for popularity.

The pathology of measurement arises when the indicators are targeted. Because performance measurements, particularly of a qualitative nature, are necessarily partial, targeting the indicator can have disastrous consequences for the true performance of an organisation.

In the former Soviet Union the only thing that they did not have a shortage of was performance indicators. They called it a five year plan. Every area of activity had a formal measurable target, the performance of which had significant implications for both the organisations and the persons running them. In one period, the five year plan for nail manufacturers identified output in terms of tonnes. Every manufacturing plant in the country made large nails and there was a shortage of small nails. Accordingly, in the next five year plan the target was stated in terms of numbers of nails, the inevitable happened, everyone made small nails and there was a shortage of big nails.

There is a direct line from Jeremy Bentham to Frederick Winslow Taylor, who invented “scientific management” with its pantometric preoccupation with measurement, to Lenin, who much admired Taylor.

Examples of the pathology of measurement are not limited to Soviet planning systems. Such examples can be identified in many different areas, including in the private sector. In the disaster that was Enron it was the focus on the share price as a measure of success and, in the form of stock

options, as a determinant of the remuneration of the executives, that led to a process of systematic distortion. The Enron house of cards was built on the pathology of performance measurement.

Over the years, I have collected numerous examples of the perverse effects of targeting the indicator – variously described as “gaming the system”, a “moral hazard” and the like. A few examples will suffice:

- A United States job training scheme allocated funds on the basis of results in finding jobs. Agencies maximised their funding by refusing to accept for training people who were unlikely to get jobs, i.e. the very people who needed help most [3].
- When comparative success rates for cardiac surgeons began to be published in New York and Pennsylvania, mortality rates in both states declined significantly because heart surgeons refused to operate on the risky cases, who were referred to adjoining States [4].
- Police stations in Paris who were assessed on crime levels in their districts, refused to make a formal record of crime reported to them [5].
- Publication of performance data and league tables of English and Scottish schools had dysfunctional effects when schools concentrated on achieving the indicators and reduced emphasis on other school objectives such as the development of personal and social skills or the allocation of time for subjects such as physical education and art, which were not measured [6].
- UK prisons which are assessed, as one of a bewildering range of indicators, on the proportion of drug free prisoners, have no difficulty in ensuring a good result from the supposedly random process of testing, by selecting the sample of inmates who are tested [7].
- English hospitals are judged on whether they admitted 90 percent of emergency patients within four hours. Whenever the annual measurement was due, hospitals cancelled operations and flooded their emergency departments with doctors and nurses [8].
- Telephone services for ambulances in Victoria were outsourced to a private contractor who had to answer 90 percent of incoming calls within 30 seconds. Its performance was achieved by a systematic programme of numerous so-called “test calls” undertaken by its own employees, all of which were answered within the time [9].

Distortions arise because the things that *can* be measured are *not* the only things that matter. Insofar as external judgments are made on an information base which is too narrow, then the incentives created by performance indicators will operate perversely. The more significant the consequences of the measured results, the greater the perversity.

I should emphasise that the internal use of information for the purposes of managing the organisation does not create any significant risk of such perverse reactions. It is the use of this information for purposes of evaluation or allocation of resources or remuneration that creates the likelihood of distortion.

Of course the problem of perverse reaction does not apply if what is being measured really is important and maximising performance of that indicator does not involve compromise of other values. In the public sector that is actually a rare combination. I have no doubt it does exist. It is not, however, true of the administration of justice. (I pause to note that “maximise” was one of many words invented by Bentham.)

As the defects of performance indicators becomes obvious, the pantometrists almost always respond by multiplying the number of indicators, seeking to block the latest distortion. As a result – most noticeably in the UK and New Zealand – ever increasing resources are devoted to compiling and publishing statistics which the law of diminishing returns has long since rendered pointless. I believe that in the not to distant future, contemporary public management will be treated with the same bemused contempt that is accorded to the Benthamites and the Soviet planners.

Just in case, contrary to the proposals of which I am aware, there is any suggestion that appeal rates is being taken seriously as a quality indicator by anyone, I will make some brief observations.

Over a period of time, the fact that a particular court or even a particular judge is frequently overturned on appeal may indicate something. That, however, is only true at the extremes and, in no case, is what happened in a single year an indicator of anything. The idea that some form of aggregation can produce a number that indicates quality, except at the extremes, can only be advanced by someone who is ignorant of the judicial process.

Appeals are allowed for a wide range of reasons which have nothing to do with the quality of the decision. Appeals are dismissed in a wide range of cases, often in the exercise of an appellate discretion, which do not constitute any kind of endorsement. The assumption that in some way these variations will come out in the statistical wash, can only be held by someone who believes in pantometry.

To serve any kind of indicator of quality, appeal rates have to be expressed by reference to the total number of cases from which appeals could be brought, not by reference to the number of appeals or, even, by reference to applications for leave to appeal. However, the number of appeals is actually quite small – rarely exceeding five percent of cases decided. The so-called indicator would actually look quite trivial. For example, only about two to three percent of New South Wales intermediate appeal court cases go to the High Court. What does anyone do with a number such as: “Successful appeals from New South Wales to the High Court doubled last year from one to two percent”?

More significantly, there is in this, as in all such cases, a real risk that over time the process will be distorted by the limited factor capable of measurement. Judges in trial courts or intermediate courts of appeal should make judgments and exercise discretions uninfluenced by what a court of appeal might think. Appellate courts should do the same without thinking about how the court or the judge from which an appeal is brought might be faring in the tables.

It now appears that the focus of attention in terms of the development of a quality indicator, to fill the apparently embarrassingly empty box in the template, is “client satisfaction”. However, questions of “satisfaction” are only of significance once one has determined the most fundamental question: satisfaction by whom and about what.

It may be useful for some purposes to develop some kind of index of “satisfaction”. That is not the case if the questioning involves aspects of the judicial process, where the principal focus must be on fidelity to the law, the fairness of the outcomes and the fairness of the procedures.

Over the course of many centuries we have established a series of institutional arrangements that are designed to ensure that the administration of justice is not conducted with a view to popularity. Any focus on “satisfaction” with respect to judicial decisions is inconsistent with the principle that judges should not be concerned with popularity.

The courts must, and do, collect information about the experience of persons involved in the administration of justice. The courts receive such information in various ways, e.g. user groups and other forms of communication, albeit primarily from the legal profession. Some general surveys acquire useful information. Often, the most useful information is of a qualitative character expressed in narrative terms, not capable of being reduced to a number.

What is proposed by way of a “quality indicator”, as I understand it, is some sort of survey, probably of the tick a box kind, on the basis of which a number can be generated. I doubt that such numbers will be of more than marginal use. Limited to matters of court administration of the kind I have described – signage, facilities, etc. – they may do some good and will do no harm. Beyond that, they can do harm.

Frankly, there are times where the ‘one size fits all’ template that requires all component parts in the public sector to report in the same way with quality and quantity indicators becomes a joke. To give only one example, the Department of Foreign Affairs and Trade, because it is required to have a quality indicator, identifies matters such as the following: “Satisfaction of portfolio Ministers with the Department’s policy advice ...” and “Satisfaction of portfolio Ministers with the protection and advancement of Australia’s national interests ...”. This Department has a quite narrow perspective of who – to use the argot of managerialism – its “stakeholders” are. In any event the reports do not pretend to provide a statistical measurement of their ministers’ state of “satisfaction”.

Beyond the matters I have identified as involving court administration, it is difficult to identify any purpose, other than the fulfilment of an ideological programme, that is served by attempting to measure perceptions about court performance. In many areas of the public sector the quality of the performance is capable of measurement. It is possible to measure mortality rates or rates of recovery from medical procedures. It is possible to measure, in a reasonably objective way, the results of education by way of examination. Whether or not measurements of this qualitative character ought to determine allocation of resources, remuneration and matters of that character is a different question. Nevertheless, something meaningful about the quality of the performance of certain sections of the public sector can be measured, albeit in a partial way. That is not true of the law.

The outcomes of judicial decision-making process can be variously stated. The administration of justice in accordance with law is one way. The attainment of a fair result arrived at by fair procedures is another. Such outcomes are not measurable. They can only be judged. There is no proxy indicator of the quality of these matters. "Client satisfaction" has nothing useful or interesting to say about them.

I should make it clear that the judicial process does not involve only the final decision in the form of a judgment. The whole of the process, including preparation for trial and case management is part of the judicial process. It is by no means clear to me that the current proposal for a quality indicator with respect to client satisfaction about "court administration" is so limited. If it is not, it is fundamentally unacceptable. If it is, then I doubt it will add much to what courts already do.

In any event, it is wrong to call "consumer satisfaction" a "quality indicator". It would be seriously misleading to pretend that any such survey could ever measure the "quality" of a court's conduct with respect to the important functions performed by courts. At best it relates to tangential matters. To pretend that this fills an empty box for a quality indicator in a template, applicable to all sectors of public management, is self-deception.

In all important respects, the quality of the administration of justice is not capable of being reduced to numbers. In particular, some kind of index of "client satisfaction", does not measure quality.

The state of "satisfaction" will often bear no relationship of any character, let alone a direct linear relationship, to the actual quality of the relevant decision-making.

Obviously about half of all litigants go away dissatisfied with the outcome and that dissatisfaction also often impinges on their state of satisfaction with the process. This inbuilt bias is not only amongst parties. It is a bias, more often than not, also manifest by the legal practitioners.

There are many cases in which both parties go away dissatisfied. Fidelity to the law sometimes requires this. Fair procedures must be fair to both sides. Fairness to one side may be regarded by another as unfairness to them, or at least as contrary to their interests. Fair outcomes arrived at by fair procedures are not necessarily perceived to be fair in either respect by the litigants or, in many cases, by their legal representatives. That is because the point of the process is not their satisfaction or their perception of fairness.

Judicial decisions must be determined by objective standards. The satisfaction of the participants is not one of the purposes to be served. It is not an objective of courts to be popular. Courts must maintain public confidence in their integrity. However, that has nothing to do with "satisfying" persons as consumers of a "service".

States of satisfaction or dissatisfaction are not naturally expressed in quantitative terms. In order to translate a narrative into quantitative terms some kind of artificial categorisation or ranking, of a tick a box character, has to be imposed by the designer of the survey. How that is done can influence and may determine the results.

Opinion surveys about quality are based on perceptions. Such surveys are notoriously unreliable, particularly on matters about which the interviews have limited understanding.

There are countless studies which show the wide range of distortion that arises from surveys of opinion. The results are often determined by the nature of the form and the precise wording of the question. Perhaps more significantly, perceptions are often systematically inaccurate: people believe they witnessed events when they were not there or which did not happen at all.

One study found that 44 percent of persons claimed to have seen a non-existent film of the car crash



in which Princess Dianna died. Indeed, they were able to provide details about the event. Similarly, 55 percent of people claimed to have seen a television broadcast of a non-existent film of an air crash [10]. The litigation process, as well as the survey process, contains numerous occasions for misdirecting the suggestibility of participants.

The courts deal with the plasticity of memory on a daily basis. The collective experience of the judiciary is that perception often diverges from reality and that is so not only for querulous litigants who appear in person.

To give only one example, a United States study of student evaluations of university lecturers showed that the results were determined in significant measure by how good looking the lecturer was. The "quality" of the lecturer was determined in this way, with real effects on promotion and remuneration [11]. Other studies show that attractive witnesses in court are regarded as being more credible [12].

Surveys of opinions directed to issues of quality depend on the understanding, knowledge, experience and capacity of the persons expressing those opinions. In order to assess the value of the opinions it is necessary to know this. That never happens.

Often surveys are little more than surveys of reputation. Reputation is not necessarily related in any direct, or even rational way, to the matter sought to be assessed in a qualitative manner. They are an unreliable way of assessing quality.

Such surveys may give the appearance of being democratic. It may be unfashionable to say so, but quality is by its nature not susceptible to democratic assessment. Quality is hard to judge. It requires knowledge and experience. In the case of the judicial process, surveys will be of no value at all. However, my real concern is that the effects of such a process may be to pervert the decision making process it proposes to improve.

To the degree to which a so-called "quality indicator" is generated and acquires a level of public prominence – as has occurred for example with league tables for schools in England – courts will be given significant incentives to target the indicator in the perverse manner I have suggested is endemic to such a system. If courts come to be judged by the degree of satisfaction of the persons surveyed, then they may do what they can to increase the level of "satisfaction" about which questions happen to be asked.

Performance indicators are always partial and are always manipulable. The persons who administer the measurement system always have superior private information about how their own actions influence the measured results, than do the persons to whom the results are reported. Strategies of targeting the indicator, rather than doing the job properly, are always capable of being adopted. Doing so rarely has adverse consequences for those responsible because of the difficulty of auditing the distortions which occur. Indeed, the audit process itself often focuses on exactly the same performance indicators. The objectives that have been distorted are often either not measurable or not measured.

So it could be with "client satisfaction" if it extends beyond matters of administration. It is the only thing that looks like a quality indicator that anyone can think of. However, it does not measure anything that is of real importance about the quality of court performance. There is no necessary or direct relationship between perceptions about the quality of judicial process and that quality assessed on any objective standard.

The *Report on Government Services* sets out comparative tables giving the same figures for all States and Territories and Commonwealth institutions. This is a critical aspect of the exercise. Such "benchmarking" is adopted to create some kind of rivalry, by a process of invidious comparison which, in the absence of any kind of market, is thought to create incentives to improve performance. Nothing remotely like that has happened as a result of the Productivity Commission reports. Nor is any such effect likely.

Courts, including my own court, have developed their own set of statistics for purposes of internal administration. The principal advantage of the Productivity Commission processes has been to refine the statistics that are compiled for our internal decision-making processes. The work undertaken for the *Report on Government Services* has improved our own internal management. Comparisons with other States are irrelevant for that purpose. Nor, in my opinion, do they produce anything that is actually useful for purposes of accountability.

Every year, at the time of publication of the Productivity Commission report, there is a spate of articles in the media based on the tables comparing the different Supreme Courts or the different District Courts on the published indicators of backlog, clearance rates, cost for finalisation and the like. Even a cursory glance at the footnotes and qualifications to these tables would make it perfectly clear that no valid comparison of any character can be drawn. Nevertheless, the Report continues to publish tables setting out the information as if they were comparable. If such a table were published in trade or commerce, it would be enjoined for being in breach of the *Trade Practices Act's* prohibition of false and misleading conduct.

The case mix of different Supreme Courts is completely different. The Supreme Court of New South Wales has a caseload which is, in general terms, broadly comparable with that of the Supreme Court of Victoria. There is, however, no similarity between our caseload and that of any other Supreme Court or Federal Court. For example, a substantial portion of the criminal jurisdiction of the Supreme Court of Queensland involves minor offences of a character which, in New South Wales, are dealt with in the Local Court.

Nevertheless, we have to tolerate an annual burst of publicity, which purports to compare performance between jurisdictions on issues of delay or cost. To continue to publish tables which invite such comparisons, despite the knowledge that the qualifications contained in notes to the tables will be ignored, is not particularly responsible. I expect the same will occur if comparisons can be made about "client satisfaction".

I can see little purpose to be served by way of benchmarking with respect to "client satisfaction". As long as the surveys are limited to matters of court administration, as I have defined it, they can do little harm, other than the inevitable media attempt to make comparisons. We have to put up with much worse.

The ubiquity of opinion polls has introduced fundamental distortions to the political process. I for one will resist any attempt to degrade the judicial process in the same way.

#### END NOTES

1. The published versions of my addresses are: "The Qualitative Dimension of Judicial Administration" (1999) 4 *The Judicial Review* 179; "[Seen to be Done: The Principle of Open Justice](#)" (2000) 74 *Australian LJ* 290, 378; "[Economic Rationalism and the Law](#)" (2001) *University of NSW LJ* 200; "[Citizens, Consumers and Courts](#)" (2001) 60 *Australian Journal of Public Administration* 5; "[Judicial Accountability and Performance Indicators](#)" (2002) *Civil Justice Quarterly* 18; "The 'New Public Management' and the Courts" (2001) *ALJ* 748; "[Quality in an Age of Measurement](#)" *Quadrant* (March 2002) p9; "[The Maintenance of Institutional Values](#)" (2002) 33 *LASIE* 91. All of these addresses are also accessible at the New South Wales Supreme Court website <http://www.lawlink.nsw.gov.au/sc>.

2. See Robert Birnbaum *Management Fads in Higher Education: Where They Came From, What They Do, Why They Fail* Jossey-Bass, San Francisco, 2000.

3. See references in my above article 75 *ALJ* at 757.

4. See *Wilson Quarterly* Summer 2003 p163 reporting on *The New York Times Magazine* Mar 16, 2003.

5. See Dalrymple "The Barbarians at the Gates of Paris" *City Journal* Autumn 2002, accessible at [www.city-journal.org](http://www.city-journal.org).

6. Wiggins & Tymms "Dysfunctional Effects of League Tables: A Comparison Between English and Scottish Primary Schools" (2002) 22 *Public Money and Management* p43.

7. *London Review of Books*, 18 December 2003 p 10, review of David Ramsbotham *Prisongate* Free Press 2003.

8. Australian Financial Review, 16 May 2003, referring to articles in *The Observer*.

9. *Report of the Metropolitan Ambulance Service Royal Commission* Vol 1, Parliament of Victoria, May 2001 at par [5.5.2].

10. See R McNally *Remembering Trauma* Harvard Uni. P. (2003) at 68-69.

11. See Hamermesh and Parker "Beauty in the Classroom: Instructors Pulchritude and Putative Pedagogical Productivity" *Economics of Education Review* accessible at <http://papers.nber.org/papers/w9853>.

[12] See C Fife-Shaw "The Influence of Witness Appearance and Demeanour on Witness Credibility" (1995) 35 *Med Sc Law* 127.

Print Page

Close Window

## Formal Opening Ceremony, Court Of Criminal Appeal, Bathurst

IN THE COURT OF  
CRIMINAL APPEAL

SPIGELMAN CJ  
McCLELLAN CJ at  
CL  
SULLY J

Thursday 31  
August 2006

Formal Opening Ceremony

Court Of Criminal Appeal, Bathurst

Councillor Norm Mann, Mayor, Bathurst City Council  
Mr Bill Walsh, on behalf of the Bar Association of New South Wales  
Mrs June McPhie, President, The Law Society of New South Wales  
Ms Julianna Creswell, President, Central West Law Society

1 **COUNCILLOR NORM MANN, MAYOR, BATHURST CITY COUNCIL:** Thank you your Honour. And I must say before I start your Honours, that it is the first time I have been in a Courthouse so if I make a faux pas do not please put me in the dock will you.

2 The Honourable James Spigelman AC, Chief Justice New South Wales, The Honourable Justice Mr Peter McClellan, Chief Judge at Common Law, and the Honourable Justice Mr Brian Sully, Judge of the Supreme Court, Mrs June McPhie, President of The Law Society of New South Wales, Bill Walsh, William Owen Chambers Orange, and Mrs Julianna Creswell, President of the Central West Law Society.

3 It is with great pleasure that I welcome you here today, to not only the Bathurst Courthouse but to the Bathurst region. To many, Bathurst is best known as the home of the V8 Racing circuit, however, there is much more to Bathurst than that. Bathurst is Australia's oldest inland settlement and with that brings a rich history of heritage that Council and our residents are very proud of.

4 For example, this courthouse was the fourth courthouse built in Bathurst and as you can see was quite a feat in architecture and design. It was decided by Governor Bourke in 1835, that gaols would be built in Sydney, Parramatta and Bathurst, resulting in these areas requiring courtrooms to be built. This ensured the future growth of Bathurst and the gaol was built on what is now Machattie Park, and the courthouse that we know today, was built adding to employment and the stature of the city of Bathurst.

5 The Bathurst Courthouse is quite a famous building in Bathurst and beyond. It attracts tourists and has featured on many different travel shows, when they have visited our region. It's forecourt has hosted concerts, the Sydney Olympic Marching Bands, and even a Black Tie Dinner. The building has been subject to its own rumours and innuendo, including the well known local yarn, that Bathurst received the wrong plans for the courthouse which was originally meant to be built in India. However, a rumour, we can assure you it is not true.

6 Bathurst Regional Council prides itself on the region's history and heritage and the fact that the Bathurst region is an ideal place for people to live, work, study, invest and play. We provide an affordable great lifestyle, and full range of quality health and community services, a vibrant culture and good retail shopping. Bathurst provides a diverse range of employment opportunities from unskilled, trade, managerial and professional opportunities, to a great environment for starting your own business. Our City is expanding faster than the State average, demonstrating that more and more

people are realising the opportunities Bathurst has to offer.

7 Again, I welcome you here today, and I hope you enjoy your time in Bathurst, thank you.

**8 MS JUNE McPHIE, PRESIDENT, THE LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.

9 It is with great pleasure that I on behalf of the 20,000 practising solicitors in New South Wales, have the opportunity to welcome your Honours and the Court to Bathurst.

10 As a rural practitioner from Cooma, I can fully appreciate the significance of today's ceremonial sitting in this Bathurst Courthouse and the significance it has to the local community. Coming from Cooma I understand that the prevailing weather in Bathurst is some 10 to 15 degrees higher than it is in Cooma, so I can understand your Honours' choice, in coming to this wonderful city.

11 This special sitting creates an opportunity for the City of Bathurst and surrounding areas, to actually observe how justice is administered in the State of New South Wales, at the very highest level. Sir William Blackstone once said that the court's policy, "was to bring justice home to every man's door, by constituting as many courts in judicature, as there are manners and townships in the kingdom. The courts of justice flowing in large streams from the King as the fountain, to his splendour and superior courts of record, and being then subdivided into smaller channels till the hole in every part of the kingdom were plentifully watered and refreshed".

12 Indeed the courts, following that course, have shown their deep commitment to ensuring that justice is equally made available to all, by providing regular regional sittings throughout New South Wales. An ethos which we generously applaud. With the analogy of Blackstone your Honours, it is a shame though, that the McLachlan River isn't flowing with more gusto and strength.

13 The Law Society recognises the value of the special sittings, to help educate the public about our criminal justice system. If the community can witness the difficult task judges have to face when determining an appropriate sentence, perhaps it could dispel some of the myths of judges being accused of being out of touch with the community. We must be mindful that judges hand down thousands of decisions every year, and it is only a very small proportion of these sentencing decisions which are appealed or reported in the media, for sensationalist journalism and/or political expediency.

14 By allocating valuable resources to hear matters in Bathurst, we can achieve key components of openness and transparency, which will help to maintain the public's confidence in the criminal justice system.

15 In closing your Honours, may I observe that it is particularly encouraging to see a large number of solicitors present here today and it is testimony to their support, the broader system of law, and this jurisdiction. And once more on behalf of those solicitors and the Law Society, we extend a warm welcome to you and thank you so much for coming to regional New South Wales.

**16 MR BILL WALSH, ON BEHALF OF THE BAR ASSOCIATION OF NEW SOUTH WALES:** May it please the Court.

17 It is my honour and privilege on behalf of the barristers of New South Wales, and in particular the regional bar, to welcome your Honours and the court to this magnificent courthouse and to this wonderful City of Bathurst.

18 People in Sydney have expressed admiration of the courage of the court in coming to Bathurst in winter. But I'd like to place on record that my inquiries with the Bureau of Meteorology indicate that Bathurst is enjoying the mildest winter in history. In addition whether from good luck, or dare I say with the utmost respect, shrewd planning, it might be noted that the court is sitting in Bathurst on the last day of winter and the first day of spring.

19 For the Court of Criminal Appeal, the highest court in the criminal justice system of this State, to travel and sit in Bathurst is a very important occasion, for the city of Bathurst and in the life of the

Court itself. I understand this is the first occasion that the Court of Criminal Appeal has sat in Bathurst. Citizens in regional and rural New South Wales often consider that they are either ignored, or that the preference is given to their counterparts the metropolitan area of Sydney. By this court taking the time and the effort to travel to and sit in Bathurst, means a lot to the people of this area. It means that the court is expressing its concern for, and interest in, the people of this region. In very recent times, the court has visited a number of regional centres. This is an important step in the life of the Court and it is very much appreciated.

20 What is not commonly known by people in the community in general, is the very high workload of this court. Near 500 appeals against convictions and sentences, are meticulously heard by this court each year. Each case is scrupulously examined, and decisions that are handed down, usually result in lengthy judgments. It is this Court, as a Court of Appeal, which provides guidance and direction to the community, to the legal profession and to judicial officers, in the manner in which criminal trials in this State, whether before juries or magistrates, are conducted and sentences handed down.

21 The court is formally and warmly welcomed to Bathurst by the Bar. It is to be hoped that your Honours and your Honours' staff have an enjoyable and productive time. As the court pleases.

22 **MS JULIANNA CRESWELL, PRESIDENT, CENTRAL WEST LAW SOCIETY:** Thank you, your Honour.

23 Your Honour I echo the words of my friend and my learned counsel Mr Walsh. It is indeed a great pleasure to have your Honours here and it does indeed give the community of Bathurst great pleasure and certainly an honour to have all the distinguished guests that we have in this courtroom today, gathered today for this very special occasion. Without further ado and on behalf of the Central West Law Society, and as a Bathurst practitioner myself, I welcome your Honours and welcome our distinguished guests and our distinguished guests in the audience of whom there are a number of distinguished guests to my right. Without further ado, if we could have your Honour's reply. Thank you Chief Justice.

24 **SPIGELMAN CJ:** Thank you Ms Creswell.

25 This is the first sitting of the Court of Criminal Appeal in Bathurst, It is appropriate that this occur, after all, we spend a fair bit of time increasing your population, through the corrective services process. We have other connections with the area. Bishop Richard Hurford spent many years at St James Church, which is really the Anglican Church for the legal profession, right next door to the Supreme Court. It is good to see him again.

26 The Supreme Court has in recent years lessened the degree of its interaction with regional New South Wales. This is simply a function of the workload. For many years civil circuits were a regular feature in many regional towns, including this one. Those sorts of cases no longer come to the Supreme Court in anything like the numbers they used. They still do come and when they do judges of the Court come and sit wherever it is appropriate to sit. Where the largest number of witnesses come from is usually the most appropriate place to sit. Judges of the Court sit in civil and criminal trials, in this Court mainly murder trials, wherever is the most appropriate place for that to occur. The Supreme Court maintains its connection with regional New South Wales, but not to the same degree as it used. Much of the civil workload was transferred to the District Court, but that has also declined.

27 It remains of great significance for the criminal justice system, and for the administration of justice as a whole, to maintain its ties with rural New South Wales. The most effective way of doing that is by these sorts of visits. I look forward to not only the cases we have to hear, which are chosen as being of significance to the local community, but also to meet the profession. We will have a number of opportunities to do so and to further our understanding of the difficulties of rural New South Wales and of legal practice in rural New South Wales.

28 Of course the circuits that used to occur have a very long history. They commenced when the judge of the Supreme Court came here in 1841, under what was then recent legislation for the creation of circuit Courts, not technically the Supreme Court, but circuit courts administered by judges of the Supreme Court. Indeed, for many years, one of the complaints that was made was that because all of the Judges were on circuit there were no Supreme Court judges in Sydney for several months of the year. That did not change for some time.

29 However, as far as I am aware, the first case on record in Bathurst was back in 1830. That was six years after the Supreme Court was brought into existence in 1824. In 1830 a Supreme Court judge came here to try some bushrangers, as it was said at the time, "In the district where their outrages had been committed." Well we still do that, even 176 odd years later. It is appropriate that that be done, because the community has to see the administration of justice at work, and particularly the administration of criminal justice. Nothing is more significant in terms of public confidence in the administration of justice than the direct exposure to criminal justice and in particular, criminal sentencing.

30 As Ms McPhie mentioned, from the thousands and thousands of criminal sentences imposed by judges and magistrates each year in this State, perhaps two dozen get any kind of publicity and it's all bad publicity. All of the other thousands of cases, in which the sentences go without comment are never mentioned in the media.

31 Sentencing engages the interest and the attention of the public, and particularly those who are victims of crime or family and friends of the victims of crime, more than anything else judges do. It is of great significance for us to explain ourselves and to take what opportunities we can, to explain why it is the sentences were imposed. The range of public opinion about what is a permissible sentence in a particular context is extremely wide. There are people at one end who hate sending anyone to gaol, particularly young persons. There are people at the other end who still believe in the death penalty. The range of permissible opinion for judges is much narrower than is the range of public opinion. We have to have some level of consistency in our sentencing so that the administration of justice is not brought into disrepute by a widespread belief that what happens depends on what judge happens to sit on a particular occasion.

32 There is a permissible range of opinions for judges, but the range of permissible opinion for the judiciary is much, much narrower, than the range of actual public opinion. That is one reason why what we do will always engage some level of controversy, not least from the victims of crime, but not only from them.

33 Sentencing and criminal activity has always been controversial. It started in the Garden of Eden, when God called Adam to account for his transgressions. Those of you familiar with the Old Testament, will know that he did the obvious thing and blamed his wife. She, more imaginatively, blamed the snake. Ever since we have been concerned with the long term implications of this particular sin and whether or not rehabilitation is possible.

34 These issues of what is proper punishment, how many generations it has to go through and what the prospects of rehabilitation are, have not changed since that day. They will always be with us.

35 It is of great significance for the administration of justice that we do what we can to explain ourselves. The best way of doing that is by face to face contact.

36 It is of course wonderful to be in this magnificent Courthouse. We have done exceptionally well in this State from our government architects over many, many decades. James Barnett is, of course, one of the greatest. He built Courthouses here, Goulburn, Forbes, Yass. He built the Australian Museum, the Post Office in Goulburn and the GPO in Sydney. But this unquestionably is one of his gems. It is a delight to see it. It is of continuing and enduring significance. It is a delight to be here and to sit in this courthouse.

37 I thank you for the observations you have made. We look forward to our stay here, brief as that may be. There are a number of cases, all of which involve parties from this general region. No doubt they will be of some interest to the persons involved. We cannot do this for all crimes that are committed because the flow of work just is not large enough to justify rural sittings for appeals in all local or regional criminal cases. Nevertheless where we can, we do. We do it at least once a year, and sometimes twice. I have no doubt that we will back here.

38 Thank you very much for your attendance. We will proceed to the work of the Court this afternoon. The Court will now adjourn.

\*\*\*\*\*





[Print Page](#)[Close Window](#)

## Case Management In New South Wales

**CASE MANAGEMENT IN NEW SOUTH WALES  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE ANNUAL JUDGES CONFERENCE  
KUALA LUMPUR, MALAYSIA  
22 AUGUST 2006**

Thank you for this opportunity to attend your conference and to enhance my understanding of your judicial system. Over recent decades a new sense of international collegiality has emerged amongst judges throughout the world. The administration of justice in New South Wales has been considerably enhanced by this international contact.

I have been asked to address you on some aspects of the Australian judicial system. The primary focus of my remarks will be directed to the management by the New South Wales Supreme Court of its civil caseload. The objective of case management is to reduce delays and minimise the costs of litigation. The means of achieving these objectives depend on the nature of the judicial system and the culture of the legal profession. These matters vary from one jurisdiction to another, including within Australia itself. Accordingly, what works will differ from one jurisdiction to another.

I would not wish to be understood as putting forward anything we do in New South Wales as best practice or as recommending its adoption. Our problem areas will almost certainly not be your problem areas. The constraints of judicial tradition and professional practice differ significantly from one nation to another.

Nevertheless, Australian judges have learned much from studying practices in other nations, particularly from the United States. I am aware that judges of other nations have said that they have profited from the Australian experience. I refer, for example, to observations to that effect made publicly and to me by Lord Woolf, whose inquiry led to major reforms in the practice and conduct of civil cases in England and Wales and by members of the Hong Kong Chief Justice's Working Party on Civil Justice Reform which reported in 2004.

I am aware that the courts of Malaysia have adopted case management principles. Much of what I have to say will be familiar to you. I will outline how civil cases are managed in my jurisdiction. I begin with some general observations about the judicial system in my State.

### **The Judicial Background**

There are about 1,000 judicial officers in Australia. Approximately one third of them are in the New South Wales judicial system of which I am Chief Justice.

As is customary, the basic structure of the system is hierarchical with a Local Court, a District Court and a Supreme Court. There are also two specialist courts: the Land and Environment Court and the Industrial Court. A number of administrative tribunals are also involved in authoritative dispute resolution.

The Supreme Court has a trial division divided into two parts: the Common Law Division and the Equity Division. The former deals with cases involving personal injury, professional negligence, defamation and administrative law. The judges of this Division also conduct criminal trials for the most serious indictable offences. Other indictable offences are tried in the District Court. The Equity Division of the Supreme Court hears cases involving commercial law, corporations law, equity, trusts, probate and the family provisions statute. This judicial structure enables the Court to take advantage of the specialist knowledge of members of the private bar, from which the overwhelming majority of appointees to the Court still come.

The Supreme Court also has two appellate divisions. The Court of Appeal consists of judges appointed as appellate judges who hear civil appeals. The Court of Criminal Appeal, which usually comprises one appellate judge and two judges of the Common Law Division, hears criminal appeals from the District Court, the Supreme Court and the Land and Environment Court.

Judges are appointed by the Governor of the State on the advice of Ministers. There is no independent judicial appointments commission. The desirability of such a commission has been raised in recent years as a possible development. This proposal has had little support in the past, but that may be changing. There has been some recent controversy about judicial appointments, but not with respect to any appointment to the Supreme Court of New South Wales.

Judges can serve until the age of 72 and may be appointed as acting judges until the age of 75. A significant majority of judges practised at the independent bar. However, a number of solicitors and a few legal academics have been appointed to the bench.

An important institution in the New South Wales system, which is not replicated in other Australian jurisdictions, is the Judicial Commission of New South Wales. As Chief Justice I am ex-officio President of the Commission. It is comprised of a majority of judicial members, including the President of the Court of Appeal and the Chief Judge of each other court in the State. It also has a representative of the profession, alternatively nominated by the Law Society representing solicitors and the Bar Association representing barristers. There are three other members who do not need to have legal qualifications. In fact, at present, two do have such qualifications, although they are not practising lawyers.

The Judicial Commission has three quite distinct functions: judicial education; complaints about judges; judicial decision-making information.

The Commission co-ordinates the education committees of each of the separate courts. Traditionally, the Commission conducts orientation programmes, an annual court conference for each court and periodic seminars in each court. In the last few years a specialist judicial college in Victoria and a National Judicial College have been created. Both of those institutions have only educational functions. They do not have any of the additional functions performed by the Commission. As part of its educational function the Commission publishes a newsletter, a journal for the information of judges and, periodically, books of articles and addresses.

The second key function of the Judicial Commission is the processing of complaints about judges and their conduct. The Commission has published guidelines about the way it processes complaints. The practical operation of the complaints function of the Commission has led to remarkably little in the way of public controversy. The overwhelming majority of complaints are dismissed. Most of them are no more than complaints by litigants who do not believe that they should have lost.

After its preliminary investigation the Commission may come to the view that the complaint is capable of leading to a recommendation to the Parliament to consider dismissing a judge. In such a case the Commission must appoint a Conduct Division, which is a panel of three judicial officers specially appointed for that particular investigation. If a Conduct Division recommends removal of a judge, then its report is tabled in Parliament and this may trigger the formal constitutional mechanism for dismissal. In the history of the Commission there has been one such recommendation considered by Parliament, but not accepted by it. Subsequently, the particular judge retired.

Other jurisdictions in Australia have not adopted such a formal mechanism for handling complaints. Although there was some judicial criticism of the establishment of the Commission, after almost 20 years of operation, I am unaware of any New South Wales judge who remains critical of the system. To some degree that is because of the combination of the complaints function with other functions performed by the same Commission, which other functions the judiciary regards very highly.

The third function of the Commission is to compile information and maintain databases to assist in the decision-making task.

The Judicial Commission produces bench books for the different courts. The bench books are compiled and kept up to date by a Committee of judges and former judges, serviced by the Commission. A Criminal Law Bench Book for the higher courts outlines and summarises the requirements of a criminal trial, notably directions to juries. The Local Court Bench Book covers the full range of its jurisdiction, both Criminal and Civil. A civil bench book is being prepared for purposes of assisting judges in conducting civil trials in the superior courts. The Equality Before The Law bench book is a resource available to all judges to help them deal effectively and fairly with the special requirements of some categories of persons who appear in the court as litigants and as witnesses, e.g. indigenous Australians, ethnic or migrant groups, persons with different religious affiliations, persons with disabilities, children and young people, women and other particular sections of the community. The Commission also publishes a Sentencing Manual setting out in considerable detail the legislation

and caselaw about sentencing for crime. All these publications are available in hard copies and online. They are publicly available and used by members of the profession.

The Commission provides an online Judicial Information Research Service (JIRS) which gives instant access to legislation and caselaw for criminal proceedings and sentencing statistics, which provide comprehensive information to judges on patterns of sentencing for particular offences. The sentencing database is used on a regular basis by all practitioners and judges – generally around 2000 hits per month. It has been widely accepted in a number of international inquiries as representing world best practice in the field. The Commission has assisted, and is assisting, a number of other jurisdictions to compile their own sentencing information systems, based on software developed in the Commission.

### **Judicial Management**

Throughout the common law world, over recent decades, the judiciary has accepted a considerably expanded role in the management of the administration of justice, both with respect to the overall caseload of the court and in the management of individual proceedings. This appears to be virtually a universal phenomenon. Judges intervene in proceedings to a degree which was unheard of only two decades or so ago. Courts are no longer passive recipients of a caseload over which they exercise no control.

I should, at the outset, distinguish between individual case management and caseload or caseflow management. The latter does not focus on particular cases. Its concern is the overall caseload encompassing delays in the system for cases generally as well as costs which the system imposes on the parties to particular proceedings. Managing individual cases efficiently is a necessary, but not a sufficient condition, for effective management of the caseload.

There is no inconsistency between the expanded managerial role for the judiciary and the essential requirements of an adversary system. Notwithstanding the historical hands off approach by the judges which allowed the legal profession to conduct cases in accordance with their own wishes and interests, such complete freedom is not an essential feature of an adversary system. What is essential is that the process result in fair outcomes arrived at by fair procedures and that the overriding test of judicial legitimacy – fidelity to the law – is served.

There is a public interest in ensuring that the limited resources available to every sphere of government are spent effectively and efficiently. That includes expenditure on the administration of justice. If judges want to retain control of the operations of their courts, then they must be prepared to be accountable for the resources entrusted to them.

Litigants who are dilatory in their preparation, or who otherwise take up too much of the court time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously. Experience in many common law countries has led to the conclusion that these responsibilities require active involvement by the judiciary in the progress of litigation. Such matters cannot be left to the discretion of members of the legal profession whose competence varies so much and whose client's interests or whose personal interests may not conform to the public interest in these respects.

One of the reasons why managerial judging has emerged is because of what economists would call market failure. In a market for legal services, where knowledge was perfect, clients would ensure that the cost of litigation would be minimised and reasonably proportionate to the value to them of success in the litigation. However, there is a substantial disparity in the knowledge of clients and that of their lawyers with respect to the process of litigation, a disparity which economists would call information asymmetry. The requirements of specialised skills and the complexity of the process of litigation are such that clients are not able to assess the quality of, or even the need for, a legal service before it is purchased. Those difficulties persist even after the service has been purchased. This kind of market failure explains a number of aspects of the legal profession. Managerial judging offsets this form of market failure.

On the other hand, it must be acknowledged that case management imposes costs on the parties. Case management must attempt to minimise the number of appearances in court and to restrict adjournments. In contrast with civil law systems, common law procedures prepare cases for a single continuous trial. This avoids the inefficiencies involved when judges and practitioners have to familiarise themselves with a case more than once.

I should note that pre-occupation with disposal of cases may lead to compromises in the quality of justice. It is of great significance for the judiciary not to give individual litigants the impression that the

case that really matters to the judge is the next one.

There is a story about a micro-economic reformer, pre-occupied with his statistics, who discovered that a Mozart quartet takes as long to play in the year 2006 as it did in 1806. In short, in 200 years there had been no productivity improvement whatsoever. He was, of course, convinced that this could only occur if there was some kind of anti-competitive conspiracy amongst professional musicians.

Some things take time. Justice is one of them. A focus on processing cases must not lead to the result that the quality of justice is compromised by the focus on quantity.

### **New South Wales Practice**

New South Wales practice with respect to civil case management has been a story of gradual development over a long period of time. There has never been a dramatic rearrangement of practice and procedure of the character that followed Lord Woolf's Access to Justice report in the United Kingdom. In New South Wales what happened was that a particular kind of practice developed in one specific area and was adopted in other areas.

The principal driving force for case management – particularly caseload management – was the acceptance that delays in the system were too great. Justice delayed, as is often said, is justice denied. Of course, not all lapse of time can be called “delay”. In New South Wales we have now adopted, by statute, a formal objective of expedition which contains a definition of delay as the time beyond that which is reasonably required for the fair and just determination of the case.

The implementation of case management techniques over the last two to three decades coincided with two important developments in civil litigation in New South Wales.

First, the gradual disappearance of the civil jury. Two or three decades ago juries were a common way of determining civil disputes. Now they are rare.

The second development, related to the first, was the replacement of oral testimony with written testimony, either in the form of statements or, more usually, affidavits. Except in cases where issues of credit are of central significance, this is now the customary way in which evidence is given although, usually, there is oral supplementation of the evidence in chief prior to cross-examination.

I do not wish to suggest that the oral tradition of the common law has been abandoned, but it has been significantly modified.

We do not have what the Americans call a “docket system” under which cases are assigned to the judge who will conduct the trial for management. Other courts in Australia use a docket system as, I understand, is also the case in Malaysia to some extent. There are arguments for and against the two approaches and what is right for one court is not right for another. I will be frank and say to you that, in my opinion, if New South Wales were to adopt a docket system the productivity of our courts would significantly decline.

Not all judges are as capable, or as willing, to manage a list as one would wish. In our system, case management is done by judges with an interest in, and an aptitude for, organisation. Judicial time is wasted if the gaps caused by settlements and adjournments are not filled quickly.

Our principal focus is on the caseload, not on the individual case. We adopt a top down approach rather than a bottom up approach. Effective and efficient use of resources, in our experience, requires something more than managing individual cases for trial. It requires an overview which, in our experience, is best done by disaggregating the caseload into distinct categories which require different treatment based, to a significant degree, on specialised law and specialization amongst legal practitioners. Most case management systems involve some system of differentiation, often called “tracks”. The New South Wales system involves a greater number of categories or “tracks”, but it works in our system because of our particular caseload. Each jurisdiction will differ in this respect.

The origin, and still in many respects the driving force, of the practice and procedure in New South Wales for individual case management and, to some degree, caseload management, was the special treatment always given to commercial cases. Originally we modelled our practices on the Commercial Court in England established in 1895, because a particular case was so mishandled by the trial judge that years of criticism by the London commercial community was brought to a head.

Mr Justice Lawrance had been appointed by Lord Halsbury for his services to the Conservative Party, not for any legal skills. His only distinction was that he was the tallest man in the High Court and was familiarly known as "Long John Lawrance".

Justice McKinnon would later describe him: "A stupid man, a very ill-equipped lawyer, and a bad judge. He is not the worst judge I have ever appeared before: that distinction I would assign to Mr Justice Ridley; Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach".

There was a legal dispute about how the rules for expenditure on salvage would be spread over the various owners of a cargo. Having listened to argument of counsel highly experienced in the field, Lawrance reserved his judgment for a period of six months until he was reminded about the case. He returned to court and commenced to deliver an *ex tempore* judgment in which he periodically stopped to ask counsel what the issues were, described the issues in terms which indicated he did not understand their replies, and had to be reminded at the end that he had not dealt with the more important issues in the case at all.

The junior counsel in the case, the future Lord Justice Scrutton, already the author of the first edition of his work on Charterparties would later anoint Lawrance "the only begetter" of the Commercial Court.

The 1895 English model was quickly adopted in New South Wales in the *Commercial Causes Act* 1903. The commercial legal community of Sydney celebrated the centenary of this legislation at a dinner in 2003.

The basic purposes of our 1903 Act are still valid today. The Act empowered a judge to require the parties to identify the real issues in dispute at an early stage and to dispense with the normal rules of practice and procedure and of evidence in order to ensure the speedy determination of those issues. These objectives have not changed.

The legal historians amongst you will recollect that the early common law in medieval times had a technique for determining the process of litigation by what was called *peine forte et dure*. This was a mechanism by which a litigant would have stones heaped upon his or her body, until he or she either pleaded or died. This was an early form of case management and is an abiding model for commercial case management.

### **The Act and Rules**

The starting point for our caseload management and case management systems is comprehensive legislation and rules which enable the court to effectively manage its caseload. The rules have been progressively developed over the course of some two decades.

The relevant statutes and court rules have recently been consolidated and applied uniformly to all three New South Wales courts by the *Civil Procedure Act* 2005 (NSW) and *Uniform Civil Procedure Rules* 2005. After a process of collaboration amongst the three courts, under judicial leadership with considerable input from departmental officers, we have adopted a uniform Act and uniform set of Rules of Civil Procedure applicable to all courts. These Rules are sufficiently flexible to allow for the differing requirements at the three levels of the hierarchy. The Act and Rules integrated existing practice. This did not involve significant change to past practice. The key reform was in the uniformity. This achievement would have been delayed if significant changes had been proposed.

The Rules are backed up by detailed Practice Notes with respect to the conduct of proceedings, particularly the conduct of proceedings in specialist lists. Although the basic rules are uniform, at the three levels of the court hierarchy practices differ, so that matters are treated with greater expedition in the Local Court than in the District Court and in the District Court than in the Supreme Court. Cases of greater legal or factual complexity are distributed upwards in the hierarchy of courts, with a view to ensuring that those which do not justify elaborate procedures are dealt with in a less elaborate way and vice versa. Obviously there remains considerable overlap and drawing a clear line is not always possible.

The first statutory provision to which I should refer is the *Legal Profession Act* 2004. That Act requires that a legal practitioner, before filing a pleading – whether for a plaintiff or for a defendant – must certify that, "there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law" that the claim or the defence has "reasonable prospects of success". This section reinforces the traditional professional obligation of legal practitioners that they must not permit the commencement or continuance of baseless proceedings.

The *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules* confirm and re-enact the powers of courts to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices. When exercising any power a court is required to give effect to the overriding purpose expressed in the Act, namely: to facilitate the “just, quick and cheap” resolution of the real issues in the proceedings. Our terminology “just, quick and cheap” is more blunt, but to the same effect, as the “objective” identified in your own Rules of the High Court (Order 34 r 4(11)).

Under our *Civil Procedure Act*, parties have a statutory duty to assist the court to further this overriding purpose and, therefore, to participate in the court’s processes and to comply with directions and orders. Furthermore, every legal practitioner has a statutory duty not to conduct himself so as to cause his or her client to breach the client’s duty to assist.

Our new Act and Uniform Rules, which distill in a coherent manner the principles that have been developed over many years of practical operation of the previous legislation and court Rules, identify the objects of case management as follows:

- The just determination of proceedings.
- The efficient disposal of the business of the court.
- The efficient use of available judicial and administrative resources.
- The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties.

The Act also requires the practice and procedure of the court to be implemented with the object of eliminating unnecessary delay, as defined. Furthermore, court practices and procedures are required by the Act to be implemented with the object of resolving issues, so that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

In order to serve the overriding purpose, and to meet the other objectives specified, the courts are given a comprehensive range of powers including:

- Power to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed.
- Powers with respect to the conduct of the hearing, including limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, limiting the time that may be taken by a party in presenting its case or in making submissions.
- Powers are to be exercised subject to the requirements of procedural fairness and are to take into account a range of relevant matters, including the subject matter and the complexity or simplicity of the case, the efficient administration of court lists (including the interests of parties to other proceedings before the court) and the costs of the proceedings, compared with the quantum of the subject matter in dispute.
- The court is empowered at any time to direct a solicitor or barrister for a party to provide to his or her client a memorandum stating the estimated length of the trial and estimated costs of legal representation including costs payable to the other party if the client was unsuccessful.

The Act provides for costs to be ordered against a legal practitioner, where costs have been incurred by reason of serious neglect, incompetence or impropriety. Such costs orders have been made, albeit infrequently.

These powers are exercised in a context where the basic system remains an adversary system. Nevertheless, their existence and their periodic exercise or, more usually, threatened exercise, has promoted cultural change amongst practitioners. This change has been reinforced by the adoption of ethical rules requiring practitioners to conduct litigation efficiently and expeditiously.

In Australia, the second largest cost after legal fees is expert evidence. The rules make special provision for such evidence in an endeavour to control those costs and to regulate the delay caused by unnecessary disputation on such matters.

A code of conduct for expert witnesses has been adopted which each expert is required to acknowledge and follow. The code states that an expert witness's paramount duty is to the court. It requires full disclosure of relevant matters in reports. Each party is obliged to make timely disclosure of expert reports and, in the case of late disclosure, cannot use the evidence unless there are exceptional circumstances.

A number of techniques have been implemented to ensure that expert evidence is given more efficiently. Parties are encouraged to agree on the appointment of a single expert, especially for particular matters which are not genuinely in dispute, e.g. quantification issues. Directions are given to require conferences of experts in order to identify areas of agreement and disagreement and requiring the preparation of joint reports which sets out these matters. A court may direct that such conferences occur in the absence of the legal representatives of the parties.

Furthermore, increased use is being made of the technique of having experts on different sides give their evidence concurrently under the direction of the judge – sometimes called “hot-tubbing”. Provision exists for court appointed experts, but that is not often done.

The courts encourage the use of alternative dispute resolution to resolve a dispute as early as possible and make detailed provision for mediation and arbitration. Earlier provision for neutral evaluation was not much used and has been removed. There has been an increase in the number of legal practitioners who are skilled in mediation and arbitration. Registrars of the Court have been trained as mediators and conduct mediations in the court. Unlike some other courts, judicial officers do not conduct mediations in New South Wales.

The Court has for many years had provision in its Rules for referring the whole or part of proceedings to independent referees. They are sometimes experts, e.g. engineers. They are often retired judges. This technique has been of great significance in ensuring the timely disposition of Commercial List cases, especially Construction List disputes, particularly cases in which technical expertise is required. It is also of significance where only some parties, or only some issues, in a wider dispute are subject to an arbitration clause. A person can be both an arbitrator and a referee and therefore resolve the whole dispute. Many referees are retired commercial judges, who also engage in commercial arbitration.

Notably, building disputes are brought to this Court's Construction List from all over Australia. The referees we use are widely regarded as having particular skills. However, they operate under the supervision of, but with minimal interference from, judges of the Commercial and Construction Lists. Their reports will only be rejected or modified for very good reason, and this rarely occurs.

One counter intuitive innovation is the conferral of power on the court to compel parties to engage in mediation, even though they do not wish to do so. Our experience is that persons often assume a posture of refusing to engage in settlement discussions on the basis that they cannot lose. However, when ordered to do so, reluctant starters have frequently turned into willing participants in the mediation process. Many apparently intractable positions have modified in the course of a compulsory mediation with successful results.

Some of the Rules, in their practical application, have required changes in the culture of the legal profession. We have not always been successful in doing that. Nevertheless, there have been significant improvements in compliance with these objectives by the legal profession. However, this is a matter that requires continued vigilance by judges.

### **Court Organisation of Management**

Different techniques are adopted for case management in different courts in New South Wales.

The District Court, a high volume civil jurisdiction, significantly focused on matters involving personal injury, requires litigants not to commence an action unless they are ready to proceed with it, save in the case of a time limitation problem. Thereafter the court insists on strict compliance with a timetable lodged at the outset of proceedings, with a view to listing a matter for hearing within 12 months of its commencement.

In the Supreme Court, cases are of a higher level of complexity and are managed in a number of different ways. Each of the divisions of the court, namely the Court of Appeal, the Court of Criminal Appeal, the Common Law Division and the Equity Division have their own registrars responsible to judges for case management.

Building on our long experience with the success of our Commercial List, cases of similar character are

grouped by subject category and specialised Practice Notes set out in detail the requirements of the particular field. Each of these lists is managed by a judge, in conjunction with a registrar. The specialist lists in the Common Law Division are the Administrative Law List, the Criminal List, the Defamation List, the General Case Management List, the Possession List and the Professional Negligence List. In the Equity Division the specialist lists are the Admiralty List, Adoption List, Commercial List, Corporations List, Probate List, Protective List and Technology and Construction List.

The conduct of each of these lists is substantially assisted by the existence of user groups which are formed for consultation between the judges who administer the particular list and representatives of the profession who practice in the fields. The process of refinement of the Rules and Practice Notes is a continuing one, in which these user group consultations play a significant role.

A key objective of our case management is to ensure trial date certainty, so that litigants and their representatives know that if a trial matter is listed for trial it will be heard. Some over-listing is done in anticipation of settlements, and there are unfortunate occasions when matters have not been able to get on. We regard it as critical, however, that that does not become a regular event, so that practitioners refuse to settle on the basis that there is a real possibility that a trial date will be vacated.

The most important aspect of the ongoing management system is that it is conducted under judicial leadership with appropriate delegation to registrars. All cases are brought under court control at an early stage with an early return date. Most lists are managed by registrars who sit daily. Some specialist lists are managed primarily by judges who sit less frequently, generally weekly. Interlocutory matters requiring orders, rather than directions, are referred to judges, either those in charge of specialist lists or to the duty judge in each of the two Divisions of the court. I annex a detailed outline of the operations of the lists (Appendix 1) and provide a brief summary:

The Registrar of the Court of Appeal manages cases and generally allocates hearing dates upon being satisfied of the state of readiness of an appeal. Cases that are likely to occupy more than two days of hearing time are referred to a judge for case management before a hearing date is allocated.

The rules of Court specify the precise steps and timetables to be taken in the main categories of cases filed. Directions hearings are scheduled before the registrar to ensure compliance with and, where justified, any modification to those requirements.

Pursuant to the rules of Court, the registrar may exercise the powers of a single judge to determine motions, except in contested applications for a stay or injunctive orders and, in practice, applications for expedition.

Most proceedings determined by the registrar concern applications for extension of time, security for costs, challenges to the competency of proceedings, dismissal for want of prosecution and the giving of directions where default has occurred in compliance with the requirements of the rules or earlier directions. Motions where stays/injunctive orders are opposed and requests for expedition are sent to a referrals judge for determination.

The registrar confers with the President of the Court on a regular basis to discuss listings and the rostering of judges. Calendaring of sittings and the identification of specialized lists is planned on an annual basis, having regard to available judicial resources and the requirements of Judges to sit in the Court of Criminal Appeal.

The Registrar in Equity generally manages cases until they are ready to be placed in the call-over for the allocation of a hearing date. The registrar allocates hearing dates at call-over. The registrar determines all motions within her delegation.

Matters are referred to associate judges and judges in the following circumstances:

1. If a motion is beyond the delegated authority of the registrar it is referred to an associate judge, Duty Judge or Corporations Judge;
2. If an associate judge has the power to deal with a matter and it is ready for hearing it is allocated to the associate judge call-over for a hearing date to be set;
3. If a timetable has been breached on three previous occasions the matter is referred to the Duty Judge; and
4. If a matter has not been finalised after having been stood over on four or more occasions in order to



allow the parties to have settlement discussions, the matter is referred to the Duty Judge.

The registrar and Chief Judge in Equity hold a weekly meeting to discuss case management issues and the general conduct of the lists.

In Common Law, except for the Professional Negligence List, the registrar manages cases in a similar way to the Equity Division. Similar criteria apply for referring matters to associate judges and judges of the Division. The referral mechanism for recalcitrant matters is less structured than in the Equity Division. The Common Law Division is in the process of settling caseload management changes that will move it towards the Equity model.

In the Professional Negligence List the registrar case manages all cases until they are ready to be allocated a hearing date. All opposed applications are sent to the Referrals Judge. Recalcitrant matters are referred to the List Judge after three timetable defaults.

Caseload and case management is a matter that is regularly discussed in formal and informal meetings, including weekly meetings of the relevant list judges and by regular contact between the judge in charge of a particular list and the registrar administering the list under the judge's guidance. A considerable body of statistical information is available about the caseload and the progress of individual cases. Judges with administrative responsibilities for Divisions and particular Lists are able to monitor the state of any part of the list, so that emerging problems can be anticipated and corrective action taken. Our present systems will be substantially enhanced when a new software system under development, called CourtLinkNSW, is fully deployed. (See Appendix 2.)

Cases are set down for hearing, usually three to four months ahead, in three different ways. The Common Law Division has a List Judge, a time consuming job undertaken for a year. The specialist lists of the Division feed into a monthly listing hearing before the List Judge where, with the assistance of the registrar, dates are allocated. In the Equity Division, the registrar acting in consultation with and under the supervision of the Chief Judge, has a daily general directions list and, every quarter lists all cases ready for trial and allocates hearing dates, usually three to four months ahead.

Traditionally, there has been a high rate of settlements in the Common Law Division. Accordingly, significant overlisting has occurred in that Division. Except for special fixtures, usually long cases or cases with special requirements such as overseas witnesses, cases are not allocated to a particular judge. Cases in this Division are fixed for hearing in the knowledge that a certain number of judges are available at that time. The system works on the assumption that there will be a significant number of last minute settlements, but this may be changing.

In the Equity Division, as in the Commercial List to which judges are specifically allocated, cases are set down for hearing before a specific judge. Settlements in the Equity Division and in its Commercial List have historically occurred with more notice than in the Common Law Division. Late settlements in that Division enable the judge to assist the Duty Judge, who deals with urgent matters, or to a call up from the Short Notice List maintained in the Division, being a list of short cases in which the parties have indicated a willingness to be ready on three days notice.

### **Commercial and Construction Lists**

I have earlier mentioned the significance of Commercial List practice for the development of our case management practices. It was our first specialist list and is in many ways the model for other lists. The commercial pressure remains to ensure the just, quick and cheap resolution of issues genuinely in dispute between parties in commercial litigation. Commercial clients have witnessed dramatic changes in their cost structures over recent decades. They do not accept that litigation should be exempt from downward cost pressure.

Our Practice Note for the Commercial List, and for the jointly administered Technology and Construction List, continues to adopt innovations which, I am confident, will be influential on practice in other areas of litigation.

Rules and practice for these two Lists reject traditional forms of pleading. They make provision for an initiating Statement by a plaintiff and a Response by a defendant. These documents are required to set out in summary form:

- The nature of the dispute.

- The issues which are likely to arise.
- The contentions and response to contentions.
- The questions that either party considers are appropriate to be referred to a referee for inquiry and report.
- Identification of all attempts to mediate.

Matters in each List are actively managed by the judge in charge of the List. The management includes:

- Review of suitability for mediation or reference out or the use of a single expert or court appointed expert.
- Timetables for preparation for matters for trial are set in considerable detail at the first Directions hearing including:
  - Filing of statements of agreed issues.
  - Making of admissions.
  - Appointment of single experts.
  - Exchange of expert reports and the holding of conferences of experts.
  - Filing of list of documents and provision of copies of documents.
  - The administration and answering of interrogatories.
  - Service and filing of affidavits or statements of evidence by specified dates.
  - Directions about the use of technology in accordance with the court's Practice Note encouraging such use.

Interlocutory motions and directions are heard in a running list on every Friday and otherwise as required. Use of technology often enables cases to be managed without the costs of attendance at court.

The most recent development in the List is the formal provision of a technique for limiting the costs of a hearing by the adoption of the system of Stop Watch Hearings. This method of trial involves the identification by agreement of the parties, of the total amount of time that will be allocated to a trial. Blocks of time are allocated to the respective parties and some time to the court.

The usual court order will allocate blocks of time to different aspects of the case, in accordance with the parties' expectations but that is subject to variation as the trial continues. A party may allocate its time to whatever aspect it wishes, e.g. more time taken in cross-examination will leave less time for an opening or for oral submissions.

The objective of a Stop Watch Hearing is to achieve a more cost effective resolution of the real issues between the parties. It requires more intensive planning by counsel and solicitors prior to trial. The technique has been successfully used in commercial arbitration and I have every reason to believe it will work in commercial litigation.

### **Backlog Reduction**

Two to three decades ago backlogs in both the District Court and the Supreme Court were substantial. Delays of more than five years, often substantially more, were common. The backlog has been reduced dramatically in the District Court and more gradually in the Supreme Court.

The techniques for dealing with the substantial backlog were different from those required for ongoing case management. A range of techniques was required to achieve that position.

The first measure to clear the backlog was an increase in the jurisdiction of the lower courts and the transfer of significant numbers of matters from the Supreme Court into the District Court. The jurisdiction of the District Court was increased and, in motor vehicle cases, was made unlimited. A Supreme Court judge sat for many days reviewing all of the files, identifying a large number of matters in which no issue of complexity or legal difficulty arose so that they could be handled, appropriately, at a District Court rather than a Supreme Court level. Hundreds of cases were transferred and were disposed of by the more expeditious procedures employed in the District Court. Getting the distribution of the caseload in the hierarchy of courts right is an important way of achieving the most effective use

of limited resources.

The second measure to tackle the accumulated backlog, was the appointment of additional judges, both full time judges and acting judges. The latter included the secondment of senior barristers as acting judges for limited periods of time, such as a few months. Questions of judicial independence arise in the case of active practitioners serving as judges. Once the initial breakthrough was made, the practice changed. Only retired judges are now appointed as acting judges. They continue to play a significant role in assisting the court to further reduce delays. The ability to call up experienced former judges, at comparatively short notice, also enables the whole list to be operated at a higher pressure so that when, as does happen from time to time, expected settlements do not eventuate, we do not need to vacate trial dates. Nevertheless, in the future the use of acting judges in our system will progressively diminish.

Furthermore, a considerable number of personal injury cases were disposed of by referring out cases which did not raise complex issues to arbitrators, generally from the private bar, to determine the disputes. This arbitral determination by experienced practitioners may not have provided the quality of justice of a hearing by a judge, but the complaints were few. This mechanism helped clear the backlog but is now only employed to a limited extent.

Acting judges played an important role in a particular technique of backlog reduction, which we called a "blitz", in which a large number of cases of a particular character, especially personal injury cases, were listed together.

Each "blitz" was preceded by a series of listing conferences designed to ensure that cases were prepared for hearing. Throughout this period the court imposed requirements for greater pre-trial disclosure and strictly enforced a no adjournments policy.

The "blitz" technique involved sitting a substantial number of judges, including on occasions virtually the entire court, including appeal judges, to hear hundreds of cases in a short period of time. Cases were not listed for a particular day, but for a particular week, and were treated as a running list so that, whenever one case settled or was determined, the next case in the list was sent to the judge immediately. This approach provided considerable incentive for the profession to settle cases and enabled judges to dispose of substantial numbers of cases in a short period of time.

These days we only conduct "mini-blitzes" on particular kinds of cases when filings build-up. The technique of a "blitz" is used on particular matters, e.g. disputes under our *Family Provisions Act*, concerning alleged inadequacy of provision for family members in wills are conducive to the blitz treatment. For similar reasons, we tend to group cases on appeals which are concerned with the same legislative regime, e.g. our workers compensation legislation, so that judges can focus on the common issues that often arise in such a specialist area in a concentrated manner.

The combined effect of all these measures was such that, within a decade or so, the substantial delays of five years and more were reduced to a substantial degree. In the case of practitioners who genuinely want to get their cases on, there is no reason today why the case cannot be disposed of to final hearing within 12 months in the District Court and within two years in the Supreme Court. However, many cases are still taking longer than they should and the task of disposing of older cases requires continuing attention.

Nevertheless, delay is no longer a significant concern for civil justice in New South Wales. Now the focus of our attention has shifted to reducing costs, both the cost to the court and the costs incurred by the parties. There is no doubt that case management, which was essential to overcome delay, can increase costs. Decisions have to be made about how much management a particular case, or a particular kind of case, requires. This is an ongoing process.

## **Conclusion**

To summarise, the essential requirements for the efficient and expeditious administration of justice are now well known:

- (1) A court must monitor and manage both its caseload and individual cases.
- (2) Management cannot be successful without judicial leadership and commitment.
- (3) Procedures must be clearly established in legislation, court rules and written practices.
- (4) Cases must be brought under court management soon after their commencement.
- (5) Different kinds of cases require different kinds of management.
- (6) The degree and intensity of management must be proportionate to what is in dispute and to the complexity of the matter.

- (7) The number of court appearances must be minimised.
- (8) Realistic but expeditious timetables must be set and, unless there is good reason, must be adhered to.
- (9) A key objective is to identify the issues really in dispute early in the proceedings.
- (10) Trial dates must be established as soon as practicable and must be definite, so as to ensure compliance with timetables.
- (11) Alternative dispute resolution should be encouraged and sometimes mandated.
- (12) Monitoring of the caseload must provide timely and comprehensive information to judges and court officers involved in management. Time standards may be useful in focussing the attention of all those involved.
- (13) Communication and consultation within the court and with others involved in the litigation process is an ongoing process.

Of all the requirements, one is overriding. Unless there is judicial commitment to the process, it will not work.

## **Appendix 1**

### **Introduction**

The Court manages the flow of its cases from inception to completion in a number of different ways, and is continually looking to improve its processes and outcomes.

Caseflow management strategies are reflected in the Uniform Civil Procedure Rules, the Rules of the Supreme Court and the Practice Notes issued by the Chief Justice. The Judges, Associate Judges and Registrars work together to ensure that cases are resolved as efficiently and justly as possible.

Commonly, cases will be allocated to Registrars to establish the core arguments in dispute and determine when cases should progress to hearing before a Judge or an Associate Judge. A Registrar makes directions to ensure that the case is properly prepared for hearing. If an issue arises that falls outside the specified duties of a Registrar, the Registrar may refer that case to a Judge or an Associate Judge.

### **Overview by jurisdiction**

#### **Court of Appeal**

New appeal cases are initially reviewed for competency and, if necessary, referred back to legal representatives to either substantiate the claim of appeal as of right, or seek leave to appeal. Applications for leave to appeal are examined to ascertain whether they are suitable for hearing concurrently with the argument on appeal.

Appeals are allocated a directions call-over date before the Registrar when a notice of appeal is filed. At that call-over, the appeal may be listed for hearing if the appellant has filed written submissions and the red appeal book. Case management may be ordered with respect to lengthy or complex appeals.

The Registrar case-manages and lists most appeals and applications for leave to appeal, however some cases may be referred to a Judge of Appeal for special case management. Urgent cases are expedited and can be heard at short notice, if appropriate. The Registrar in the Court of Appeal also deals with most interlocutory applications, except applications to stay judgments pending an appeal.

Mediation is offered to parties in appeals identified as capable of resolution by this process. Detailed statistics regarding the number of matters referred to mediation can be found in Appendix (ii).

#### **Court of Criminal Appeal**

Case management begins in the Court of Criminal Appeal when an appeal or application is filed in the registry. The appeal or application is listed for callover within two weeks of filing. Callovers are held fortnightly, although special callovers can be held in urgent matters. At the callover, the presiding Registrar will fix a hearing date and make directions for the filing and serving of submissions by the parties.

Generally, three Judges hear an appeal or application. The Chief Justice may also direct that more than three Judges sit on an appeal or application, particularly in matters involving an important issue of law. In some circumstances, the Chief Justice may direct that two Judges hear an appeal against

sentence. A single judge hears sentence appeals from the Drug Court of New South Wales, and also deals with bail applications and other interlocutory applications in the Court.

Since 1 July 2002, pre-appeal management procedures have been implemented for sentence and conviction appeals to the Court of Criminal Appeal. Accused persons may initially lodge a Notice of Intention to Appeal, without specifying their grounds of appeal. The Notice of Intention to Appeal allows the accused person six months (or such longer time as the Court grants) to file an actual appeal. Transcripts and exhibits are now provided to accused persons free of charge to facilitate the preparation of an actual appeal.

The impact of these pre-appeal management procedures on disposal rates can be seen by comparison with previous years. For detailed statistical analysis of the effects these procedures have had on disposal rates, refer to the chapter entitled *Court Operations*.

### **Common Law Division**

Case management in the Division begins when a summons or statement of claim is filed in the registry. Each Summons or Statement of Claim (with the exception of default matters) is given a return date before a Judge or Registrar and placed in a List. A Judge is appointed to manage each List, whilst the Common Law List Judge monitors all matters listed for hearing before a Judge. Registrars of the Division handle default matters administratively.

### **Common Law List Judge**

The List Judge manages the progress of cases from Call-up until a trial judge is appointed. Judges and Registrars refer matters to the Call-up that are ready for hearing and a hearing date is allocated. At the Call-up, the List Judge considers a number of factors, including the availability of Judges, the type of matters, and estimates of duration, before listing matters for hearing.

The List Judge also hears any applications for adjournment. Justice Hislop was the Common Law List Judge in 2005.

### **Common Law Duty Judge list**

The Duty Judge is available each day to hear urgent applications, including applications for interlocutory injunctions, during and outside normal Court hours when required. Judges of the Division are rostered to act as the Duty Judge for a week at a time during law term. A Vacation Judge is rostered during the court vacation to perform this same role.

The Duty Judge also conducts an applications list each Monday. The applications in this list are matters that cannot be determined by an Associate Judge or a Registrar. These matters include appeals from the Local Court under the *Crimes (Local Courts Appeal and Review) Act 2001*, applications for restraining orders, applications for declaratory relief, and applications to dispense with a jury. Matters are initially listed at 9am before a registrar to determine whether the application is ready to proceed. The Duty Judge may specially fix matters that cannot be heard on the Monday to later that week.

The Duty Judge determines interlocutory applications for restraining assets and issuing examination orders under the *Confiscations of Proceeds of Crime Act 1989*, *Criminal Assets Recovery Act 1990*, and *Proceeds of Crime Act 1987 (Commonwealth)*. The Duty Judge also considers, in chambers, applications seeking authorisation of warrants, such as those made under the *Listening Devices Act 1984*.

### **Associate Judges' list**

The Associate Judges in the Common Law Division deal with statutory appeals from the Local Court (except under the *Crimes (Local Courts Appeal and Review) Act 2001*), the Consumer Trader and Tenancy Tribunal, and against cost assessors.

The Associate Judges also deal with applications for summary judgment and dismissal, applications for extension under the *Limitations Act 1969*, as well as opposed applications to transfer matters from the District Court. The Associate Judges may deal with other matters as outlined in Schedule D of the *Supreme Court Rules 1970*.

Matters allocated to the Associate Judges' List are case managed by a Registrar daily at 9am. The

Registrar refers applications to an Associate Judge when ready for hearing.

### **Lists of the Division**

In addition to the above, the work of the Division is also distributed amongst a number of specialised Lists. These Lists (in alphabetical order) are:

- Administrative Law List;
- Bails List;
- Criminal List;
- Defamation List;
- General Case Management List;
- Possession List; and
- Professional Negligence List.

The Chief Justice appoints a specific Judge to be responsible for the management of a List throughout the year. The Judges responsible for the management of a list during 2005 are detailed below.

#### **Administrative Law List**

The Administrative Law List reviews decisions of government, public officials and administrative tribunals such as the Consumer Trader and Tenancy Tribunal. The Administrative Law List operates in accordance with the procedures outlined in Practice Note SC CL 3.

In 2005, Justice Hall was responsible for the management of the Administrative Law List, with the assistance of Justice Adams.

#### **Bails List**

Applications for bail or to review bail determinations can be made to the Supreme Court under the *Bail Act 1978* in respect of any person accused of any offence, even if the trial will not be heard in the Supreme Court. These applications are listed throughout the year, including during the court vacation. Common Law Division Judges are rostered on a weekly basis to determine these applications.

#### **Criminal List**

Arraignment hearings are held each month during Law Term. The aim of the arraignment procedure is to minimise the loss of available judicial time that occurs when trials are vacated after they are listed for hearing, or when a guilty plea is entered immediately prior to, or on the day of, the trial's commencement.

The arraignment procedure involves counsel at an early stage of the proceedings. This allows both the prosecution and defence to consider a range of issues that may provide an opportunity for an early plea of guilty, or shorten the duration of the trial. The procedures for arraignment are detailed in Practice Note SC CL 2. Justice Barr was responsible for the management of the Criminal List during 2005.

#### **Defamation List**

Section 7A of the *Defamation Act 1974* sets out the respective functions of the Court and jury in defamation proceedings. An initial hearing is held before a jury to determine whether the matter complained of carries the imputation alleged and, if it does, whether the imputation is defamatory. A separate, subsequent, hearing takes place before a Judge to determine whether any defence can be established and if damages are payable. This second hearing is only required if the jury determines that the matter complained of was defamatory.

The Defamation List was managed by Justice Nicholas during 2005. A Registrar assists by case-managing matters listed for directions. Practice Note SC CL 4 governs the operation of the List.

#### **General Case Management (GCM) List**

This List comprises all civil cases commenced by Statement of Claim that are not included in the Administrative Law, Defamation, Professional Negligence or Possession Lists. It includes money claims, personal injury claims, claims for possession (excluding land), breach of contract, personal property damage, malicious prosecution, and claims under the *Compensation to Relatives Act 1897*. These cases are case-managed by a Registrar who conducts status conferences, and final

conferences. At the status conference, the Registrar gives directions to ensure the case is ready for hearing by the compliance date. The procedures associated with the running of this List are set out in Practice Note SC CL 5. Justice Hoeben managed the GCM List during 2005.

### **Possession List**

The Possession List deals with all proceedings for the recovery of possession of land. The management of the List encourages early resolution of cases through mediation, other alternative dispute resolution processes, or settlement. Case management is also used to clarify the real issues in dispute. Practice Note SC CL 6 applies to cases in this List. Justice Johnson was responsible for managing the Possession List during 2005.

### **Professional Negligence List**

Claims against medical practitioners, allied health professionals (such as dentists, chemists and physiotherapists), hospitals, solicitors and barristers are allocated to the Professional Negligence List. Specialisation in the List allows the parties to focus on the real issues under dispute in these types of claims. A Registrar monitors cases at regular conference hearings. Conference hearings provide an opportunity for parties to discuss outstanding issues in the case, and provide a forum for mediation between the parties. Practice Note SC CL 7 applies to this list.

The Professional Negligence List Judge hears applications and makes directions according to the specific needs of each matter. Mr Justice Studdert managed the List during 2005. Justice Sperling assisted Mr Justice Studdert with the list until he retired in February.

### **Equity Division**

Several general lists operate in the Equity Division to assist in managing the Division's caseload:

- Expedition list;
- Short Matters list;
- Equity Duty Judge list;
- General list;
- Long Matters list, and
- Associate Judges' list.

### **Expedition list**

In 2005, two Judges were made available to hear expedited cases. A case is expedited when sufficient urgency is shown. When the application is granted, the Judge gives directions and monitors the preparations for hearing. The Expedition list Judges heard all applications for expedited hearings in 2005. The same Judge hears the case when it is ready to proceed. Mr Justice Young was the Expedition list Judge during 2005.

### **Short Matters list**

Cases in this List are fixed for hearing before a Judge when judicial time becomes available at short notice. A Registrar maintains this List, which includes cases that will be ready for hearing with three days' notice. These are mostly cases of a less complex kind that can usually be disposed of within one day. The Short Matters List is called over before the Expedition list Judge on the last Friday of each month immediately after the Expedition list.

### **Equity Duty Judge list**

The Duty Judge mainly hears urgent applications, sometimes outside normal court hours. The Duty Judge also hears uncontested or short cases, Judges of the Division are ordinarily rostered as Duty Judge on for a two-week period. There is provision for the Duty Judge to fix an early hearing date for a case and engage in pre-trial management of that case. The Duty Judge would make use of this provision if he or she considers that an early final hearing would result in a substantial saving of the Court's time. The work carried out by the Duty Judge is extremely varied and may include urgent applications by the Department of Community Services to intervene where a child's welfare is involved, or property and commercial disputes.

### **General list**

Other cases are placed in the General list when set down for hearing (if commenced by a statement of claim), or when the Registrar considers the matter ready for hearing (if commenced by summons).

Provide the estimated hearing length is less than six days and there are fewer than 100 matters already listed, the Registrar will place the matter in the next periodic call-over. At the call-over, the Registrar allocates a date for provisional hearing of the case, as well as a time for pre-trial conference, ordinarily before the trial judge.

### **Long Matters list**

Matters in the General list are placed in the Long Matters list when the Registrar becomes aware a matter may require more than 6 hearing days. Parties are required to file a synopsis of facts of the case and the issues under dispute. On receipt of this synopsis and any other details required by the Registrar, the matter will be referred to a Judge who will then conduct case management hearings and fix the hearing date.

### **Associate Judges' list**

The work of the Equity Division Associate Judges includes dealing with contested procedural applications and conducting inquiries as directed by Judges. Their work also includes the hearing of most applications under the *Family Provision Act 1982*, the *Property (Relationships) Act 1984*, and certain provisions of the *Corporations Act 2001 (Commonwealth)*. An Associate Judge conducts a monthly callover of matters, at which time a hearing date (usually in two months' time) is allocated. An Associate Judge also handles weekly referrals from the Registrar, determining those that can be dealt with immediately, and adjourning the balance. The Registrar only refers matters where the hearing time is not expected to exceed an hour. More complex matters are listed in the next call-over of proceedings in the Associate Judges' list. Urgent referrals, such as the extension of a caveat, may be made at any time.

### **Lists of the Division**

The Equity Division's caseload is also managed by allocating certain matters to specific Lists according to the nature of the claims. These Lists are set out below in alphabetical order:

- Admiralty List;
- Adoptions List;
- Commercial List;
- Corporations List;
- Probate List;
- Protective List; and
- Technology and Construction List.

The Chief Justice appoints a Judge to each of these Lists to bear responsibility for monitoring the List throughout the year. The Judges allocated to each List during 2005 are noted below.

### **Admiralty List**

The Admiralty List deals with maritime and shipping disputes. It is administered in the same manner as the Commercial List (see below). Justice Palmer had responsibility for this List in 2005.

### **Adoptions List**

This List deals with applications for adoption orders and declarations of the validity of foreign adoptions under the *Adoptions Act 2000*. Most applications are unopposed. Once all supporting affidavits are filed, a Judge will deal with the application in the absence of the public, and without the attendance of the applicants, or their lawyers. Unopposed applications require close attention for compliance with formal requirements, but there is little delay. A small number of contentious hearings take place in court in the absence of the public. Most of these relate to dispensing with consent to adoption. The Registrar in Equity deals with requests for information under the *Adoptions Act 2000*. Justice Palmer was the List Judge during 2005.

### **Commercial List**

The Commercial List is concerned with cases arising out of transactions in trade or commerce. The caseflow management strategy applied to the running of this List aims to have matters brought on for hearing quickly by:

- attending to the true issues at an early stage;
- ensuring witness statements are exchanged in a timely manner; and



- intense monitoring of the preparation of every case.

There is also adherence to the allotted hearing dates, and hearings are continued to conclusion, even though time estimates may be exceeded. Justice Bergin was the List Judge in 2005.

### **Corporations List**

A Judge sits each Monday and Friday to hear short applications under the *Corporations Act 2001 (Commonwealth)* and related legislation. The Registrar may refer applications to the Judge, with urgent applications to be heard on Friday.

The Judge will give directions and monitor preparations for hearing in longer matters, as well as in other complex corporate cases. Cases managed in this List are generally given a hearing date as soon as they are ready.

The Corporations List Judge during 2005 was Justice Austin, assisted by Justice Barrett.

### **Probate List**

The work performed by the Judges and the Probate Registry consists of both contentious and non-contentious matters. The majority of non-contentious cases are dealt with by the Registrar and Deputy Registrars. This includes the granting of common form probate where applications are in order and unopposed.

Both the Probate List Judge and the Registrars have procedures whereby some supervision is kept over executors in the filing of accounts, and ensuring beneficiaries are paid. This supervision is usually by way of "spot checks" or upon receiving a complaint.

In court, the Registrar considers routine applications, and applications concerning accounts. Should a routine application require a decision on a matter of principle, the application is referred to the Probate List Judge.

The Probate List Judge sits once a week to deal with complex applications. If an application can be dealt with quickly, it is usually heard immediately. Others are set down for hearing, normally within a month.

Contentious matters are monitored by either the Registrar or a Judge. Contentious matters commonly include disputes as to what was a testator's last valid will. When these cases are ready to proceed, they are placed in the call-over list to receive a hearing date before an Equity Judge.

The Probate List Judge meets with the Registrars on a regular basis to discuss the efficient working of the List. Mr Justice Windeyer was the Probate List Judge during 2005.

### **Protective List**

The work of this List involves ensuring that the affairs of people deemed incapable of looking after their property, or themselves, are properly managed. The List also deals with appeals from the Guardianship Tribunal of NSW, along with applications (in chambers) by the Protective Commissioner for advice regarding the administration of estates. From July 2005, the Court also considers applications regarding missing persons' estates and, in certain circumstances, may order that their estate be managed under the *Protected Estates Act 1983*.

Often, the issues under dispute in the Protective List are of a highly sensitive nature. The Court acknowledges this situation, and endeavours to be as flexible as permissible in handling these proceedings, with a minimum of formality. However, when there is a dispute which cannot be solved in this way, it is decided according to law.

The Deputy Registrar dedicated to the Protective List sits in court one day a week and almost all cases are listed in front of her. The Deputy Registrar may submit a case to be determined by the Judge without further appearance or adjourn a case into the Judge's list. A Judge sits once a week to deal with any referred cases. Most cases are considered on the Judge's usual sitting day as soon as the parties are ready. Longer cases, however, are specially fixed, usually within one month.

The Protective List Judge consults regularly with the Deputy Registrar to discuss the efficient working of the List. Mr Justice Windeyer was the Protective List Judge during 2005.

### **Technology and Construction List**

Cases involving complex technological issues and disputes arising out of building or engineering contracts are allocated to this List. The List is administered by the same Judges and in the same manner as those in the Commercial List.

### **Regional sittings of the Court**

The Court of Criminal Appeal sat in Newcastle and Albury during 2005. Several first instance criminal trials were conducted in the following regional locations in 2005: Bathurst, Dubbo, Griffith, Newcastle and Wollongong. Criminal trials will continue to be held in regional venues as required.

Civil hearings were held at regional venues by special fixture at the following locations during the year: Albury, Newcastle, Orange, Wagga Wagga and Wollongong.

All proceedings are managed from Sydney irrespective of where the proceedings commenced or the venue for hearing.

### **Alternative Dispute Resolution**

Alternative dispute resolution is a broad term that refers to the means by which parties seek to resolve their dispute, with the assistance of a neutral person, but without a conventional contested hearing. The two alternative dispute resolution processes most commonly employed in Supreme Court proceedings are mediation and arbitration.

#### **Mediation**

The option of dispute resolution through mediation is available for most civil proceedings pursuant to Part 4 of the *Civil Procedure Act 2005*. Mediation is not available in criminal proceedings.

A matter may proceed to mediation at the request of the parties, or the Court may refer appropriate cases to mediation, with or without the consent of parties. If the Court orders that a matter be referred to mediation, there are several ways in which a mediator may be appointed. Firstly, parties may be in agreement as to a particular mediator. Secondly, the Court may appoint a specific mediator, who may also be a Registrar of the Court. If parties cannot come to an agreement, the Court is responsible for appointing a qualified mediator from a prescribed list. This procedure is set out in Practice Note SC Gen 6.

The role of the mediator is to assist parties in resolving their dispute by alerting them to possible solutions, whilst allowing the parties to choose which option is the most agreeable. The mediator does not impose a solution on the parties. The Court made eleven of its qualified Registrars and Deputy Registrars available throughout 2005 to conduct mediations at specified times each week.

Settlement of disputes by mediation is encouraged in the Court of Appeal, and both the Common Law and Equity Divisions. Parties may derive the following benefits from mediation:

- an early resolution to their dispute;
- lower costs; and
- greater flexibility in resolving the dispute as the solutions that may be explored through mediation are broader than those open to the Court's consideration in conventional litigation.

Even where mediation fails to resolve a matter entirely and the dispute proceeds to court, the impact of mediation can often become apparent at the subsequent contested hearing. Mediation often helps to define the real issues of the proceedings and this may result in a reduction in eventual court time and, consequently, lower legal costs.

#### **Arbitration**

While arbitration involves adjudication of a dispute by a third party, this adjudication is not conducted by the Court. Determination of a dispute regarding recovery of damages through arbitration is permitted under Part 5 of the *Civil Procedure Act 2005*.

The Chief Justice appoints experienced barristers & solicitors as arbitrators following a nomination by their respective professional associations. Arbitrators generally hold their appointment for two years and the Chief Justice may also reappoint the arbitrator.

By contrast with a mediator, an arbitrator imposes a solution on the parties (an award) after listening to the arguments and evidence presented.

A decision of an arbitrator becomes a final judgment of the Court 28 days after the award is given. Any party to the arbitration may apply for a rehearing, upon which, the matter is then reheard before a Judge.

## Appendix 2

### CourtLink

#### Contents

Paragraphs 1 - 2	CourtLink Aims and Objectives
Paragraph 3	CourtLink Implementation – On Track
Paragraph 4	Progress to date – laying the foundations
Paragraphs 5 - 9	Working with clients to develop eServices and eService Pilots
Paragraph 10	Implementing in the registry
Paragraphs 11 - 14	Working Together

#### CourtLink Aims and Objectives

##### 1. CourtLink will deliver:

- An integrated multi-jurisdictional court administration system supporting: NSW Supreme, District and Local Courts, Coroner's Court, Children's Court and the NSW Sheriff Office
- Web-based eServices to users of the courts
- A generic interface for electronic information exchange with Justice Sector Agencies

##### 2. The CourtLink program aims to:

- Provide a range of services online that will reduce the cost of administering justice
- Standardise and simplify processes to attain a common approach across all jurisdictions
- Replace all current paper-based data exchanges between courts and Justice Sector Agencies with electronic data exchanges

#### CourtLink Implementation

3. Supreme and District Court Crime are currently in the Systems Integration Testing phase with activity progressing on track. The Civil component for Supreme and District Court is in the Development phase and is also on track.

November 2005	Launch of eService pilots: Electronic Document Lodgement and Online Court	Delivered on target
April 2006	Costs Assessment, Supreme Court	Delivered on target
January 2007	Crime – Supreme Court and Court of Criminal Appeal	On Track
February 2007	Crime – District Court	On Track
May 2007	Civil – Supreme Court and Court of Appeal	On Track

June 2007	Civil – District Court	On Track
May 2007	eServices Release 1	On Track
July 2007	Crime & Civil – Local Courts and Sheriff's Office	On Track

## Progress to date

### 4. Laying the foundations

- A re-engineering of the litigation process
- A reduction in the number of forms used in criminal proceedings (from approximately 700 to less than 100)
- The synchronisation of civil rules and civil forms between the three main jurisdictions. The Civil Procedure Act 2005 and the Uniform Civil Procedure Rules commenced on 15 August 2005, introducing uniformity in civil processes for the first time
- Development of a legislative framework to implement electronic case management in courts.

### eService Pilots

5. An **online document lodgement** service has been piloted from November 2005. This facility enables legal firms to pay filing fees by credit card, to file documents electronically and then to download the document certified and ready to serve. The pilot is running in the Corporations List and the Possession List of the Supreme Court.

o Between November 2005 and August 2006 there have been over 1700 documents filed online.

6. The five firms using the service reported significant benefits in terms of time saved. The system was viewed as easy to use, straightforward and stable. All five firms experienced a staggered start due to resolving internal processes, and this has provide some good learning for the project team. The service standard adopted by the Supreme Court Registry staff, of returning the stamped documents within 2 hours, was very well received. The pilot's success has resulted in demand from other firms using the Corporations and the Possession List, and the service is now available to them.

7. An **Online Court** facility that allows resolution of non-controversial interlocutory matters without the need to attend court has being piloted by Supreme Court Judges since April 2006.

- Justice Gzell in the Equity Division of the Supreme Court commenced using the virtual court from 31 July 2006 for directions hearings. To date Justice Gzell has successfully completed 14 such hearings on-line and is now looking to expand its use to all directions hearings under his jurisdiction.
- Associate Justice Macready will shortly commence using the same environment for some 80 claims under the Family Provisions Act

8. The design of the eServices products has involved workshops with members of the primary audience group, legal practitioners, and their involvement will continue throughout development, implementation and review.

9. The eServices scheduled for delivery in 2007 are:

**File Document:** The electronic filing of court documents

**Online Court:** A virtual courtroom for use in case management activities

**Search Case or Court Listings:** The electronic retrieval of the accessible electronic court record of a case

**Search Listing:** The ability for parties to search for listing dates

**Buy Transcripts:** which is the electronic ordering, purchasing and receipt of court transcripts

### **Transforming the user experience in the Registry**

10. Phase two of CourtLink's implementation saw the launch of the system into the Costs Assessment and related Finance functions in the Supreme Court of NSW in April 2006. This release allowed a 'proof of concept' test for the software. The system was very well received by staff. The next release will cover Supreme and District Court Crime in early 2007. Roadshows of the system with staff have been very positive with the system being given 9 out of 10.

### **Working Together**

11. At every level, the CourtLink project is an exemplar of promoting a team approach to Justice sector service delivery.

12. The Governance structure has successfully engaged the Judiciary as champions of change in each Jurisdiction. Senior stakeholders meet weekly to manage progress and to set the strategic direction. Judges groups meet weekly to monitor progress and give input at a strategic level.

13. Legal Practitioners are involved in the development, piloting and review of eServices.

14. The Attorney General's Department chairs the Justice Sector Information Exchange Co-ordinating Committee, comprising 12 NSW agencies and the Commonwealth Director of Public Prosecutions. This committee is leading the development of electronic data exchange with agencies who are integral parts of the justice system and with whom high volume, frequent exchanges of data occur. This electronic data exchange will mean that:

- Records held by relevant agencies will be updated as a result of activity in another justice sector agency. For example:
  - When a court records sentence details, the criminal history held by NSW Police will be simultaneously updated
  - The imprisonment details and warrant will appear in the records held by the Department of Corrective Services
  - Bail details will be accurate and available where they are needed immediately, as will details of Apprehended Violence Orders
- There will no longer be a need to transport large quantities of documents between agencies.

[Print Page](#)[Close Window](#)

## Address to Parole Authorities Conference 2006

**ADDRESS TO PAROLE AUTHORITIES CONFERENCE 2006  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
SYDNEY 10 MAY 2006**

The maintenance of public confidence in the administration of criminal justice is a matter of the utmost significance, to which both judges and parole authorities make a contribution. Criminal justice is a very public process and the punishment of convicted criminals engages the interest, and sometimes the passion, of the public at large to a substantial degree.

In all of recorded history there has never been a time when crime and punishment has not been the subject of debate and difference of opinion. This is not likely to change in the future. The problem seems to have started in the Garden of Eden itself, when God called Adam to account for his transgression. He, of course, blamed his wife. She – more imaginatively – blamed the snake. All three were the subject of condign punishment. For millennia, theologians and others have been debating whether that punishment has had the desired effect of general deterrence and how to enhance mankind's prospects of rehabilitation.

When judges impose sentences for criminal offences and when parole authorities make decisions concerning earlier release, both must give primary weight to the protection of the public. What is the best way to protect the public is, however, a matter upon which reasonable minds can, do, and will continue to, differ.

The different legislative schemes pursuant to which each of the parole boards and authorities represented at this conference operate, contain a list of considerations which must be taken into account when making decisions. As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters. Long experience has established that such tasks are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill informed, or partly informed, public debate on such matters.

Most of us can only truly serve the public interest by maintaining a level of toughness in the face of those rages and enthusiasm. That is not to suggest that what we do is above criticism and cannot profit from public debate. It is just that so much of what passes for debate is ill informed, formulaic and unhelpful.

There is a significant section of the community which believes that all sentences should be tougher than they in fact are and that virtually no-one should be released before time. However, there is also a section of the community that believes that the public interest is best served by promoting the rehabilitation of convicted persons. Both of these opinions are legitimate. From time to time the balance of community opinion may favour one rather than the other. However, it is necessary to recognise that in the community there is a broad range of opinion.

The range of permissible judicial opinion on sentencing and the range of reasonable exercise of the statutory discretion involved in release on parole is, in each case, necessarily narrower than the range of actual public opinion on these matters. It is necessarily narrower because of the principle of equality of justice.

Both in sentencing and in parole decision-making it is necessary to ensure, on the one hand, that offenders do not have a sense of grievance that they have drawn a particularly harsh judge or harsh parole decision and, on the other hand, that victims do not feel a sense of grievance because an offender has drawn a particularly lenient judge or an indulgent parole decision. For this reason the range of permissible judicial and parole decision-making is necessarily narrower than the range of public opinion. It is, therefore, inevitably the case that judicial and parole decisions will disappoint

somebody in the community. That is a problem that just goes with the job we do, and we have to wear it.

One reason why we must ignore transient rages and enthusiasms is because, in the long term, the maintenance of public confidence in the administration of justice will be determined to a substantial degree by the maintenance of the principle of equality of justice. That principle has two quite distinct dimensions: first, similar cases should be treated similarly and, secondly, relevant differences should lead to different results.

The degree that the community focuses on only one aspect of the relevant decision-making process, i.e. the effect on victims being the most common focus of public attention in recent times, it is necessary for those who can do so to ensure that the community is aware that both judges and parole authorities are required *by law* to take other considerations into account. The principle of equality of justice – that like be treated the same and unlike be treated differently – requires this to be so.

With respect to the possibility of release on parole there is a well established division of functions between the judiciary and a parole authority. Pursuant to the common statutory regime, judges must determine a non-parole period which is the minimum period of incarceration required by justice in the circumstances of the case. Thereafter the role of the parole authority is triggered by the particular statutory regime in force in the jurisdiction.

There was once a line of authority in New South Wales to the effect that a court should fix the shortest period as a non-parole period, in order to permit the parole authority to determine when the offender should be released on parole. However, that line of authority was decisively overruled by the High Court [1]. On the basis of those authorities the sentencing judge is required to determine the non-parole period from the perspective of what should be the length of the minimum period of actual incarceration.

In New South Wales a majority of sentences are short sentences. This has the effect of taking away the discretion of the Parole Authority by force of statute. Whenever a New South Wales court imposes a sentence of imprisonment for a term of three years or less and appoints a non-parole period, the court must make an order directing the release of the offender at the end of that non-parole period [2]. As a result of this provision, the majority of offenders in New South Wales are released to parole pursuant to an order of the court, rather than pursuant to a decision of the Parole Authority. The Authority's jurisdiction is primarily directed to longer sentences.

Of particular significance in New South Wales is the fact that our legislative regime makes provision for a presumptive statutory ratio, whereby the non-parole period ought, unless varied by a judge, be three-quarters of the head sentence. The most frequently cited reason given by judges for reducing that ratio is to allow for a greater than usual period of supervision on parole which a judge believes to be required given the particular circumstances of the offender. We act on the fact that that occurs, although I have seen doubts expressed whether that is always so.

One of the important considerations for a judge when fixing a non-parole period, or for a parole authority exercising its statutory power to release on parole, is the risk of re-offending by a parolee. Recidivism by offenders determines, to a very substantial degree, the amount of criminal conduct in the community. Studies in New South Wales indicate that about 35 percent of those released from prison in Australia re-offend seriously enough to warrant their return to prison within two years. For some groups of offenders the rate of return to prison is as high as 60 percent. This particular group makes such a disproportionate contribution to crime that reducing re-offending rates ought to be a high priority [3].

Recidivism is of great significance for those who make decisions for release on parole, whether judges who determine a non-parole period when imposing a sentence of three years or less, or a parole authority exercising its statutory powers. Each decision-making process ought to be informed by relevant research. Recently, the New South Wales Bureau of Crime Statistics and Research published a comprehensive study on the subject of re-offending by parolees [4]. The study does suggest that the expectation of judges and parole authorities about the state of rehabilitation of particular prisoners has proven to be incorrect more often than anyone would wish.

Although judges and the parole authority must take into account a range of relevant considerations, the difficult issue of predicting whether or not re-offending is likely must be one of the primary matters considered. Where, by reason of express statutory provision, the judge in effect determines that a

person will be released on parole, the judge must give significant weight to the risk of re-offending when determining whether to set a non-parole period at all. For the same reasons, the matter is of central significance to a parole authority.

The difficulty with predicting future behaviour is, of course, manifest, particularly in a context where the person who stands to be sentenced, or the inmate seeking early release, has a vested interest in pretending he or she has attained a level of rehabilitation which is far from the fact. Sometimes the helping professions who draft reports for judges or parole authorities for purposes of making these decisions, appear to operate on the assumption that everything they are told must be true, not only with respect to the future conduct of a particular person, but also with respect to past conduct. All too often there is little checking of assertions made about the past. In this respect there are, of course, resource constraints which prevent compilation of information that is essential for the decision that needs to be made.

However, it seems to be in the nature of the helping professions, whether of psychology, psychiatry or of social work, to believe in the perfectibility of man more often than in man's inherent capacity for evil. It is not that persons in such professions are particularly credulous, it is just that in many of the things that such professionals are called upon to do, the fact that something is *believed* to be true is itself of considerable significance. For those of us who have to act on such advice, there are times when a healthy dose of scepticism is required or, at least, a reality check.

The recent research of the Bureau of Crime Statistics and Research is not limited, as earlier research was, to identification of a breach of parole conditions. Many such breaches are quite technical and do not involve re-offending, e.g. failing a drug test, failing to report, etc. The recent research concentrates on criminal conduct after release on parole. The study identified about 2,800 offenders released to parole in 2001 and 2002. The study sought to identify how many re-offended within the follow-up period from 27 to 39 months; how quickly persons re-offended; and what characteristics were connected with differences in time to re-offend. The study considered both court determined parole, i.e. there was a non-parole period for a sentence of less than three years, as well as parole decisions by the Parole Board/Authority.

The general conclusion of the recent report is that nearly two-thirds of the sample – 63 percent – of all those who had been released on parole were re-convicted of a further criminal offence. Indeed, 41 percent were sent to prison as a result of the nature of the offence which they committed after release on parole. Of those who did re-offend, 23 percent did so within the first three months of release and 50 percent did so within one year. The study does not, however, indicate the extent to which re-offending occurred *within* the parole period.

The Bureau report identifies a number of matters which are associated with the likelihood of re-offending. Of particular significance is re-offending by habitual criminals. A person who has been in custody on only one prior occasion is 1.59 times as likely to re-offend as a person with no prior history of convictions leading to full time imprisonment. However, a person who has been in custody four or more times is 2.84 times more likely to re-offend than a person with no prior history of custody. It is, of course, relevant to note, when assessing such figures, that some categories of crime are more amenable to detection than others, with the result that they return higher rates of recidivism. I refer, for example, to the well-known low rates of conviction for sexual offences.

There are significant differences amongst different groups. An analysis of which groups of offenders are more likely to re-offend, in order of likelihood is:

- Having a greater number of prior custodial episodes in the eight years preceding release.
- Being younger at the time of release.
- Identifying as indigenous.
- Having a most serious index offence for robbery or another violent offence, property/deception or for breaching a justice order.
- Having been issued with a parole order from a court (as opposed to the Parole Authority).
- Having one or more prior offences for using or possessing heroin, amphetamine or cocaine in the previous eight years.
- Having spent less time in custody during the custody episode.



There may be differences in the relevant sample between differential rates of detection rather than differential rates of offending. It has been suggested that this is so with respect to indigenous offenders. Nevertheless, even making allowances for offence types that are more susceptible to detection, the authors of the recent study conclude that there is still a higher risk of re-offending amongst indigenous offenders.

It is relevant for us to know, both judges who make decisions with the effect of release and also parole authorities, that according to this most recent study, a quarter of offenders have re-offended within three months of release; half re-offend within one year; just under two-thirds were estimated to have re-offended within two years following their release from prison. These figures, albeit high, are consistent with previous research in New South Wales and Britain.

Research of this character provides an important basis for judges and parole authorities to understand why offenders fail parole. As that understanding develops, sentences, policies, programmes and parole decisions can be adapted in order to reduce the risk of re-offending on parole. Research of this character is of significance for us to know 'what works' in crime prevention and to assist the targeting of rehabilitation efforts. Furthermore, it assists judges and parole authorities to make more effective decisions when assessing the appropriateness of release on parole at all.

It is, of course, essential that each parole board or authority comply with its particular statutory regime. I have no doubt that an assessment of whether or not an offender is likely to re-offend during the period of release on parole is a matter to which every such authority gives careful consideration. I find it a little surprising that this is not expressly stated in the New South Wales legislative regime [5]. Nevertheless, the overriding obligation of the New South Wales Authority is to refuse to release an offender unless it decides that release is appropriate having regard to the principle that the public interest is of primary importance. Furthermore, amongst the matters which the Authority is obliged to take into account are a number of matters which would raise the question of probability of offending. These include consideration of the offender's antecedents; any report prepared by or on behalf of the Crown; an assessment of the offender's conduct while serving sentence, including willingness to participate in rehabilitation programmes and also the "likelihood" that an offender, if granted parole, would benefit from rehabilitation programmes and is able to adapt to normal *lawful* community life.

Nevertheless in New South Wales, as I suspect is the case in other statutes which I have not reviewed, the breadth of the discretion granted to a parole authority is not restricted by an obligation to give significant, let alone determinative, weight to a judgment as to the likelihood of a potential parolee re-offending during parole. However, I do not wish to be understood to suggest that the discretion should be constrained.

A particular feature of the legislative regimes which have emerged over the last decade or so is a new emphasis on the effect upon victims of early release. Indeed, on some parole authorities there are victim representatives.

Express reference to victims was first introduced in New South Wales in 1996, into the regime which was then found in s17 of the *Sentencing Act* 1989. Such provisions have subsequently been introduced in all other States and Territories and New Zealand commencing in 2001 in Victoria, South Australia and the ACT; then 2002 in Tasmania and New Zealand; and 2004 in the Northern Territory. Queensland and Western Australia have introduced such amendments this year [6].

Australian statutes vary in a number of respects, e.g. some do not confer a right on victims to make submissions to parole authorities, New South Wales restricts the right to serious offences, where the non-parole period exceeds 12 years [7].

An emphasis on the role of victims in the criminal justice system has emerged throughout the western world over recent decades. It represents a basic reorientation in the administration of criminal justice to which judges have been required to adapt and parole authorities have also been required to adapt.

As I have emphasised, the imposition of sentences concerns a variety of different and often conflicting objectives, in the reconciliation of which a wide spectrum of opinion is permissible. There is and always has been a recognition that punishment performs important public purposes. What has emerged over recent times is a recognition that one of those purposes is the acceptance of the justice of the outcome by the victims of the crime including, particularly in the case where a crime has resulted in a death, by the family of the deceased.

The urge to seek revenge for criminal conduct, particularly violent criminal conduct, may not be the most noble of human motivations. Nevertheless, it must be accepted that revenge is a basic human response to loss and grief. Assuaging the need for revenge cannot be ignored, even by those who regard it as an ignoble human characteristic. Perhaps the most important single function of the criminal justice system is that it ensures that people do not pursue revenge privately or, as it is sometimes put, do not 'take the law into their own hands'. There are too many examples in human history of such conduct for us not to ensure that in the administration of justice, whether sentencing by judges or decisions to grant early release, the sense of outrage by victims about inadequate punishment is assuaged.

These issues become particularly acute in the case of violent crime and especially so in the case of loss of life. We have, permanently, turned our backs on the death penalty in this nation and in most democratic nations. There are some who continue to believe in the reintroduction of the death penalty. That is not a belief that we should seek to assuage. Nor can we provide any logically correct answer to those who pose the question of proper punishment when a life has been taken, in terms of 'What is the value of a human life?' These are emotional issues which require sensitivity on the part of those of us who have to make decisions about such matters to the effect of those decisions on persons who are, by necessity, likely to be particularly significantly affected by them, namely victims and their families. The new obligation to hear and consider the views of victims is one manifestation of the democratic principle that citizens are entitled to have some influence on decisions of public authorities that affect their lives.

In primitive society punishment was seen primarily through the eyes of retribution for those who suffered as a result of criminal conduct. The "eye for an eye" rule of the Old Testament is well-known. The same principle appeared in Hammurabi's Code and in the tribal role of blood feuds and other similar principles [8]. One of the great achievements of medieval Europe was that the concept of the Kings Peace replaced the idea of retribution, with the idea that crime was an offence against the entire community, represented by the King [9]. For centuries the victim played virtually no role in criminal proceedings, other than reporting crime to the authorities and as a witness. Over recent decades, however, this has changed.

The new focus on the impact of the criminal justice system on those members of the community most affected by a particular crime, is a focus that is very much part of the restorative justice approach that has received greater emphasis over recent decades. The primary emphasis previously given to the objective of rehabilitation has been modified by the need to take into account other objectives to be served by the criminal justice process. The new prominence given to the role of victims in that process is a manifestation of a broadly based social reaction to what was perceived to be the adverse consequences of an exclusive focus on the rights and interests of the person who had committed a criminal offence. We are all now required to consider the significant consequences upon victims.

The first response to this change in public opinion was the introduction of victims compensation schemes, which were in large measure the implementation of a welfare state approach to the recognition of the particular harm suffered by victims of crime. Subsequently, the focus has changed to a recognition that a victim, including the family and friends of victims, have a particular *interest* in the criminal justice process. There is now statutory recognition of the legitimacy of direct involvement by victims in that process. The significance of the change is manifest in the terminology of "victim's rights" to describe this interest.

In New South Wales the first step was the *Victims Rights Act* 1996. This Act, for the first time in New South Wales, made provision for the reception of victim impact statements. These were not always well received by judges, who were unsure as to how to deal with them. In large measure, this first reaction was the usual manifestation of the fundamental principle, operative throughout the legal profession including the judiciary, that nothing must ever be done for the first time.

It has always been a principle of the common law that effect of the crime on the victim is a critical matter to be taken into account by a sentencing judge [10]. This principle is now reinforced by a variety of legislative provisions which emphasise the, one would have thought obvious, proposition that the gravity of an offence is affected by the extent to which the offence has made other persons suffer.

The role of the victim as part of the restorative justice principle is emphasised by legislation which permits a victim impact statement to be read aloud by the victim in the course of the sentence hearing [11]. This change both enhances the sense of participation of the victim in the justice process and also enables the victim to directly confront the offender with the human consequences of his or her crime.

The latter purpose can be seen to also serve the purpose of rehabilitation, which may be enhanced by the direct confrontation of the offender with those consequences.

In Australia victim impact statements are directed to the sentencing process. A significant debate has occurred in the United States, where victim impact statements are read to the jury before the determination of guilt. At one stage the Supreme Court of the United States declared this to be unconstitutional, but quickly reversed its position [12]. The result of the latter decision is a continuing campaign to amend the Constitution to write in a Charter of Victims Rights [13].

The particular role of a victim impact statement in the sentencing process is by no means resolved. A variety of judicial approaches is discernible in the authorities [14], both in terms of the emphasis to be given to cases in which the victims seek condign punishment and also in those cases where victims manifest a level of forgiveness of the crime.

Difficult issues arise as to the weight to be given to victim impact statements in the sentencing process. Similar difficulties unquestionably arise when parole authorities, such as those represented at this conference, come to take into account such statements. I suggest that it may be of assistance for parole authorities to consider the case law on victim impact statements in sentencing decisions. I urge those who prepare materials for your decision-making process to pay careful attention to developments in the case law on this matter.

In New South Wales judges are informed in this regard by the publication of a *Sentencing Manual* by the Judicial Commission of New South Wales. The current form of that *Manual* has a small section on Victim Impact Statements which will be considerably expanded in the new edition, that will also be available on line.

I do not wish to suggest that, at this stage, a coherent set of principles has emerged, but there are number of cases which highlight particular issues that are quite likely to also arise in the context of parole decision-making, where the position of victims is required to be taken into account.

Some judges appear to place weight on the fact that victim impact statements are not subject to cross-examination [15]. I would have thought that, save in the case of sexual offences, most victims would be perfectly prepared to subject themselves to cross-examination which, in my experience, defence counsel would invoke very rarely, knowing full well that they are likely to go backwards rather than forwards. Further, in my experience, very little evidence tendered on the sentencing process is ever subject to cross-examination. As parole authorities do not take decisions after cross-examination, these reservations are probably less relevant in your case.

A more difficult issue is what weight is to be given to the fact that victims have forgiven the perpetrator of an offence. Judges have manifested a reluctance to give substantial weight to forgiveness because of the significance of general deterrence in the sentencing exercise. Nevertheless, in the case of crimes involving domestic violence the general approach has been that forgiveness is entitled to weight [16]. It does not appear to me that considerations of this character are wholly spent at the end of the sentencing task by a judge. They remain relevant considerations at the time of the parole decision-making process.

As a manifestation of the gravity of the offence, the impact on victims is only one of many considerations required to be taken into account in the sentencing process. As I have emphasised these considerations quite frequently conflict or, at least, point in different directions: some suggesting a higher sentence, others a lower sentence. The same kind of conflict between essentially incommensurable objectives must arise in the parole decision-making process.

A parole authority will, perfectly properly, manifest the same divergence of view that appears in the judiciary with respect to these matters. That is perfectly understandable in the absence of definite legislative guidelines about the weight to be given to particular matters involved in a difficult decision making process. Many judges remain of the view that crime is first and foremost a wrong committed against the general community, which is itself entitled to exact retribution. This perspective is entitled to greater weight than similar concerns expressed by victims. Parole authorities may, be reason of past practice, give determinative weight to prospects of rehabilitation. Nevertheless there are important policy issues here which have been reflected in legislative change to which judges and parole authorities must adapt.

The difficulties of the sentencing task which judges face is reflected in a similar set of difficulties faced

by parole authorities. The core of the problem is the reconciliation of conflicting and incommensurable purposes to be served by criminal punishment. Asking whether retribution is entitled to more weight than rehabilitation in a particular case is, to adapt an analogy of one United States judge, like asking "whether a particular line is longer than a particular rock is heavy" [17]. What is required is an overall judgment based on experience. We must not be distracted from this task by the transient pressures of short-term unpopularity with the outcome of such decisions.

#### END NOTES

1. See *R v Portolesi* [1973] 1 NSWLR 105 esp at 107; *R v Sloane* [1973] 1 NSWLR 202 at 206; overruled in *Power v The Queen* (1974) 131 CLR 623 esp at 627, 628, 629, subsequently reaffirmed on numerous occasions (see the authorities set out in *R v Simpson* (2001) 53 NSWLR 704 at [56]).
2. See s50 of the *Crimes (Sentencing Procedure) Act* 1999.
3. See Don Weatherburn *Law and Order in Australia: Rhetoric and Reality* Federation Press, Sydney (2004), p220.
4. See Craig Jones et al "Risk of Re-Offending Among Parolees" *Crime & Justice Bulletin No 91* January 2006.
5. See *Crimes (Administration of Sentences) Act* 1999, s135.
6. See s74A *Corrections Act* 1986 (Vic); s77 *Correctional Services Act* 1982 (SA); s46 *Rehabilitation of Offenders (Interim) Act* 2001 and now s123 *Crimes (Sentence Administration) Act* 2005 (ACT); s72(2B)(b) *Corrections Act* 1997 (Tas); s47 *Victims Rights Act* 2002 (NZ); Parole and Sentencing Legislation Amendment Bill 2006 (WA); Corrective Services Bill 2006 (Qld).
7. See generally Matt Black "Victims Submissions to Parole Boards: The Agenda for Research" *Trends and Issues in Crime and Criminal Justice No 251* Australian Institute of Criminology, May 2003.
8. See Exodus 21:24-25; S Cornille "Retributions 'Harm' Component and the Victim Impact Statement: Finding a Workable Model" (1992) 18 *University of Dayton L Rev* 389 esp at 396 fn 50; Pollock and Maitland *History of English Law* (2nd ed, 1923) Vol 2 esp at 450-451.
9. See e.g. L Henderson "The Wrongs of Victim's Right" (1985) 23 *Stanford Law Review* 937 esp at 939-940.
10. See e.g. *Siganto v The Queen* (1998) 194 CLR 656 at [29].
11. Introduced in New South Wales by the *Victims Legislation Amendment Act* 2003 (NSW).
12. See *Booth v Maryland*, 482 US 496 (1986) and *Payne v Tennessee*, 501 US 808 (1990).
13. See, eg, V Schwartz "The Victims Rights Amendments" (2005) 42 *Harvard J on Legislation* 525.
14. See in particular Ivan Potas *Sentencing Manual, Law Principles & Practice in New South Wales*, Judicial Commission of New South Wales, Law Book Co (2001) esp Pt 3B;
15. See, eg, *R v Slack* [2004] NSWCCA 128 at [61]-[62]; *R v Wilson* [2005] NSWCCA 219 at [27]-[28]; *R v Byrd* [2004] NSWCCA 300 at [48]-[49].
16. See, eg, *R v Glen* unreported, 19 December 1994 NSWCCA per Simpson J; *R v Dunn* (2004) 144 A Crim R 180 at [47]; *R v Simpson* (2004) 145 A Crim R 361 at [83]; *R v Kershaw* [2005] NSWCCA 56 at [24].
17. See *Bendix Autolite Corp v Midwestco Enterprises Inc*, 486 US 888 (1998) at 897 per Scalia J.

[Print Page](#)[Close Window](#)

## Transaction Costs and International Litigation

**TRANSACTION COSTS AND INTERNATIONAL LITIGATION  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE 16TH INTER-PACIFIC BAR ASSOCIATION CONFERENCE  
SYDNEY, 2 MAY 2006**

I welcome this opportunity to address this gathering of business lawyers from throughout the Asian-Pacific region. Your choice of "Free Trade Agreements" as the overall theme for this Conference reflects the increasing significance of such agreements in this, the most dynamic economic region of the world. The trend towards bilateral free trade agreements is, of course, a reflection of the difficulties that have been encountered in developing multilateral agreements [1].

The purpose of this paper is to identify a range of issues about the practice and procedure of international litigation that should be part of this international microeconomic reform agenda.

### Transaction Costs

The expansion of international trade and investment over recent decades looks certain to continue. There has already been a dramatic increase in the frequency of cross border legal disputes. International litigation will continue to expand, despite the high level of risk, cost and delay that is involved. The transaction costs involved in the enforcement of the legal rights and obligations of international trade and investment operate as a burden on such trade and investment.

International litigation involves:

- Additional layers of complexity.
- Additional costs of enforcement, indeed uncertainty about the ability to enforce contractual rights.
- Risks arising from unfamiliarity with foreign legal process.
- The risk of unknown and unpredictable legal exposure.

Minimising the transaction costs of international litigation requires the attention of business lawyers and of commercial judges. I do not doubt the difficulties involved. The achievement of significant international micro-economic reform through free trade agreements, suggests that we should now take reform of international litigation out of the too hard basket.

Minimising transaction costs is one of the central themes of the law and economics literature, which appears to be the dominant school of jurisprudence in the United States. That dominance is not reflected elsewhere. The focus on transaction costs is derived from the seminal work of the Nobel Prize winning economist, R H Coase, who advanced the Coase Theorem that efficient outcomes can be achieved by market participants without government regulation, as long as property rights are well defined and transaction costs are zero. Of course, transaction costs, notably legal costs, can never be zero. Economists concentrated on this artificial world, notwithstanding Coase's [2] criticisms.

Even without accepting the whole intellectual toolkit [3], it can readily be accepted that transaction costs which impede the beneficial mutual exchange of either trade or investment should be minimised. However, this objective has not been a significant feature of negotiations for bilateral free trade agreements. This may be because the costs and uncertainties of international litigation are so high, particularly when compared with domestic litigation, that there is a belief that nothing of substance can be achieved. I am not so sure. In any event, there will be international litigation and it is likely to expand. This is a matter that should be of significant concern to all business lawyers. It is only if the business lawyers of the region come to believe that there is some point in pursuing such matters that representatives of the respective governments around the negotiating table will take them up in bilateral or regional discussions.

One commentator has described a business lawyer as a "transaction cost engineer" who facilitates

commercial intercourse by reducing future transaction costs [4]. Well-drafted commercial arrangements avoid conflict with regulatory regimes; anticipate, and therefore avoid, future disputes; and create structures for dealing with the unknown or the unanticipated. By such advice, transaction lawyers add value to a transaction.

Of course part of what businesses, your clients, call costs, and what economists call “transaction costs”, is what you call “income”. There is a tension here which requires three things: first, the maintenance of high standards of professional conduct; secondly, a level of regulation of the profession that is appropriate in each jurisdiction; thirdly, supervision of the litigious process by the active involvement of judges, particularly through effective case management and caseload management.

The cost structure of much economic activity has been transformed over recent decades by new management techniques, by technology and by the reduction in barriers to trade through microeconomic reform. Lawyers are not and will not be immune to the gales of creative destruction, to use Schumpeter’s telling phrase, unleashed by contemporary entrepreneurs. Your clients are acutely conscious that one of the few areas of business expenditure that has not notably diminished over recent decades is the cost of dispute resolution. Unless business lawyers are seen to deliver a cost-effective service, you may very well find yourselves bypassed in the same way as some other sections of our profession have come to be bypassed in recent times, often by legislative intervention.

### **International Comity and Reciprocity**

Multilateral and bilateral arrangements to facilitate international litigation manifest the principles of comity and reciprocity.

The High Court of Australia has adopted an explanation of the principle of comity first advanced in the Supreme Court of the United States in the following terms:

“ ‘Comity’, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, on the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its law.” [5]

At the core of the idea of comity is the expectation of reciprocity: we will act in the way that our conduct will be treated by others. In this respect the principle of comity is based on an enlightened self-interest, not on some form of idealistic internationalist perspective. The principle of reciprocity is also reflected in bilateral treaties, such as free trade agreements. The minimisation of the transaction costs involved in international commercial litigation is well within the purpose and objective of such agreements.

### **Law Reform Report**

In 1996 the Australian Law Reform Commission produced a report on legal risk in international transactions [6]. This report covered a wide range of the issues involved in international co-operation and legal enforcement for international transactions. It described itself as a feasibility study, directed to indicating subjects for further inquiry. Unfortunately, it has not led to much in the way of practical results. I will refer to some of the Commission’s recommendations when dealing with specific matters below.

The report contained many useful suggestions, both for the courts and for the profession. Indeed, it is noteworthy that the report specifically mentioned this organisation, in the context of making the observation that it is practitioners who bear the frontline burden of dealing with cross border issues. The Commission said:

“Work at this level is enhanced by professional associations like the Inter-Pacific Bar Association, Law Asia and the International Bar Association. These assist lawyers to become more familiar with cross border issues, to track down sources of legal advice in other jurisdictions and collectively to help develop better solutions to cross border problems. There are also several international judicial conferences which assist in a similar way.” [7]

Interaction amongst lawyers in the region has grown considerably in the decade since these issues were considered by the Law Reform Commission. Similarly there has been a considerable expansion of contact between judges at conferences and in visits by delegations. A new sense of international

collegiality has developed amongst judges and the level of understanding of each other's practices is qualitatively different today. There is a solid foundation on which to build.

### **International Commercial Arbitration**

Lord Goff described the international situation as "a jungle of separate, broadly based jurisdictions all over the world" [8]. Sometimes the process appears to be an application of the law of the jungle.

The complexities of international litigation stand in invidious comparison to the well-established regime of international commercial arbitration. To some degree these are alternatives. I am a strong supporter of alternative dispute resolution. Not all judges are. It helps, coming from a busy court. Staying on top of the caseload of the Supreme Court of New South Wales is like trying to drink from a fire hose. We would not survive without settlements, which these days generally involve mediation or arbitration.

I am, myself, a strong advocate of a hands-off approach to the process of commercial arbitration. Judgments of the Supreme Court of New South Wales are, I believe, widely recognised in the commercial arbitration community as supporting the parties choice of dispute resolution mechanisms [9]. Nevertheless, when arbitrators meet, there is a continual refrain of complaint about interference by the courts. This refrain is not entirely altruistic.

It is necessary to recognise the vital role that the courts play in maintaining the integrity of the commercial arbitration process. Things do go wrong. Arbitrators do manifest bias. Arbitrators have been known to commit errors of so fundamental a kind as, on any view, to justify intervention by a court. The court's role in maintaining the integrity of the process should be welcomed by arbitrators. It enhances the attractiveness of arbitration to the commercial community.

The advantages of arbitration are real, notably in a context in which parties have a continuing relationship. The ability to decide or influence the selection of the decision-maker is often seen to be an advantage of commercial arbitration. Another advantage is that arbitration takes place in private, or in secret, depending on your point of view. In commerce there is a reluctance to wash your dirty linen in public. Commercial arbitration offers privacy which the courts rarely can or should offer. It is also sometimes said that commercial arbitration minimises costs. Particularly in the area of commercial litigation I do not believe that is true in Australia to any substantial degree. Of course it is capable of being true, but it depends very much on the arbitrator and the parties.

The ability to play some part in the selection of the arbitrator is not a fool-proof mechanism for protecting the integrity of the process. This is particularly so whenever one party is much more frequently involved in the process of selecting arbitrators than another – "repeat players" as they are called.

It is also hard to ignore the fact that an arbitrator on a daily rate does not have a strong personal interest in minimising the time the process takes.

Not all commercial disputes are appropriate to be resolved by mediation or arbitration. Subject to their contractual obligations, parties may choose to litigate in preference to arbitration. As with the submission to arbitration, their wishes should be respected. Furthermore, notwithstanding the high quality of the arbitrators, many of them are retired commercial judges, some disputes raise novel legal issues that can only be authoritatively determined by appellate courts. To some degree, commercial arbitration may suffer from the lack of coercive powers available to courts, e.g. compelling discovery or the attendance of witnesses and ensuring the preservation of assets.

There is in place a coherent international system for resolving commercial disputes by arbitration, which stands in marked contrast to the complex, incoherent, "jungle" of diverse provisions for international litigation. I refer to the interlocked UNCITRAL Model Law [10], the New York Convention for Enforcement of Arbitral Awards [11] and the Washington Convention for Investment Disputes (ICSID) [12]. These international instruments have been widely adopted, including in Australia by the *International Arbitration Act 1974* [13].

Perhaps, the most significant advantage that international commercial arbitration has over international litigation in courts is the ability to effectively and efficiently enforce arbitration awards virtually throughout the world, pursuant to the New York Convention. Nothing remotely like that exists if one obtains a judgment from a court.

### **Venue Disputation**

The considerable expansion in international litigation has been attended by transaction costs which, in

large measure, are unique to international trade and investment. Disputes as to the appropriate jurisdiction in which litigation should occur are now more common. This sometimes happens in domestic commercial litigation, notably in federal systems and in any jurisdiction in which there are separate courts with exclusive jurisdiction in a particular field, requiring the determination of precise legal boundaries. Nevertheless, such disputes are of a different order, and frequency, when cross border transactions are involved.

As Justice Colman of the English Commercial Court recently said:

"In recent years the Commercial Court has increasingly been called upon to resolve complex jurisdictional issues which have arisen even in the face of binding law and jurisdiction clauses. Such disputes arise because of the apparent inability of the parties even to attempt to apply commonsense to the choice of venue for resolution of their disputes. Parties to the Brussels, Lugano and San Sebastian Conventions and ultimately to EU Regulation 44/2001 have at least established a jurisdictional regime of reasonable certainty for international commercial disputes connected with the courts of Member States. Once outside that regime, the opportunities for disruption of the resolution of substantive claims by time-consuming and costly jurisdictional ancillary litigation are far too often relentlessly and needlessly pursued to the prejudice of all parties. The applications now before this court exemplify the futility of this kind of ancillary litigation and point up the urgent need for an international jurisdiction and judgments convention of the widest possible application." [14]

Of course international trade has always thrown up such issues and there is a long history of disputes over such matters. There seems little doubt, however, that the scope and intensity of such disputation has considerably expanded over the last few decades. The publication of specialist journals and books on the subject reflects this growth [15]. Perhaps the best indicator, however, is the emergence of proceedings for anti-suit injunctions, both of a pre-emptive nature, and to prevent the continuation of proceedings in another jurisdiction.

Some of the international litigation literature seems to make a virtue of this form of disputation by suggesting that once matters have been determined the disputes appear to lead to a commercial settlement. There is no room for self-congratulation here. The commercial settlement is almost always available from the outset. It is the uncertainty as to the jurisdiction, about both the formal rules that will be applied and the mode of their application, that delays the settlement.

Jurisdictional disputes are always, and in all circumstances, a waste of money. They are, regrettably, necessary in the current and likely future structure of international institutional arrangements. They represent a transaction cost which is a peculiar imposition on international trade and investment and which, therefore, discourages such trade and investment. We should do whatever we can to minimise the occurrence of such disputation.

The problem of course is that for a growing range of disputes there are at least two, and frequently more, options available for instituting proceedings. Exorbitant or long-arm jurisdiction is a feature of many nations. Australia, in the common law tradition, has rules of court which entitle a court to assume jurisdiction based on service in situations where connection with the jurisdiction is at best tenuous, perhaps amounting no more than residence, or even temporary presence or, in the case of tort, the fact that injury continues after the return of a resident to the jurisdiction [16]. Under the French Civil Code any French national may sue a foreign contractor in the French courts [17]. So may a resident of Belgium or the Netherlands in the courts of those nations. In Germany, the Code of Civil Procedure confers jurisdiction in proceedings against any person who possesses property in Germany [18].

These choices are made, at least in the first instance, by plaintiffs. This is not a neutral process. Initially plaintiffs determine where the proceedings are brought. They have a "first mover" advantage. Properly advised, they will take advantage of the options available. There is nothing neutral about the choice of jurisdictions, subject to self-denial on the part of the jurisdiction first chosen or an anti-suit injunction, which can be made effective, from another jurisdiction [19]. The inevitable has happened, in response to these defendant strategies there has emerged the pre-emptive anti-anti-suit injunction [20].

There are numerous different tests adopted for determining when it is appropriate to decline to exercise long-arm jurisdiction. Even within particular nations there are differences between judges and differences over time with respect to the degree of parochialism or international comity manifest when these issues arise. This is a large topic to which justice cannot be done on an occasion such as this.



However, I do wish to raise for consideration the possibility that, in a commercial context, this is a matter that can be alleviated, to some degree, in a bilateral treaty such as a free trade agreement. Particular attention should be given to the effect of a choice of jurisdiction clause in contracts for international trade or investment.

The futility of venue disputes is exemplified by one of the leading authorities from Australia. In *Akai Pty Ltd v The People's Insurance Co Limited* the High Court was concerned with the Australian subsidiary of a Japanese corporation which obtained credit risk insurance over risks situated in Australia and New Zealand. At that time it was difficult to obtain such cover in Australia, so it sought cover from the People's Insurance Company, a company incorporated in Singapore. That company proposed an express choice of Singaporean law. However, after negotiation, the contract expressly provided for English law to govern the contract. Following an insolvency, Akai commenced proceedings in the Supreme Court of New South Wales and claimed that the terms of the Australian *Insurance Contracts Act* overrode the choice of law clause.

The High Court, by a bare majority of 3 to 2, upheld this contention, on the basis of the section of the Act which prevented parties from contracting out of its operation. This is a classic case of the effect to be given to what are called "mandatory rules". However, what should be given the conclusory appellation of a "rule" that is "mandatory", is frequently a difficult matter.

The High Court decision in *Akai* widened the circumstances in which a foreign jurisdiction clause may be held to offend the public policy of the Australian forum. However, the defendant successfully invoked the jurisdiction of the English courts, which granted an anti-suit injunction on the basis of the express choice of forum. In any event, Singapore, the defendant's home jurisdiction, and the location of its assets, would probably have refused to give effect to the Australian court's decision. No doubt all of this informed the ultimate settlement of the case, but the transaction costs incurred before that was resolved were formidable [21].

The frequency and intensity of battles over jurisdiction indicate that parties attribute considerable significance to venue [22]. The clearest example of this, of course, is the size of damages awards that may be made if jurisdiction can be established in the United States. That nation offers pre-trial discovery which most jurisdictions regard as oppressive fishing expeditions; jury trials with awards of damages that are regarded everywhere else as exorbitant and statutory provision for treble damages – all driven by an entrepreneurial class of trial lawyers with a major financial interest in the result. In all multilateral negotiation on legal issues, this is the 1000 lb gorilla sitting in the corner [23].

Justice Einstein, a judge of my Court, has described the position of the United States as "one of the most intractable obstacles to be overcome in any move towards a substantially global judgment enforcement convention" [24]. I agree. No doubt for that reason, these matters are not covered in the Free Trade Agreement between Australia and the United States. Indeed, Australia felt the need to enact legislation many years ago, to protect its companies from treble damages actions [25].

### **Civil Procedure**

International commercial litigation does not, in principle, differ from domestic commercial litigation in its basic requirements. The first is speed. The adverse effects of delay are particularly acute in this context. In commerce, delay is not merely undesirable. Delay means that capital is tied up, for example in increased provision for contingencies; entrepreneurial energy is diverted; uncertainty and increased risk breed timidity and avoidance or increase insurance costs. Much litigation is concerned with dividing a pie. Delay in commerce means the pie is smaller.

In most jurisdictions the particular requirements of commerce are recognised by special rules of practice and procedure. In many jurisdictions, as in New South Wales, this recognition is reinforced by devoting a group of judges, selected for their commercial expertise, to such cases on a full-time basis. This recognises the necessity for such litigation to be dealt with expeditiously and at the lowest cost consistent with a fair process.

The Australian legal heritage, as is well known, is that of England. The Commercial Court in London is a well-established example of the special treatment of commercial cases. This was the model that we adopted in Australia. Indeed, we played a role in its creation.

On 29 January 1889 a ship called *The Sir Walter Raleigh*, loaded with wool from Sydney, came to grief on the French coast at Cap Giz-Nez near Bourgogne. The cargo was salvaged and eventually found its way to London. The subsequent proceedings in the Queen's Bench Division of the High Court of Justice were so mishandled by the trial judge that years of criticism by the London commercial

community of the judiciary was brought to a head, leading to the establishment of the Commercial Court [26].

The trial judge was Mr Justice Lawrance whose only distinction was that he was the tallest man in the High Court. He was known as "Long John Lawrance". He had been appointed by Lord Halsbury for his services to the Conservative Party, not for his legal skills. Lord Justice McKinnon would later describe him thus:

"A stupid man, a very ill equipped lawyer, and a bad judge. He was not the worst judge I've ever appeared before: that distinction I would assign to Mr Justice Ridley; Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach." [27]

A dispute arose as to how the rules for salvage expenditure could be spread over the various owners of the cargo on *The Sir Walter Raleigh*. Junior counsel for the plaintiffs was the future Lord Justice Scrutton, already the author of the first edition of his work on *Charterparties*. He would later anoint Lawrance as the "only begetter of" the Commercial Court.

Having listened to argument of counsel highly experienced in the field, Lawrance reserved his judgment for a period of six months until he was reminded about the case. Accordingly, he returned to court and commenced to deliver an ex tempore judgment in which he periodically stopped to ask counsel what the issues were, described an issue in terms which indicated he did not understand the reply, and had to be reminded at the end that he had not dealt with the more important issues in the case at all.

This was the last straw for the commercial community that had long been critical of the unnecessary delays, technicalities and excessive costs of commercial litigation in the Queen's Bench Division. In 1895 the Commercial Court was established. We followed very quickly thereafter.

The New South Wales *Commercial Causes Act* was enacted 1903. The business lawyers of this city celebrated the centenary of our commercial list in 2003 [28].

The essential requirements of commercial litigation were established at that time and remain the same today. Technical rules and long encrusted practices and procedures must be set aside. The judge must be empowered to require the parties to identify the real issues in dispute at an early stage and, thereafter, must ensure the speedy and efficient determination of those issues. The Supreme Court of New South Wales continues to conduct a specialist List dealing with commercial, technology, building and construction matters in this manner. It was the origin of much of the approach to case management that has subsequently been adopted in other areas of litigation. Our practices had an influence on Lord Woolf, when he instigated the recent major reforms of civil procedure in England [29].

The same principles are relevant to international litigation of a commercial character. However, by reason of the cross border nature of the transactions, it is often difficult to apply case management practices to minimise delays and costs.

The uncertainties associated with international litigation can be attenuated if the commercial community and its legal advisers develop a sense of familiarity with the civil procedure for commercial cases in foreign jurisdictions. The differences in legal traditions are such that harmony will never be attained. Nor do I regard it as desirable. Nevertheless, some degree of harmonisation with respect to the basic principles applicable to commercial litigation could play a significant role in taking away the sense of unfamiliarity that exists when a party is embroiled in foreign proceedings.

I refer particularly to the Model *Principles of Transnational Civil Procedure* promulgated jointly by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) [30] for application to transnational commercial transactions. These *Principles* combine features of both the civil and common law legal traditions and attempt to overcome the problem of exorbitant, long-arm jurisdiction by promulgating a "substantial connection" test. Although not free from difficulty in its practical application, in the commercial context with which the *Principles* are concerned, this is probably as good a starting point as one could have. The substantial connection test is that found in the Brussels Convention. There is a body of interpretation to draw on.

Of further significance is the structure of civil procedure for which the Principles make provision with respect to joinder of parties, service of process, pleadings, the composition and impartiality of the court, default judgments and dismissals, mechanisms for settlement, for coercive interlocutory orders, case

management, discovery, exchange of evidence, admissibility, privilege, burden of proof, cross-examination of witnesses, costs, appeals and enforcement provisions.

In this comprehensive set of respects a serious attempt has been made to develop a hybrid model which is understandable to lawyers from both the civil law and the common law traditions.

Although a uniform forum non conveniens test is not likely to be achievable, the ALI/UNIDROIT *Principles* are a useful model that could be more widely adopted with respect to practice and procedure. As a start, each jurisdiction could assess its own practices and procedures with a view to determining whether or not a greater degree of harmonisation could be achieved with respect to international litigation by moving towards that model. The present practice of the special regimes operating in many Australian jurisdictions, including New South Wales, generally accords with the model [31].

The development in each national commercial community of a belief that there is a degree of similarity and harmonisation in the procedures for commercial litigation in other jurisdictions of the Asia-Pacific region, would do much to remove the sense of unfamiliarity, even of bewilderment, which can sometimes be held by parties and their legal advisers who become embroiled in litigation in a foreign jurisdiction. Minimising the degree of uncertainty, as well as minimising transaction costs, is an objective worth pursuing on a jurisdiction by jurisdiction basis.

This process would also be assisted by improving communications between courts. I have recently proposed a conference of judges from the region with a view to comparing case management practices for commercial litigation. The initial response has been quite positive.

In a federal context such as Australia, mechanisms for ensuring harmonisation in this regard have been developed. We have a Chief Justices Council which includes all of the Chief Justices of the jurisdictions in Australia. We are advised by a Harmonisation Committee which has produced a number of reports on detailed practical issues, that have led to the adoption of similar regimes. It may well be that the Council of Asian Chief Justices could adopt a similar approach.

### **Service of Process**

The Hague Service Convention of 1965 has many signatories, including the United States, China, South Korea and Japan [32]. For inexplicable reasons, Australia is not a contracting State. Service under the Convention includes the creation within each contracting State of a Central Authority, which effects service on behalf of other contracting states. An alternative method of service is allowed whereby consular officials of the delivering state effect service in the destination state [33]. The Convention also makes provision for service of documents by direct post, subject to an objection by the State of destination. This mechanism, which could reduce transaction costs, is principally used as a back-up to official service. A number of States have objected to the option [34]. In any event, postal service – “snail mail” as it is called – is technologically obsolete. In this, as in other respects, the Hague Convention is out of date. Pending the long process of multilateral reforms, bilateral arrangements could update practice in the field.

Nevertheless, the Convention has coped for many years with the diversity of procedural mechanisms in the numerous jurisdictions to which it applies [35].

In 1996, the Australian Law Reform Commission recommended that Australia should “as a matter of priority” accede to the Convention [36]. It noted that it replicated the common form Rules of Court in Australia, including the New South Wales Supreme Court Rules. In some respects it was simpler. The report identified numerous advantages that the Convention would bring to Australia. There seems to be no reason why Australia should not accede to the Hague Service Convention. Earlier discussions, within the Australian federal context, did not lead to that happening primarily, it appears, because of the lack of priority given to the project, rather than because of any significant disagreement with its content. I raised this issue in an address earlier this year. I understand that it may be placed back on the agenda of the Standing Committees of Attorneys-General [37].

Pending ratification, this is a matter which is capable of being reflected in bilateral treaties, as in the treaties that Australia has entered into with South Korea and Thailand [38]. There seems no reason why it should not be a standard component of a free trade agreement. Indeed, provisions which further reduce the transaction costs involved in the Hague Convention itself could readily be developed. A free trade agreement could update and improve the system under the Convention.

### **Assistance with Evidence**

The Hague Evidence Convention has been one of the most successful of the Hague Conventions [39]. However, it has not been widely adopted in the Asia-Pacific region. Australia is a party, as are China (including Hong Kong), the United States and Singapore [40]. No doubt the many nations in this region, who have not acceded, have their reasons. Free Trade Agreements could contain a provision promising accession or making alternative bilateral arrangements.

I had occasion to consider judicially the Australian implementation of the Hague Evidence Convention pursuant to a letter of request from the United States of America, relating to the tobacco litigation in Washington DC. The United States Government instituted proceedings designed to recoup the billions of dollars of governmental expenditure on health, which it alleged were caused by the world's largest tobacco companies. The government sought evidence from a number of former employees of those companies who were living in Australia and in the United Kingdom.

Australian legislation implemented the Hague Evidence Convention in a form derived from the English legislation and adopted by most nations of the British Commonwealth [41]. The Court of Appeal, on which I sat, held that the Convention was intended to make available evidence in the form of pre-trial discovery as understood in our systems, but not the extensive form of pre-trial discovery available in the United States [42]. The New South Wales court found that legal professional privilege over the documents had been waived by reason of consent orders in other proceedings in the United States, which orders resulted in the legally privileged documents being published on the internet.

A few months after our judgment, the English Court of Appeal had to decide the same question. It held that, in English law, the privilege had not been waived [43]. The division of the English Court of Appeal that decided that matter was presided over by Lord Justice Henry Brooke. In May 2005 both Lord Justice Brooke and I attended a conference in Washington and had the pleasure of calling in on the United States District Court for the District of Columbia to watch Judge Gladys Kessler preside over this case.

I thought we had done the United States legal system a favour by making available the documents, and that the English Court of Appeal was unnecessarily curmudgeonly about this request. However, the Chief Judge of the United States District Court informed us that Judge Kessler had received several thousand pages of transcript of such foreign depositions. No-one had ever read them in the trial. No summaries had been made for the judge. Eventually that would occur. I came away with a view that perhaps it was Henry Brooke who had done her the favour, not me.

The Hague Convention procedure for letters of request is now well established. National regimes have shown a capacity to adapt their own procedures so that the evidence they collect is more readily usable under the procedures of the requesting State. As one author has noted:

“The German courts, for example, have developed a procedure for taking depositions in response to requests from foreign countries, with provision for cross-examination which appears entirely to meet the needs of common law countries; the French Code of Civil Procedure now allows a verbatim recording and a limited form of cross-examination to meet the needs of parties using the Convention.” [44]

This Convention has been very successful. However, it preceded the considerable expansion of international litigation. It appears to involve some unnecessary expense and delay. In cases where the witness is co-operative, it is now regularly bypassed in Australia by taking evidence by videolink [45]. There is little doubt that, in the context of free trade agreements or other bilateral arrangements, more expeditious mechanisms could be adopted.

This Hague Convention, like the Hague Convention on service abroad, operates through an excessively bureaucratic regime of Central Authorities receiving a request from foreign courts. No doubt such governmental oversight is regarded in some places as protecting the national interest. An alternative mechanism is found in the UNCITRAL Model Law on Cross Border Insolvency, which gives recognition and standing to a “foreign representative”, being a person authorised to administer foreign proceedings [46]. Such a representative can apply *directly* to a court of a participating State. This mechanism would minimise the transaction costs imposed by a centralised bureaucratic regime.

In its 1996 Report, the Australian Law Reform Commission considered the possibility of enhancing mutual co-operation in evidence collection by means of bilateral agreements [47]. A bilateral agreement could make provision for direct communication of a letter of request to a court. Furthermore, provision could be made for obtaining the assistance of a foreign court to compel a witness, even though the State has not made a declaration permitting this under the Hague Evidence Convention.

Finally, when evidence is given for foreign proceedings, a bilateral arrangement could impose the sanction of a local prosecution for perjury or contempt.

The Australian Law Reform Commission made a number of specific recommendations for the amendment of the *Foreign Evidence Act* 1994 [48]. There have been no amendments. A number of recommendations were made for review, by the Australian Attorney General, of certain evidentiary issues, including the scope of judicial assistance available in Australian courts; permitting foreign lawyers to conduct examinations after a letter of request; clarification of the meaning of "civil or commercial" in Australian statutes and establishing procedures for direct judicial co-operation between Australian and overseas courts in cases of overlapping jurisdiction [49]. I am unaware of what consideration has been given to these recommendations. Nothing much seems to have emerged.

### **Cross Border Insolvency**

In the case of cross border insolvency, a high level of co-operation between courts of different nations is essential. That a company in liquidation has assets in more than one jurisdiction is now more frequently the case than ever. There is an understandable tendency for the courts in any particular jurisdiction to protect the interests of the creditors of that jurisdiction, particularly where they are likely to receive a higher dividend if they get access to the assets in their jurisdiction, than they would if those assets were placed into the general pool available to the liquidator. ("Ring fencing" as it is called.) There is much scope for disputation with respect to such matters. I am sure many of the people in this room have been involved in such disputes.

I cannot say that there is anything improper about this attitude. After all, it is usually the case that there is a separate subsidiary vehicle incorporated within jurisdiction that holds the relevant assets and also owes the relevant debts. The separate legal personality of a subsidiary corporation remains significant for many purposes. Jurisdictions differ in their preparedness to lift the corporate veil. The fact that it is usual to have every subsidiary guarantee the debts of other members of the group adds a level of complexity. Nevertheless, the flow of trade and investment is impeded by increasing the transaction costs of corporate insolvencies. Delay in distribution of assets by liquidators prevents those assets being deployed in the most efficient way. The costs of an extended liquidation are a waste, except to lawyers and accountants.

There is no single correct solution to these problems. However, international co-operation is obviously desirable. It has arrived in the form of the UNCITRAL Model Law on Cross Border Insolvency, 1997. It came into operation in Japan in April 2001, in the European Union in May 2002, in the United States on 17 October 2005 and in the UK on 1 April 2006. Australia has announced that in a process of law reform which has the less than delightful acronym of CLERP 8, the Model Law will be adopted in Australia [50].

The Model Law makes provision for the identification of "main proceedings" in the jurisdiction of the debtor's "centre of main interests". Although European experience with an equivalent regulation (No 1346/2000) indicates there is much scope for contention in the concept of "the centre of main interests", there can be no doubt that the Model Law will substantially reduce the transaction costs involved in corporate insolvency. Significantly, the Model Law may prevent local creditors "ring fencing" local assets for themselves.

Justice Barrett of the Supreme Court of New South Wales has summarised the key provisions of the Model Law:

"A 'foreign representative' (i.e. person or body authorised to administer, or act as a representative of, the foreign proceedings) may apply directly to commence insolvency proceedings in a court of the participating state, without subjecting the debtor's foreign assets or affairs to its jurisdiction for any other purpose. The foreign representative may also apply for recognition of foreign proceedings. The court will presume that the representative has been duly appointed and that documents submitted in support of the application for recognition are authentic. It must determine the application at the earliest possible time. Pending the outcome of the application, the court may grant interim relief unless the relief would interfere with the administration of a foreign main proceeding. Recognition activates the presumption that the debtor is insolvent.

In respect of foreign main proceedings, there is an automatic stay on the commencement or continuation of individual proceedings in any other jurisdiction concerning the debtor's assets, rights, obligations or liabilities. Execution against the debtor's assets is also stayed and the right to transfer, encumber or otherwise dispose of any assets is

suspended. ...

...

The Model Law mandates cooperation and direct communication between a local court and foreign courts or foreign representatives. The means of cooperation may include: the appointment of a person to act as directed by the court; communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation by the courts concerning the coordination of proceedings; and coordination of concurrent proceedings regarding the same debtor." [51]

The significance of international cooperation for international commerce is emphasised by the fact that the Model Law is *not* dependent on reciprocity. It operates as a law, not a treaty.

### Freezing Orders

A further area in which judicial assistance is essential arises in the case of special orders which we now call freezing orders, which we used to call Mareva injunctions, after the English case in which they were first promulgated. Freezing orders are designed to prevent a person dissipating assets in order to frustrate a potential judgment. Such orders may be of considerable significance in international litigation so long as jurisdiction will act in support of foreign proceedings abroad, not simply in support of proceedings within the court's jurisdiction.

The UNCITRAL Model Law of Cross Border Insolvency was motivated in part by the ability of insolvent debtors to fraudulently conceal assets, particularly by transfer to other nations. Such conduct is not limited to insolvent companies.

As Lord Millett once said:

"In other areas of law, such as cross border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response." [52]

I agree with his Lordship. This is clearly an area where courts can assist each other to the benefit of international trade and investment.

A freezing order may conflict with a foreign law. Accordingly, English and Australian Courts have released from liability under such an order, persons who reasonably believed themselves to be obliged by foreign law to act otherwise than in accordance with a freezing order, including a person who is ordered by a foreign court to do so [53]. A bilateral treaty could lead to the amelioration of this constraint.

In England the law is still based on traditional equity jurisprudence and is limited by a series of conditions laid down in *The Siskina* [54] which established three constraints. First, a freestanding freezing order in aid of foreign proceedings could not be given with respect to assets of the foreign respondent within the jurisdiction; secondly, the plaintiff must establish that a cause of action had accrued before an application can be made; and, thirdly, a freezing order will only be granted in protection of a cause of action which the court has jurisdiction to enforce by final judgment. Furthermore, it has been held that an English court does not have jurisdiction to make a freezing order pursuant to a formal letter of request from another court [55].

In New South Wales, and most other Australian jurisdictions, freezing orders are now the subject of Rules of Court. Justice Campbell of the New South Wales Supreme Court has held that the *Siskina* constraints do not apply in Australia [56]. Accordingly, he made an order freezing the Australian assets of a defendant in support of foreign proceedings.

The Harmonisation Committee of the Council of Chief Justices has recently developed a standard form set of rules with respect to both freezing orders and search orders (formerly called *Anton Pillar* orders). I expect this will soon be adopted in all Australian jurisdictions. Those rules will carry into formal effect the reasoning of Justice Campbell. The three *Siskina* constraints will be expressly overruled, so that freezing orders will be readily obtainable in Australia in support of proceedings brought in other jurisdictions.

The principle of reciprocity in this regard could be incorporated in bilateral treaties, including in free trade agreements [57]. Australian courts will support foreign proceedings by preserving the assets of foreign defendants held in Australia. It is, therefore, reasonable to seek to ensure that a foreign court will preserve the foreign assets of a defendant in Australian proceedings.

### Enforcement of Foreign Judgments

In Australia the enforcement of judgments operates in part by statute and in part at common law [58]. The *Foreign Judgments Act* 1991 (Cth) applies only to money judgments from jurisdictions which the government has determined provide reciprocity. These include Japan, New Zealand, Fiji, Hong Kong, Korea, Papua New Guinea, Solomon Islands, Taiwan, Tonga, Western Samoa and France. The common law principles apply to nations not scheduled, such as the United States, China and India [59].

There are a number of distinct categories of approaches to the recognition of foreign judgments [60]:

- A new action for debt is brought for which the foreign judgment is conclusive proof. This is the common law position. The common law applies in Australia in part, and also in Hong Kong, Malaysia, Singapore and Sri Lanka.
- In these jurisdictions express statutory provision is also made for registration of a foreign debt. On registration, the foreign judgment may be enforced as if it were a judgment of the local court, subject to challenges to the registration [61].
- The common law requirement that a new action be brought has itself been codified by statute, subject to defences modelled on the 19th century common law. This approach generally provides a defendant with many more opportunities to avoid enforcement than may be the position under contemporary common law. This appears to be the position in India, Pakistan, Burma and Bangladesh [62].
- A foreign judgment creditor is not required to commence a new action, but may apply for a judgment of execution that allows direct recognition. This approach is based upon the German Civil Code and applies in China, Japan, Korea and Taiwan [63]. Theoretically, under this method, the merits of a foreign judgment are not to be considered, but it does appear that this restriction is not of the same practical significance as may appear at first glance. Japanese courts distinguish between a review on the merits, which is not permitted, and a re-examination of the facts which, apparently, is permitted. In effect, therefore, enforcement proceedings are liable to become de facto trials with all the additional costs that entails [64].
- Courts in some jurisdictions, which have no statutory provision for enforcement, examine the merits of the judgment creditor's claim afresh. This category includes Afghanistan, Nepal, Indonesia and Thailand [65].
- A specific regime, based on United States practice, is applicable in the Philippines where a foreign judgment is "in principle" enforceable [66]. However, it appears that clear mistakes of fact or law form a ground for refusing enforcement.

Whenever jurisdictions adopt principles that encourage re-litigation of substantive issues, the transaction costs of international litigation are considerably increased. This is probably the most important area requiring attention, at least on a bilateral basis. It is also the most difficult.

The diversity of procedural and substantive laws and of legal cultures is such that a global multilateral treaty on recognition of foreign judgments has never proven to be feasible. This is unlikely to change. Bilateral treaties or regional arrangements may be feasible in some cases. The most successful regional arrangement of this character is in Europe, through the Brussels Convention of 1968, now reflected in an EU Regulation [67]. That Convention was supplemented by the similar Lugano Convention which is open to a wider range of countries. As I understand the position, such a Convention would be unlikely to be attained, even in the core ASEAN grouping of nations, let alone on a broader regional basis.

The Hague Conference's attempt to draft a multilateral convention, commenced in 1994. By 2001 the talks had broken down as parties could not agree on even seemingly straightforward bases of jurisdiction such as habitual residence and the place at which a tort occurs. What was ultimately agreed was a convention on choice of court agreements in commercial contracts [68]. On 30 June 2005, the Convention on Choice of Court Agreements was concluded and is now open for signature. No state has yet acceded.

This new Convention has the same core justification as the New York Convention on Arbitral Awards.

Where parties have chosen a jurisdiction in a commercial contract, the same reasons for giving effect to the wish of the parties exist, as there are to give effect to their agreement for arbitration. The latter is widely, though not universally, adopted. There is a good case for doing the same with the new Convention. As one commentator has noted, the only difference between an arbitration agreement and a choice of court agreement is that one selects a private forum and the other selects a public forum [69].

Difficulties may arise when a contract is made with an allegedly commercial entity that is in substance controlled by the government. In such a context, the choice of court provision may not reflect a true commercial bargain. Another issue with the Convention is whether it makes adequate allowance for gross inequality in bargaining power. Although it does exempt individual consumers, many nations have legislation designed to protect small businesses which are not exempt from the scope of the Convention.

There are good reasons for Australia to accede to this Convention. I do not know whether it is likely to become effective as a multilateral convention. I would have thought it was in the interests of the commercial community of each nation to ensure that each government does ratify a convention designed to implement the wishes of parties to a contract. No doubt a process of consultation is underway in each of the nations represented at this conference. Whether or not a multilateral convention emerges, this appears to be a perfectly reasonable matter to be raised on a bilateral basis, including in free trade agreements or on a regional basis, e.g. within the ASEAN framework.

Some corporations have indicated an intention to create an exclusive jurisdiction arrangement between the company and their shareholders. Recently Rio Tinto, which has dual incorporation and listing in Australia and England, proposed amendment to its Articles of Association providing for exclusive jurisdiction in any dispute between the shareholders and directors or a the company to be, respectively, the Supreme Court of Victoria and the High Court of England and Wales [70]. The motivation of Rio Tinto appear to be clear. It reflects a matter which bedevils all attempts at international recognition of foreign judgments. It is US litigation, the 1,000 pound gorilla to which I have referred.

Under the new Convention the chosen court has jurisdiction unless the agreement is null and void under the law of the designated State. A court not chosen does not have jurisdiction and must decline to hear the case. The Australian *Akai* decision would have been decided differently if this Convention has been in force.

Australian accession to this Convention is likely to be delayed pending a review of Australian legislation designed to protect small businesses and others who have unequal bargaining power, but do not fall within the Convention exemption of natural persons acting for personal, family or household purposes. Such legislation may need to be amended to invoke the exemption in Article 6 of the Convention of agreements declared to be null and void under Australian law. This appears to require express provision or necessary implication. It goes beyond present doctrine for identifying a mandatory rule [71]. There is a high probability that some, perhaps all, of the protections in the *Insurance Contracts Act*, the Act in issue in *Akai*, will be so declared.

### **The Australian/New Zealand Example**

Perhaps no two nations are more similar in their legal heritage and culture than Australia and New Zealand. Co-operation on all of the matters I have discussed above is more readily achievable in such a context. Similarities in legal culture may be an essential precondition for the achievement of substantial harmonisation of procedural and substantive laws and the establishment of close co-operation between legal systems. The European Union has been able to achieve much in this respect. To a lesser extent, the same has occurred in Latin America. It is by no means clear that anything of this character will be achievable in Asia and/or the Pacific Region. Nevertheless, further bilateral arrangements are possible, including between Australia and New Zealand.

Under the Australia and New Zealand *Closer Economic Relations Trade Agreement*, 1983 [72] considerable convergence has been achieved in substantive law, particularly with respect to the consumer protection and competition regimes. This reflects the high degree of integration between the two economies, which the CER agreement sought to foster. There are memoranda of understanding on business law and business law co-operation and joint standards for food. In competition law, both the principles and the regulatory mechanisms have been integrated by legislation [73].

Parallel legislation has facilitated the taking of evidence, including by way of subpoena of witnesses, save in criminal and family proceedings. There is express provision for the taking of evidence and the making of submissions by video link or telephone. Proof of certain matters such as public documents



and acts of state is facilitated [74].

At present there are no special arrangements between the two countries for service of documents. New Zealand is recognised as providing reciprocity under the *Foreign Judgments Act* in the case of money judgments. The common law applies to other judgments.

In August 2005 a Working Group published a detailed discussion paper setting out a range of recommendations for expanding co-operation including the recognition and enforcement of judgments; provision of interim relief including freezing orders, extending to search orders; consideration of the applicable forum non-conveniens rules; expanding the regime for trans-Tasman evidence and the use of technology. The discussion paper sets out a range of practical difficulties that have arisen in these respects and makes detailed recommendations for their amelioration.

In the case of service, understandably, the model that has been proposed is that which operates within the Australian federal system amongst the States [75]. This is a system which permits service in the other jurisdiction without leave and with the same effect as if it occurred in the place where the proceedings were filed.

With respect to final judgments the proposal is for registration and, thereafter, recognition and enforcement can only be refused on public policy grounds. It is also recommended that judgments that require someone to do or not to do something (such as an injunction or an order for specific performance) would be enforceable. Furthermore, it is proposed that interim relief should be available in support of foreign proceedings, pursuant to express statutory authority to be conferred on each court.

There is a level of incoherence between the conflict of laws principles applicable in each nation. New Zealand's Courts apply the English "more appropriate forum" test [76]. Whereas Australia applies a "clearly inappropriate forum" test [77]. The Working Group proposes that a new statutory test be adopted with respect to cases of overlapping jurisdiction. Proceedings in one country should be stayed if a court in the other is "appropriate to decide the dispute", taking into account a list of factors including any choice of court provision [78].

Depending on the level of confidence and understanding that exists between legal systems, provisions of this character could be adopted in other bilateral agreements.

### **Conclusion**

One of the difficult issues which impedes further development in this field, is the variation in the quality, independence and impartiality of the judiciaries of different nations. To a substantial degree, again setting aside the particular situation of government controlled entities and unequal bargaining power, the choice can be left to bargaining between parties to a commercial relationship. Nevertheless, this problem does inhibit bilateral agreements because, in terms of enforcement there will not be reciprocity, as a matter of substance.

Important steps have been taken over recent years throughout the Asia-Pacific region to ensure that nations that do not have a long tradition of judicial independence strengthen their judiciary. Nevertheless, this process is not complete in all nations of the region. In particular there remain real questions about corruption within the judiciary in some places. It is, however, pertinent to remember that not all businessmen regard a corruptible judiciary as a bad thing.

I am pleased to say that corruption has never been an issue in Australia. The Australian judiciary has a long tradition of complete integrity. There has never been a whiff of corruption associated with any judge of the Supreme Court of New South Wales in its 182 year history. The number of cases in which there have been elements of corruption in the judiciary anywhere in Australia, at any level, can be counted on the fingers of one hand. This is an important institutional strength which we maintain to this day.

It is possibly not polite to mention doubts about the integrity of another nation's judiciary in diplomatic negotiations, whether multilateral or bilateral. The suggestions I have made for consideration in free trade agreements may not be appropriate in all cases.

There is an understandable fear on the part of a business which is based in one nation that a national of the jurisdiction in which proceedings are heard will receive a "hometown advantage". There is some empirical evidence that there is such an advantage in the United States courts [79]. I am reasonably confident that there is no such advantage in Australian courts, at least amongst specialist commercial

judges.

Nevertheless, the suspicion is a natural one, which can only be overcome by improving the mutual understanding of each other's systems amongst business lawyers and judges. Your organisation makes an important contribution to improving such understanding and, thereby, establishing the requisite level of confidence that all litigants will receive fair treatment.

#### END NOTES

1. On the Australian position see Brian Mercurio "Should Australia Continue Negotiating Bilateral Free Trade Agreements? A Practical Analysis" (2004) 27 UNSWLJ 667.
2. See RH Coase *The Firm, the Market and the Law* Uni. of Chicago P. Chicago 1988 pp 13-16, 174-179.
3. For an outline of transaction cost economics see Oliver Williamson *The Economic Institutions of Capitalism* The Free Press 1985; and for an updated summary see Oliver Williamson "Why Law Economics and Organisation?" (2005) *Annual Rev. Law Soc Sci* 369, accessible at [www.ssrn.com](http://www.ssrn.com). For an application to international litigation see D Schmidtchen, R Kirstein and A Neunzig "Conflict of Law Rules and International Trade: A Transaction Cost Approach" Center for the Study of Law and Economics, University of the Saarland Discussion Paper 2004-01, March 2004, accessible at [www.ssrn.com](http://www.ssrn.com).
4. See Ronald J Gilson "Value Creation by Business Lawyers: Legal Skills and Asset Pricing" (1984) 94 *Yale LJ* 239; L Berstein "The Silicon Valley Lawyer as Transaction Costs Engineer" (1995) 74 *Univ Oregon LRev* 239. See also D Driesen and S Ghosh "The Functions of Transaction Costs: Rethinking Transaction Cost Minimisation in a World of Friction" (2005) 47 *Ariz LRev* 61.
5. *Hilton v Guyot*, 159 US 113 (1895) at 163-164 quoted with approval in *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 at 395-396.
6. See Australian Law Reform Commission *Legal Risk in International Transactions: Report No 80*, Commonwealth of Australia (1996).
7. ALRC 80 supra at par 2.29.
8. *Airbus Industry GIE v Patel* [1999] 1 AC 199 at 132.
9. See *Raguz v Sullivan* (2000) 50 NSWLR 236.
10. *Model Law on International Commercial Arbitration* (1985).
11. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959) 330 UNTS 38.
12. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1966) 575 UNTS 159.
13. For an overview of the commercial significance of the New York Convention see J. L. Amundsen "Membership Has its Privileges: The Confidence Building Potential of the New York Convention Can Boost Commerce in Developing Nations" (2003) 21 *Wisc Int'l LJ* 383.
14. *Advent Capital plc* [2005] 2 Lloy'd Rep 607 at 610.
15. See eg, Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* Oxford Uni Press, Oxford, 2003 and note the references set out at p2 fn 8 and 9; See also Mary Keyes *Jurisdiction in International Litigation* Fed Press Sydney, 2005.
16. See, eg *Uniform Procedure Rules* 2005 (NSW) Pt 11.
17. French Civil Code, Art 14.
18. German Code of Civil Procedure, Art 23.
19. On defendant strategies see Bell supra Ch 4.
20. See *Ibid* pars 4.137-4.142.
21. See *Akai Pty Limited v People's Insurance Co Ltd* (1996) 188 CLR 418; *Akai Pty Limited v People's Insurance Co Limited* [1998] 1 Lloyds Rep 90; See Keyes supra at pp84-87; Bell supra at pars 2.50-51, 4.233.
22. See Bell supra at pars 1.31-1.43, Ch 2.
23. See the observations of Lord Denning in *Smith, Kline and French Laboratories v Bloch* [1983] 1 WLR 730 at 733-4.
24. See Justice C R Einstein and Alexander Phipps "Trends in International Commercial Litigation in Australia" (2005) *IPRax*, 273, 365 at 367. This article which comprehensively surveys many of the issues considered in this paper and from which I have benefited is accessible on the New

- South Wales Supreme Court website at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under Speeches.
25. *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). See Nygh and Davis *infra* par 9.48. (The relevant proceedings alleged price fixing by exporters of uranium.)
  26. See V V Veeder "Mr Justice Lawrance: The 'True Begetter' of the English Commercial Court" (1994) 110 *LQR* 292. The appeal to the House of Lords in the case is reported: *Rose v The Bank of Australasia* [1894] AC 687.
  27. Sir Frances McKinnon, "The Origin of the Commercial Court" (1944) 60 *LQR* 324, quoted in Veeder *supra* at 294.
  28. My address on this occasion is accessible on the New South Wales Supreme Court website [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under Speeches.
  29. See *Access to Justice: Final Report* London HMSO (1996), section 2.
  30. ALI/UNIDROIT, *Principles of Transnational Procedure Civil Procedure* (2004) *Unif L Rev* 759.
  31. See B Beaumont "The Proposed ALI/UNIDROIT Principles of Transnational Civil Procedure and their Relationship to Australian Jurisdictions" (2001) 6 *Unif L Rev/Rev Dr Unif*, 951; Clifford R Einstein and Alexander Phipps "The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales" (2004) 9 *Unif L Rev/Rev Dr Unif* 815. The Einstein and Phipps Paper is available on the New South Wales Supreme Court website [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under Speeches.
  32. *Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters* (1965) 658 UNTS 163.
  33. As is expressly contemplated as a consular function by Article 5(j) of the *Vienna Convention on Consular Relations* 1963.
  34. See David MacLean *International Co-operation in Civil and Criminal Matters* (2002) at 35-36.
  35. See e.g. MacLean *supra* at 55.
  36. See ALRC 80 *supra* at 87.
  37. See my address "The Judicial Exchange between Australia and Japan" accessible at the New South Wales Supreme Court website [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under Speeches.
  38. *Treaty on Judicial Assistance in Civil and Commercial Matters between the Government of Australia and the Government of the Republic of Korea* [2000] ATS 5; *Agreement between the Government of Australia and the Government of the Kingdom of Thailand on Judicial Assistance in Civil and Commercial Matters and Cooperation in Arbitration* [1998] ATS 18.
  39. *Convention on Taking Evidence Abroad* (1970) 847 UNTS 231.
  40. See generally David MacLean *supra* at 107.
  41. See D McLean and C McLachlan, *The Hague Convention on the Taking of Evidence Abroad: Explanatory Documents Prepared for Commonwealth Jurisdictions* (1985). The Convention is implemented in New South Wales by the *Evidence on Commission Act 1995*, Part 4.
  42. See *British American Tobacco Australia Services Limited v Eubanks for the United States of America* (2004) 60 NSWLR 483 esp at [22]-[40]. On the widespread rejection of the US approach to discovery see A Lowenfeld, *International Litigation and the Quest for Reasonableness* Oxford, Clarendon Press 1996 esp at 137; L Collins "The Hague Evidence Convention and Discovery: A Serious Misunderstanding" in L G Collins *Essays in International Litigation and the Conflict of Laws* Oxford Unit P New York, (1994) esp at 289, 299; R C O'Brien "Compelling the Production of Evidence by Non-Parties in England Under the Hague Convention" (1997) 24 *Syracuse J of Int'l Law* 77 esp at 86-87.
  43. See *British American Tobacco (Investments) Limited v United States of America* [2004] EWCA Civ 1064.
  44. See MacLean *supra* at 118-119. See also D R Shemanski "Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German American Judicial Co-operation" (1983) 17 *International Law* 465.
  45. See, eg, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).
  46. UNCITRAL, *Model Law on Cross-Border Insolvency* 1997. See esp Art 2(d).
  47. See ALRC 80 at par 4.14-4.15.
  48. See ALRC 80 *supra* Recommendations 13, 17 and 24, although s26 of the *Foreign Evidence Act* appears to deal with the latter.
  49. ALRC 80 *supra* Recommendations 11, 15, 16.
  50. See R I Barrett "Cross Border Insolvency: Aspects of the UNCITRAL Law" a paper presented by Justice Barrett of the Supreme Court of New South Wales to the 22nd Annual Banking and Financial Services and Practice Conference, August 2005; also his speech at that conference

accessible on the Court website at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc); His Honour considers in detail the European caselaw on “centre of main interest”. See also Baird “Cross Border Insolvency and the UNCITRAL Model Law” (2006) 18 *Aust Insolvency Journal* 4; Commonwealth Department of Treasury, *Cross Border Insolvency: Promoting International Co-operation and Co-ordination* (2002).

51. R I Barrett supra at pp2-3.
52. *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827G.
53. See *Bank of China v NBM LLC* [2002] 1 WLR 844; *Walter Rau Neusser Oel Unt Fett AG v Cross Pacific Trading Limited* [2005] FCA 399.
54. *Siskina v Distos SA (The Siskina)* [1979] AC 210; see also Steven Gee, *Commercial Injunctions* (5th ed) Sweet & Maxwell, London 2004 par 12.001.
55. *Fourie v Le Roux* [2005] EWCA Civ 204.
56. See *Davis v Turning Properties Pty Limited* (2005) 222 ALR 676.
57. See Peter Biscoe, *Mareva and Anton Pillar Orders: Freezing and Search Orders* Lexis Nexis Butterworths Australia (2005) Ch 5; Peter Biscoe “Transnational Freezing Orders” (2006) 27 *Aust Bar Review* 161.
58. See P E Nygh and M Davies, *Conflict of Laws in Australia* 7th ed Lexis Nexis Butterworth Australia (2002) Ch 9; M Tilbury, Davis and Opeskin, *Conflict of Laws in Australia* Oxford Uni Press Sydney (2002) Ch 6.
59. See *Foreign Judgements Regulations* 1992 (Cth), Schedule 1.
60. This characterisation is based on Bradford A Caffrey *International Jurisdiction and the Recognition of Enforcement of Foreign Judgments in the LAWASIA Region: A Comparative Study of the Laws of 11 Asian Countries Interse and with the EEC Countries* CCH Australia, Sydney (1985).
61. Australia: see Hong Kong: see *Foreign Judgments Act* 1991; Hong Kong: see *Foreign Judgements (Reciprocal Enforcement) Ordinance* cap 319. Malaysia: see *Reciprocal Enforcement of Judgements Act* 1958; Phillip Koh TN, ‘Malaysia: Digest’ (2004) in N Stephan Kinsella (ed) *Digest of Commercial Laws of the World*. Singapore: see *Reciprocal Enforcement of Foreign Judgements Act* 1959. Sri Lanka: *Enforcement of Foreign Judgements Ordinance* 1937.
62. India: see Code of Civil Procedure, ss 13 and 14.
63. Japan: see Code of Civil Procedure, Arts 200. Korea, see Code of Civil Procedure, Arts 203, 476–477. Taiwan, Compulsory Execution Law Art 43; Code of Civil Procedure Art 407. China: Code of Civil Procedure, Art 267; David C Buxbaum, “China, the People’s Republic of: Digest” (2005) in Stephan Kinsella (ed) *Digest of Commercial Laws of the World*.
64. See L Gamertsfelder “Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Monetary Judgments in Japan” (1998) 17 *Aust Bar Review* 1961.
65. Indonesia: see Richard Cornwallis, “Indonesia: Digest” (2005) in N Stephan Kinsella (ed) *Digest of Commercial Laws of the World*.
66. See *Soorajmull Nagarmull v Binalbagan – Isabela Sugar Co Inc* (1970) 67 Philippine Reports 170; Hector M de Leon, “Philippines: Digest” (2004) in N Stephan Kinsella (ed) *Digest of Commercial Laws of the World*.
67. See Council Regulation 44/2001, 2001 OJ (L12) 1.
68. See W E O’Brian Jr “The Hague Convention on Jurisdiction and Judgements: the Way Forward” (2003) 66 *Mod L. Rev* 491; J S Yackee “A Matter of Good Form: The (Downsized) Hague Judgements Convention” (2003) 53 *Duke LJ* 1179; Myers supra pp236-244.
69. Yackee supra at p1181.
70. See *Australian Financial Review*, 11 April 2006, p12.
71. C/f Keyes supra at pp80-90.
72. *Australia New Zealand Closer Economic Relations Trade Agreement* [1983] ATS 2 (“CER”).
73. Memorandum of Understanding on Harmonisation of Business Law 1988; Memorandum of Understanding on Business Law Coordination 2000; Trans-Tasman Mutual Recognition Arrangement; Joint Food Standards Setting Treaty [1996] ATS 12. For further discussion, see Productivity Commission, *Australian and New Zealand Competition and Consumer Protection Regimes* (2004).
74. See *Evidence and Procedure (New Zealand) Act* 1995 (Cth) and *Evidence Amendment Act* 1994 (NZ).
75. *Service and Execution of Process Act* 1992 (Cth).

76. *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 followed in *Longbeach Holdings Ltd v Bhanabhai & Co Ltd* [1994] 2 NZLR 28.
77. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538
78. See *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group Attorney-General's Department (Aust) and Ministry of Justice (NZ)* August 2005.
79. U. Bhattacharya, N Galpin and B Haslem "The Home Court Advantage in International Corporate Litigation", February 2004, accessible on [www.ssrn.com](http://www.ssrn.com).

[Print Page](#)[Close Window](#)

## Judicial Exchange Between Australia And Japan

### JUDICIAL EXCHANGE BETWEEN AUSTRALIA AND JAPAN

#### ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

#### CHIEF JUSTICE OF NEW SOUTH WALES

#### TO THE INTERNATIONAL CONFERENCE ON JAPANESE LAW

#### OF THE AUSTRALIAN NETWORK FOR JAPANESE LAW

**SYDNEY, AUSTRALIA, 28 FEBRUARY 2006**

The Governments of Australia and Japan have designated this year, 2006, as the Australia-Japan Year of Exchange in order to commemorate the 30th Anniversary of the signing of the 1976 Basic Treaty of Friendship and Co-operation between Australia and Japan. Prime Minister Howard and Prime Minister Koizumi have announced that the aim of the year is to promote mutual understanding and co-operation between Australia and Japan through a series of bilateral exchanges.

For personal reasons, to which I will refer, I have organised a judicial delegation to visit Japan in July of this year as part of the 2006 Year of Exchange.

The 1976 Basic Treaty is referred to as the NARA Treaty. This appears to be an acronym for its alternative title: the Nippon Australia Relations Agreement. That, however, is an ex post facto acronym, not truly reflecting the historical origins of the name.

In another life, some time last century, I served on the personal staff of the Prime Minister of Australia. In October of 1973 I was privileged to attend the second Australia-Japan Ministerial Committee meeting in Tokyo. One of the items on the agenda for that meeting was a suggestion for a broad based treaty between Australia and Japan.

The Ministerial Committee meeting was an event which I will long remember. The Japanese delegation was led by the then Prime Minister Tanaka and included two future Prime Ministers, Mr Ohira, then Foreign Minister, and Mr Nakasone, then the MITI Minister. All three were formidable men of considerable capacity and it was a privilege for a young 27 year old to see them at first hand.

In 1973 the core treaty arrangement between Australia and Japan was the Agreement on Commerce of 1957, an extraordinary achievement so soon after World War II. A number of other specific matters were dealt with in bilateral treaties, e.g. double taxation and visas. The increasingly close and rapidly developing relationship between the nations was not reflected in any formal arrangement.

Japanese treaty practice had long focused on a traditional form of treaty known as a Treaty of Friendship, Commerce and Navigation with the acronym FCN. Such treaties played a role in the treaty practice of only the United States and of Japan. A FCN treaty was very limited in scope, dealing with a range of quite practical matters and also having a symbolic value. FCN type treaties had a long history but were of particular significance in the 19th and early 20th century between colonial powers and independent nations for the purpose of safeguarding traders.

Notwithstanding the understandable wish of Japan to pursue the kind of treaty with which it was familiar, and which it had entered with a number of other nations, the history of Australian treaty practice did not allow for such a development. We had no such treaties. We had reservations about some of the usual provisions in a FCN treaty with a stronger economic power. The Australian position, as I recollect it, was that matters associated with the facilitation of trade and commerce were best implemented through multilateral agreements or by specific bilateral agreements focusing on particular issues.

The Australian response to the Japanese request for a FCN type treaty was to develop the concept of

a treaty of Friendship and Co-operation (with an acronym not very different to the traditional FCN). Instead of the almost exclusively commercial focus of a traditional FCN treaty, the Australian proposal was for a more wide-ranging bilateral treaty covering political, cultural and social understanding and co-operation, albeit at a high level of generality, reflecting aspiration more than practical results.

This proposal was in many ways unique and, indeed, remains so. It was put forward at a time when the economic relations between the two nations was well established, but goodwill and mutual trust between the nations was only gradually developing. The generation in power in both nations still had acute memories which had to be overcome. On the Australian side, there were memories of the conflict of World War II and, on the Japanese side, memories of acts of discrimination against Japanese nationals, notably in the White Australia Policy. A broad ranging bilateral treaty was put forward by Australia to serve both a symbolic function and the practical role of promoting a higher level of co-operation, goodwill and trust than had hitherto existed.

My memory of October 1973 is that we left the Ministerial Committee talks in Tokyo at something of a standoff on the issue of the treaty. After the formal talks, the delegation visited the ancient imperial capital of Nara. On the first evening there was a formal dinner. It was at that dinner that Prime Minister Tanaka announced that Japan would enter into negotiations for a treaty of the character proposed by Australia and give up its long pressed idea of a FCN type of treaty. I recall that this announcement was greeted by the Australian delegation with considerable excitement.

The then Prime Minister, E G Whitlam, as I recall on the recommendation of his press secretary Graham Freudenberg, said immediately that the treaty ought to become known as the Treaty of Nara. It was to be named after the place of the announcement. Indeed it was referred to in that way during the subsequent negotiations. Much later, a new name was thought up to provide an acronym: the Nippon-Australia Relations Agreement. However, the title had long preceded the acronym.

It was my presence on this occasion that led me to initiate a judicial exchange after I learned of the agreement of the two governments to declare 2006 a Year of Exchange. Chief Justice Gleeson of the High Court of Australia encouraged me to pursue this project and Chief Justice Machida of the Supreme Court of Japan has responded with warmth and enthusiasm.

I first met Chief Justice Machida when he visited Australia for the centenary of the High Court over two years ago. Then, I was happy to accede to his request for the New South Wales Supreme Court to participate in a programme by which a Japanese judge would spend a period of twelve months in Sydney familiarising himself or herself with the Australian system. A number of judges have now come to Sydney under that programme.

Last year I met Chief Justice Machida on two occasions: in Australia and at a conference in China. Following our discussion on those occasions, he agreed to receive an Australian delegation as part of the 2006 Year of Exchange.

The delegation will visit Japan in July. It will be comprised of judges of the Supreme Courts of New South Wales, Victoria, Queensland, Western Australia and Tasmania. I very much look forward to the experience.

Over the last decade or so a new sense of collegiality has emerged amongst judges on an international basis. The frequency and intensity of communications between judges from different systems has developed to a very considerable extent. The exchange between Australian and Japanese judges, exemplified by the judges who have taken up residency in Sydney and the delegation that I will lead to Japan, should be seen as part of this broader context in which Australian judges meet Japanese judges quite often in international judicial conferences.

The development of understanding between Australian and Japanese judges can be of broader significance. To the degree that the judges of each nation learn more about the principles, practices and institutions of each other, then the sometimes difficult legal issues which arise in cross-border disputes, will be more readily resolved on the basis of a sense of comity between the judicial systems. This is, potentially, of considerable practical significance, for example, in determining applications for anti-suit injunctions.

It was in just such a context that the High Court adopted the explanation of the principle of "comity" first advanced by the Supreme Court of the United States:

“Comity’, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.” [1]

The principle of comity is based on an enlightened self-interest, not on some form of internationalist perspective. At its core is the expectation of reciprocity: we will act in the way that our conduct will be treated by others.

In the broadest of terms, the Australian common law tradition has some features which would be regarded as alien to the civil law tradition adopted in Japan when the nation builders of the Meiji era turned to the German Civil Code for inspiration. Having determined to select the best of what the West had to offer – modelling the army on that of Prussia and the navy on that of Great Britain – this choice of legal system was not a compliment to the common law. However, it is the nature of common law that it cannot be readily adopted, because it has grown and continues to grow organically. A code-type of system can be adapted virtually overnight, as we have seen most recently in the People’s Republic of China. In that regard the Meiji era choice can be seen to have been based on what system was feasible for Japan, rather on a judgment of what international model was best. At least we common lawyers would like to think that was so.

Over recent decades a major theme amongst comparative lawyers has been the idea of convergence between the common law systems and the civil systems. This approach has much to commend it and in that regard our two systems are able to learn from each other in a way that may not have been true in the past.

One of the topics for discussion in July will be the new saiban-in system in Japan for lay participation in criminal justice. We would regard this as a system of lay assessors not directly comparable with our jury system. However, clearly the two approaches respond to similar needs. This is a good example of convergence between systems. A lay assessor system has been adopted in a number of European nations and, recently in China. Russia has adopted a jury system or, rather, reintroduced it because it had such a system in the 19th century, as readers of Dostoevsky’s *Crime and Punishment* will know.

As the multifaceted process, often referred to as globalisation, continues apace, the circumstances in which the judiciary of one nation has to have some level of understanding of the legal systems and the judiciary of another nation will expand. Private international law will become of increased significance. Circumstances which call for assistance between courts – service of documents, taking of evidence, enforcement of judgments, recognition of jurisdiction - will multiply.

International transactions are subject to a range of risks and to additional costs, which may impede international trade, commerce and investment. We will all be better off if those risks and costs are minimised. These issues of judicial assistance should be seen as part of an international microeconomic reform agenda to lower the transaction costs of international trade, commerce and investment. The risks, costs and delays of dispute resolution for cross border transactions can be reduced and international intercourse can be enhanced.

Judges in both Australia and Japan have, for some decades, been concerned to reduce delays and costs associated with the resolution of domestic legal disputes. For cross-border disputes there is the additional burden of uncertainty and complexity to be overcome.

The solutions, in the form of multilateral or bilateral treaties and arrangements, are primarily a matter for government. Co-operation and enforcement occurs through a range of multilateral processes such as UNCITRAL, The Hague Conference on Private International Law and the International Institute for the Unification of Private Law, known as UNIDROIT. There are, after all significant differences in the quality of different legal systems and dispute resolution processes which make multilateral and even regional arrangements problematic. For example, many nations – not including Australia and Japan – have a problem with judicial corruption, which it would not be polite to mention in multilateral negotiations. Bilateral treaties are likely, in many respects, to be more achievable, notably between two such well-established systems as those of Australia and Japan.

These matters were subject to a detailed report by the Australian Law Reform Commission in 1996 [2]. The report was really in the nature of a feasibility study suggesting lines of inquiry. Few of the



recommendations of that report have been implemented or even followed up. A number of matters are worthy of further consideration.

Australia has successfully implemented the Hague Evidence Convention by a national uniform system of legislation [3]. In this respect, Australia conforms to world best practice.

The Hague Service Convention, however, has not been ratified by Australia. No doubt, our failure is based to some degree on the difficulties of our federal system. Japan has ratified the Convention. There is no bilateral arrangement between Australia and Japan in this respect. Such an arrangement exists only with South Korea and Thailand together with a colonial inheritance from our British Imperial past for some other nations. The recommendation of the Australian Law Reform Commission, that Australia pursue ratification of the Hague Service Convention, appears to have much to recommend it.

Justice Clifford Einstein, a judge who sits in the Commercial List of the New South Wales Supreme Court, together with the then Commercial List researcher, undertook a systematic study of the private international law position of Australian practice with respect to international commercial litigation, especially in the Commercial List of the Supreme Court [4]. His Honour and his co-author outline the compatibility of Australian commercial practice, particularly from the perspective of the UNIDROIT Principles of Transnational Civil Procedure, together with the private international law and statutory enforcement mechanisms of the Australian Foreign Judgments Act 1991 of the Commonwealth. They also discuss the desirability of further steps to be taken by way of harmonisation and the possibility of international or regional steps in these matters, along the lines of the Brussels and Lugano Conventions applicable in Europe. His Honour and his co-author also analyse the possibility of Australian law developing a more international focus along the lines of recent Canadian jurisprudence [5].

With respect to its foreign money judgments legislation, Australia has recognised Japan as a nation which affords reciprocity and, accordingly, Japanese money judgments can be enforced in Australia merely by registration with a court and, thereafter, are able to be enforced as if they were judgments of the Australian court. A detailed analysis of the implementation by Japanese courts of money judgments of other national courts highlights the need to understand the attitude taken by judges in Japan to these matters [6]. For example, it appears that Japanese courts take the view that reviewing the factual basis of a foreign judgment does not offend the proscription in the Japanese law against reviewing a foreign judgment on its merits. In this way the enforcement of foreign judgments in Japan may turn into de facto trials. Understanding the different approaches in this regard can be of significance.

The Hague Conference's attempt to develop an international convention on the enforcement of judgments has proven to be too ambitious. The substantial differences that exist in this respect amongst the different nations suggest that only bilateral arrangements are likely to be acceptable. Exorbitant claims to jurisdiction have traditionally been made by different nations, including common law nations which assume jurisdiction on the basis of mere service, even on the basis of quite transitory presence in a jurisdiction. However, common law nations are not alone in making claims for an exorbitant jurisdiction. Article 14 of the French Civil Code permits any French national to sue in a French court any foreigner, even with respect to contracts entirely connected with a foreign country and with no connection to France at all. Similarly, Article 23 of the German Code of Civil Procedure permits a German court to assume jurisdiction over a defendant who owns property in Germany, regardless of any other connection between that defendant and the subject matter of the dispute.

The Hague Convention process narrowed its original ambitious plans and has propounded an agreed text with respect only to choice of court clauses. The proposed *Convention on Choice of Court Agreements* will ensure that national courts recognise and enforce such choice of court clauses in commercial arrangements.

Article 5 of the proposed Convention affirms that the courts designated in an exclusive choice of court agreement have jurisdiction and should not decline to exercise jurisdiction. Article 6 provides that courts of nations other than a chosen court shall, save in defined circumstances, refuse to exercise jurisdiction. Article 8 provides that judgments of a chosen court shall be recognised and enforced in other contracting states, subject to a list of exceptions. Further, there shall be no review on the merits. There are implications for Japanese practice on foreign money judgments because "review on the merits" cannot extend to jurisdictional findings of fact.

This Convention was finalised last year and is no doubt presently under review in both Australia and Japan for ratification. It appears to be a sensible measure and will go some way to ensuring that courts are able to implement the wishes of contracting parties in cross-border commercial arrangements in a manner which has not hitherto occurred.

It is one of the great advantages of international commercial arbitration that the wishes of the parties for alternative dispute resolution in international commerce has been effectively implemented by the widespread acceptance of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, known as the New York Convention. There is a close interrelationship between choice of court agreements and commercial arbitration agreements and it would be highly desirable for international commerce that both kinds of agreements are capable of proper enforcement throughout the commercial world. Choice of court provisions and arbitration agreements frequently co-exist, notably under ICSID – the *Convention of the Settlement of Investment Disputes* [7].

There are a range of international and bilateral mechanisms for minimising the legal risks and costs associated with international transactions which, in my opinion, are appropriate to be considered as part of Free Trade Agreement discussions. No doubt issues of legal dispute resolution are part of the discussions underway between Australia and Japan.

In the event, however, the implementation of both the spirit as well as the letter of relevant bilateral and multilateral arrangements will be affected by judicial attitudes. The kind of interaction which is proposed between Australia and Japan, and which reflects the broader degree of interaction between the judiciaries of different nations, will assist in this process.

Australian judges have been, and are, no less prone than other judges to treat with suspicion legal principles and practices which they do not understand. I am pleased to say that the Australian judiciary is less and less parochial. To a substantial extent this is based on increased contact with other nations, both as legal practitioners and as judges. It is now the case that in cross border commercial disputes, Australian companies do not have a hometown advantage in most Australian courts.

Our ability to give due recognition to the law of other nations and to provide assistance to other courts in cross border disputes is affected by how much we know and understand about other legal systems. The 2006 Year of Exchange is an appropriate time to take steps, however limited, to extend the mutual knowledge and understanding between Australian and Japanese judges. A Conference such as this will also enhance this process and I look forward to reading the papers.

#### End Notes

[1] *Hilton v Guyot* (1895) 159 US 113 at 163-164 quoted in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 395-396.

[2] See *Legal Risk in International Transactions* Australian Law Reform Commission Report No 80 1996.

[3] I have had occasion to outline the history of this scheme in *British American Tobacco Australia Services Limited v Eubanks* (2004) 60 NSWLR 483 esp at [16]-[28].

[4] See [C.R. Einstein and Alexander Phipps The Principles and Rules of Transnational Civil Procedure and their Application in New South Wales \(2004\) Unif.L.Rev 815](#); [C R Einstein and Alexander Phipps "Trends in International Commercial Litigation in Australia Part 1: The Present State of Foreign Judgment Enforcement Law"; Part 2: The Future of Foreign Judgment Enforcement Law](#) in (2005) *Praxis des Internationalen Privat-un-Verfahrensrechts (IPRax)* 273, 365. Also available on the Supreme Court website at: [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under speeches of Justice Einstein.

[5] See *Beals v Saldanha* [2003] 3 SCR 416.

[6] See Leaf Gamertsfelder "Cross Border Litigation: Exploring the Difficulties Associated with Enforcement Australian Money Judgments in Japan" (1998) 17 *Aust Bar Rev* 161.

[7] See Andrea Schulz *The Future Convention on Exclusive Choice of Court Agreements and Arbitration*, accessible on the Hague Convention website [www.hcch.net](http://www.hcch.net).



[Print Page](#)[Close Window](#)

## Opening Of Law Term Dinner, 2006

**OPENING OF LAW TERM DINNER, 2006  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE ANNUAL OPENING OF LAW TERM DINNER  
OF THE LAW SOCIETY OF NEW SOUTH WALES  
SYDNEY, 30 JANUARY 2006**

Commencing with my very first speech as Chief Justice, on the day of my swearing in, through several dozen other addresses and over two hundred speeches on the occasion of the admission of legal practitioners, I have emphasised the significance of the longevity of our institutions of parliamentary democracy and of the rule of law. Many of you have had to put up with this more than once. You should brace yourselves.

This year marks a particularly significant landmark in the history of our national institutions. This is the sesquicentenary of the adoption of responsible government in Australia. 150 years ago responsible government was carried into effect in New South Wales, Victoria, Tasmania and South Australia, with a commitment to confer it on the soon to be separated colony of Queensland and, eventually, as an almost uniform national model, it was applied to Western Australia.

The new bicameral legislature met for the first time in a ceremonial sitting on 22 May 1856 in the New South Wales Parliament House, then still in the process of reconstruction. The pre-existing Legislative Council Chamber was to be occupied by the new Legislative Assembly, where it continues to sit to this day in what is said to be the oldest legislative chamber in continuous use in the world.

For 150 years the Governor of New South Wales has acted only on the advice of Ministers responsible to the Parliament. The pre-existing sweeping and autocratic powers of the Governor were reduced. Some continued with respect to certain matters regarded in London as of Imperial concern, a list which gradually attenuated with time. With the broadly similar institutional arrangements that were adopted at this time in the other Australian colonies, 1856 was the true origin of our system of parliamentary democracy.

This achievement represented the combined effect of a change in British policy with respect to its role in the advanced colonies, on the one hand, and local demands for control of the affairs of the colonies by the residents, on the other hand. Historians differ as to the relative significance of these two forces. Colonial debates, including in New South Wales, made frequent reference to the effects of British recalcitrance towards similar demands in its American colonies. The American Revolution was then not much longer ago than World War II is to us. The change in British policy had first become manifest after civil disturbances in Canada. The new system was adopted in Canada, New Zealand and, then, in the Australian colonies.

The Sydney Morning Herald proclaimed, with that national swagger we have witnessed so often: the New South Wales Constitution was "superior to any on either side of the Atlantic" [1].

Political opinion in the Australian colonies was unanimous in asserting that the British system of government was perfect in every respect. The dispute was as to how that system could be replicated in Australia. There was no difficulty with the Governor assuming the role of a constitutional monarch. Similarly, there was no difficulty with a Legislative Assembly taking on the functions of the House of Commons. The problem was with the upper house.

Conservative opinion at first inclined to recreating something in the nature of a hereditary aristocracy. John Dickinson, a judge of the Supreme Court, an uncritical admirer of the House of Lords, was convinced that the absence of a legislative peerage was in large measure responsible for the then recent revolutions throughout continental Europe of 1848. He proposed the establishment of an aristocratic order of baronetcies amongst the propertied class in Australia [2]. The proposal was taken up by William Charles Wentworth and an order of baronets was incorporated in his original draft of the new Constitution for New South Wales, as an electoral college for the upper house. This idea disappeared in a torrent of ridicule: denounced as a bunyip aristocracy involving the same

transformation as that of the British water-mole into the duckbilled platypus, with speculation on how the scion of the Macarthur dynasty would become the Earl of Camden with a rum keg on his coat of arms [3].

The poet, Charles Harpur, suggested that the criterion of selection for the new baronets should be the size of their nose. The then Governor, Sir Charles FitzRoy, had a particularly prominent appendage and he, after all, was the most aristocratic of our Governors. He was no mere naval officer, but the grandson and son-in-law of dukes and – as his name indicates – descended from royalty via one of the bastard sons of Charles II, from whom he inherited both his nose and a proclivity for cutting a swathe through the loose women of the city.

In 1850 the Imperial Parliament had authorised the Australian colonies to adopt new constitutions providing for a bicameral legislature. In New South Wales and the then new colony of Victoria the constitutions proposed in 1853 went beyond what had been authorised and, accordingly, the Imperial Parliament had to pass further legislation to approve the constitutions submitted for Royal assent. It was by reason of this requirement that, almost accidentally, New South Wales adopted not only responsible government, but a form of democracy that was advanced for its time.

In New South Wales a democratic system slipped in, virtually by the back door. The British Reform Bill of 1832 had established a property qualification for the franchise in the House of Commons which extended to all those who paid an annual rental on their residence of ten pounds or more per annum. The problem was that rents in Sydney were much higher than rents in Britain, particularly after the gold rush. Accordingly, what was a very restrictive qualification in England proved not to be such in New South Wales. Indeed, not only the whole of the middle class but all skilled workers could vote. The adoption of this property qualification created a system of household suffrage, if not universal suffrage.

Under conservative control, the existing Legislative Council had met the challenge of this franchise by adopting a rural gerrymander under which very few seats were allocated to Sydney. In the version of the new constitution for responsible government that was transmitted to London, this gerrymander was protected by a requirement that a two-thirds majority was required to change it. The position was further entrenched by the fact that the upper house was, on the New South Wales Legislative Council's proposal, to consist entirely of nominated members, in contrast with the Victorian proposal which proposed an upper house to be elected, albeit on high property qualification. The New South Wales conservatives felt secure.

They had, however, miscalculated. They assumed, reflecting the history of New South Wales at that time, that members of the Legislative Council who were nominated by the Governor would be more conservative than those who had been elected, even on a restrictive property franchise. This attitude failed to comprehend the true dynamics of responsible government. The Governor would, in matters such as this, act on the advice of his New South Wales ministers. That, of course, permitted those who controlled the lower house to ensure sympathetic appointments to the Council including, on at least one occasion, threats of swamping the Council if it continued in a particular period of intransigence. In the event, the Victorian formula of an elected upper house with a high property franchise qualification proved by far the more conservative measure.

In large measure because of a determination on the part of the then British government to permit the colonies to determine their own affairs, the conservative political strategy was destroyed. The authors of the New South Wales Constitution, including Wentworth, had not been as acute in their draftsmanship as was necessary. This was, perhaps, obvious from the first clause of the Constitution which they proposed. It referred expressly to clause 62 of the Bill. It seemed to pass without comment at the time that the Bill, as proposed, consisted of only 58 clauses [4].

Of greater significance was the fact that the Constitution submitted had no section expressly permitting its amendment. Accordingly, the British Parliament, in the Act to which the New South Wales Bill was a schedule, itself enacted, by force of the Imperial Parliament, a clause permitting amendments. By reason of this provision, there was nothing entrenching the two-thirds majority required by the scheduled Constitution to vary important provisions of the Act, including the provision with respect to electoral districts. That is to say the Constitution of New South Wales, because of the British Imperial Statute, could be amended by a simple majority of each House of the New South Wales Parliament. Within a year that is precisely what the New South Wales Parliament had done by reducing the two-thirds requirement for constitutional change to a simple majority. Within another year the Parliament adopted manhood suffrage, the secret ballot and the extent of the rural gerrymander was reduced.

These results were not entirely inadvertent, but they were in large measure unintended. It was in this way that the people of New South Wales both assumed responsibility for the conduct of their own affairs and adopted a system of democracy that was well ahead of its times.

1856 was a year of considerable significance for this nation. It is well that we mark its sesquicentenary.

On 17 July 1856, a Grand National Banquet was held in the Theatre Royal to commemorate the advent of responsible government, in the presence of the Governor-General Sir William and Lady Denison, the Judges of the Supreme Court, the foreign Consuls and everyone else who mattered in Sydney. The principal address was delivered by Dr William Bland in honour of his long advocacy of political reform. He placed the New South Wales Constitution Act of the Imperial Parliament in what he described as the "brightest of Britain's trophies, victories gained over itself – the epic poetry of history", amongst which he included the Reform bill, the Emancipation bill, the Abolition of Slavery, the repeal of the Corn Laws and the inauguration of Free Trade [5].

Bland's prominence on this glittering ceremonial occasion represented, in a dramatic manner, the passing of the previous era of Australian social and political history. Bland was an emancipated convict. He was transported after being convicted for murder, albeit in a duel fought on a matter of honour when he and the deceased were serving in the royal navy. However, he was imprisoned again in the colony after being found guilty of criminal libel for criticising Governor Macquarie [6].

In 1849 Bland was at the centre of controversy when he was proposed as one of the foundation senators of the University of Sydney. His qualifications for the appointment were doubted in the Legislative Council by reason of his convict origins. This was a violation of the strict taboo that had developed in New South Wales of any reference to convict origins[7].

The division between emancipists and descendants of convicts, on the one hand, and free settlers, particularly those of higher status called the "exclusives", on the other hand, had been the basic fault line of social and political life for the early decades of the colony. Wentworth himself, who had started off on the emancipist side, had become a conservative, indeed in his own eyes at least, a putative baronet. By mid century the absorption of the convicts and the descendants of convicts into the broader society was almost complete. It had been a frictionless and seamless transition.

Here we find the origins of one of the great strengths of Australian society, which has shown itself on numerous subsequent occasions. I refer to our extraordinary capacity for the integration of disparate groups into a cohesive, tolerant and inclusive society. We should not permit the transient frictions of this process to lead us to doubt our ability to succeed in this task.

A similar process occurred with the succeeding great division in Australian social, economic and political life, a division which existed for the best part of a century. I refer to the division between Catholics and Protestants.

When I first entered the law in the late 1960's the significance of this division was quite apparent. There were law firms in this city that had never had a Catholic employee, let alone partner. There were others that had never had a Protestant. The position of Commissioner of Police had, for as long as anyone could remember, been filled alternatively by a Catholic and Mason. Neither group could monopolise so critical a position. There were government departments, including in the Commonwealth, which were known to be primarily composed of members of one religion or another.

In a similarly seamless and frictionless process, that began in the 1970's, this division simply disappeared in all spheres of life. Throughout the economy, in politics, in the bureaucracies and in the law, there are virtually no traces of it today. Yet, as I have said, for about a century it was the basic fault line of Australian economy, society and politics.

This nation has and retains an extraordinary capacity for adaptation. I have been a beneficiary of this capacity. I am quite confident that the same process will occur with the more recent migrations from Asia and the Middle East. I am very conscious of the fact that there are those who say: "Well these new migrants aren't like you good old migrants". However, of course, we were not like "us" then either; particularly when we were being called "dagos", "wogs", "reffos" and the like.

My migrant story, like every successful migrant story, is a tale of access to opportunity. In my case

that opportunity was afforded in the education system, in politics and in the law. It is one of the great hall marks of this society that neither I nor other migrants from a non Anglo Celtic background were in any way required to deny our origins in order to avail ourselves of the best this nation has to offer. That remains the case for our most recent migrations.

The issue has come to prominence recently by reason of the events at Cronulla a few weeks ago and the retaliation that followed. I agree with the observations on this matter of the Prime Minister, John Howard, in his important Australia Day Address last week, when he emphasised that all Australians "deserved to be treated with tolerance and with respect". He also correctly said that these events called for neither "national self flagellation nor moral panic".

Part of the process of accommodating this recent manifestation of the inevitable tensions of adaptation, which I am convinced will be transient, is for those of us who have benefited from the tolerance and inclusion by other Australians, to emphasise the gratitude that we feel and, perhaps by our example, to convince others of the benefits Australia as a whole has received from such past tolerance and inclusion.

Australians have long since accepted the importance of cultural diversity in a tolerant, cohesive and inclusive society. However, when acknowledging that significance, we must always remember the overriding importance of those institutions which give cohesion to the whole. Our mechanisms of governance, both parliamentary and judicial, together with certain aspects of our history, of our environment and of the English language, constitute the central components of Australian national identity. Our long and proud heritage of the rule of law, no less than our democratic traditions, ensures the maintenance of our capacity for tolerance, inclusiveness and cohesion.

There are two aspects of the administration of justice which are particularly relevant in this regard. First, is the central role of personal autonomy in the adversary system. Second, is the level of civility with which legal affairs are conducted. In both respects the administration of justice can serve as a model for other fields of social discourse, many of which do not manifest these values to the same degree and would profit from doing so, or returning to past practices when they did.

The adversary system operates on the basis that it is the parties that control what happens in the court. This is a manifestation of the value that we attach to personal autonomy. The system maximises the control that citizens have over the processes of legal decision-making which affect their lives. This is fundamentally different from the basic structure of the inquisitorial system in which the judge is in control of what happens, the judge decides what the issues are, what inquiries are made, what witnesses will be called and he or she asks virtually all of the questions.

The adversary system is manifest not simply in civil disputes but also in the criminal justice process, where the State appears in its role as prosecutor on the basis of a complete equality with the citizen. Even in criminal cases the prosecution is required to conduct proceedings as if it was an ordinary litigant in the court. It receives no privileges. It receives no special access to the judiciary. Its right to call or interrogate witnesses and to make submissions is no different from that of any other litigant in the court.

Respect for freedom and personal autonomy has very deep roots in this country, much deeper than in virtually all of the countries from which migrants to Australia have come. One of the reasons why these values are so secure is because they are reflected many times every day in the procedures within our courts, indeed in the very structure of our courtrooms.

These values are also reflected in our capacity for tolerance and inclusion of culturally diverse groups. All Australians have the ability to choose to conduct their lives in accordance with a culture that differs from what other Australians regard as the norm. Our recognition of cultural diversity is a manifestation of deeply held structural values which lie at the core of our traditional institutions.

The second aspect of our legal system, which also reflects the values of tolerance and inclusiveness, is the civility of the discourse in the operation of the law. Civil conduct reinforces the contribution which our fundamental social institutions make to our social cohesion. However, it goes beyond that.

By civility I do not refer, or do not only refer, to matters of etiquette and manners. The core element of civility is the manifestation of respect for other persons. In Asian societies such respect is manifest in the courtesies involved in giving "face" to others. In the Western tradition, civility has long been accepted as a public virtue manifest in signs of respect to strangers in language, etiquette and in

tempering the assertion of self-interest.

This public virtue assumes that there are broadly accepted rules for conduct: a system of public morality reflecting the core values of our society, particularly the respect for the freedom and personal autonomy of others.

Civility remains on daily display in our courts and throughout the legal system. All legal practitioners must, and generally do, treat judges, clients, witnesses and each other with respect. We must all ensure that proper conduct remains a principal characteristic of our legal discourse. Ours is a profession of words. We must continue to express ourselves in a way that demonstrates respect for others.

Civil conduct in the law is manifest in the language of advocacy, both in addressing judges with appropriate honorifics and in communication with opponents and witnesses. It would never cross the mind of a barrister to address me in court, or generally outside court, by my first name. That is a privilege reserved for 18 year olds in telephone call centres. All too often rudeness is justified as a form of egalitarianism.

The tradition of civility in the legal profession goes well beyond the requirements of appearance in court. It is to be found in the full range of discourse between practitioners, both oral and in correspondence. This tradition has been maintained in the law to a greater degree than other areas of social discourse. It is recognised as a fundamental ethical obligation of a professional person.

There are well known pressures, mainly of a commercial character, on professionalism and, of course, the obligation to conduct legal intercourse with civility is sometimes breached. Competition for clients sometimes leads to a "win at any cost" attitude that may manifest itself in aggressive conduct and even rudeness. For example, a solicitor may seek to prevail by threats of retaliation in abusive communications. Prosecutors sometimes become overzealous, bordering on the self-righteous. Defence counsel in criminal matters sometimes run hopeless cases and bad points, hoping for some error on the part of the prosecution, which they perversely believe they may honourably exploit. Sometimes judges use unnecessarily strong language about lawyers, witnesses and, even, about each other.

In the United States, over the last decade or so, there has been much concern over a "crisis of civility" in the legal profession. Detailed codes of civil conduct have been promulgated in many jurisdictions, commencing with the Seventh Circuit. They do no harm and are quite instructive, but I do not wish to be understood to advocate such a code. We face no such crisis.

Notwithstanding conduct that does breach our standards, the abiding model of behaviour for the administration of justice in this State is one that emphasises civility as a professional ethical obligation. Perhaps breaches are more frequent than they once were, but the courts and profession remain committed to enforcing the standards and succeed to a much greater extent than other spheres of social interaction.

There is from time to time social commentary suggesting that there has been a decline in the level of civility in our society. It is not clear how one measures this. Even the most casual reading of history would suggest that there has probably never been a time when there has not been complaints to the effect that the standards of behaviour are slipping. In the sixteenth century Erasmus wrote a book entitled *On Civility for Boys*. Things were never as they used to be.

It is only necessary to recall the stark depictions by William Hogarth of a gin-soaked London of the eighteenth century, and to contrast that with the standards of behaviour required in the Victorian era, to realise that there are cycles in such human behaviour.

There does, however, appear to be a growing concern with personal conduct in many areas of discourse: the emergence of road-rage; the behaviour of parents at school sporting events, referred to as the "ugly parent syndrome"; the prevalence of offensive language in many spheres of social interaction and popular culture; the sensationalism of a media driven by declining circulations and audiences; the indifference to the tranquillity of others by the infliction of noise, whether from boorish conduct or mobile phones; the vulgarity and rudeness of reality TV shows; the selfishness of littering; the virtual disappearance in common discourse of words such as "please", "thank you" and "sorry".

Criminal behaviour is not the only form of conduct to which a zero tolerance response may be



appropriate.

In a complex society such as ours relationships of civility, tolerance and trust cannot be established or maintained only on the basis of interpersonal relationships. They must be institutionalised. That is what has happened in the law. The institutions for the administration of justice, both in the courts and in the legal profession, operate on the basis of well recognised rules of proper conduct. Our legal system and profession has much to be proud of in this respect. We must ensure that it remains so and hope that others learn from the ability of this profession to resist the decline in civility apparent elsewhere in society.

#### End Notes

[1] P Loveday and A W Martin *Parliament Factions and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856-1889* Melbourne University Press, Melbourne, 1966, pp6-7.

[2] See Ged Martin *Bunyip Aristocracy: The New South Wales Constitution Debate of 1853 and Hereditary Institutions in the British Colonies* Croom Helm, Sydney, 1986 p76ff.

[3] See C M H Clark *Select Documents in Australian History 1851-1900* Angus and Robinson, Sydney, 1955, pp341-342.

[4] See Anne Twomey *The Constitution of New South Wales* Federation Press, Sydney, 2004, p17 fn 95.

[5] Edward Sweetman *Australian Constitutional Development* McMillan, Melbourne, 1925, pp298-299.

[6] See *Australian Dictionary of National Biography Vol 1 1788-1850*, Melbourne University Press, Melbourne, 1966, p112-113.

[7] See Ruth Knight *Illiberal Liberal: Robert Lowe in New South Wales 1842-1850* Melbourne University Press, Melbourne, 1966, pp246-248.

***Sentencing Manual*, Judicial Commission of New South Wales,  
Sydney, 2006**

**FOREWORD**

**BY THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

The sentencing of convicted criminals is one of the most important tasks performed by the judiciary. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else Judges do. The public attitude to the way Judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

Individual judicial officers call upon a vast body of collective experience of other judicial officers, both contemporary and past, to assist them in this task. This publication constitutes a distillation of the principles derived from that cumulative knowledge.

A former Chief Justice of New South Wales, Sir Frederick Jordan, once said with respect to sentencing that:

“The only golden rule is that there is no golden rule.”

There is a wide spectrum of legitimate opinion about appropriate levels of punishment for criminal offences. It is, of course, impossible for courts to satisfy all sections of the community with respect to a matter like sentencing, because there are such significant divisions of opinion within the community. However, the permissible range for the exercise of the sentencing discretion by the judiciary is necessarily narrower than the broad range of opinion held within the community. This is because the core value of fairness in the administration of criminal justice requires the range to be narrow, so that criminal justice is seen to operate reasonably equally.

The reason why debate about sentencing will know no rest is because the sentencing task has always been, and will continue to be, a process of balancing overlapping, contradictory and incommensurable objectives. The preservation of a broad sentencing discretion is critical to the ability of the criminal justice system to ensure justice is served in all of the extraordinary variety of circumstances of individual offences and of individual offenders. The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives, including deterrence, retribution and rehabilitation. These objectives do not always point in the same

direction. The requirements of justice and the requirements of mercy are often in conflict, but we live in a society which values both justice and mercy.

Centuries of practical experience lead to the conclusion that the balancing of such a multiplicity of factors requires the exercise of a broad discretion. Nevertheless, that discretion is a judicial one and must be exercised in accordance with principle. This volume summarises the principles applicable to the exercise of that discretion in the criminal justice system of New South Wales.

This publication incorporates many years of research about sentencing acquired by officers of the Judicial Commission of New South Wales. It serves one of the principal functions of the Commission – the promotion of consistency in sentencing. Although the work is primarily designed to assist judicial officers on a day-to-day basis, its general publication will enable it to serve as a resource for all legal practitioners and others who seek a better understanding of the principles and the practice of sentencing in New South Wales.

The Honourable J J Spigelman AC  
Chief Justice of New South Wales

**G Winterton (ed), *State Constitutional Landmarks*, Annandale, The Federation Press, 2006**

**FOREWORD**

**BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES**

This year is the sesquicentenary of the introduction of responsible government in New South Wales, Victoria, Tasmania and South Australia. A commitment was made to confer it upon the soon to be separated colony of Queensland. Eventually, as an almost uniform national model, it was applied to Western Australia. This is a particularly appropriate time to produce a work which contains definitive treatments of the most important turning points in the development of State constitutional law.

In 1856, three of the four judges of the Supreme Court, the fourth was usually on circuit in Brisbane, accepted nomination as Members of the Legislative Council. The then Chief Justice, Sir Alfred Stephens, accepted the post of President of the Legislative Council. His only regret was that the new Constitution failed to adopt his own recommendation that, as Chief Justice, he would also, like the Lord Chancellor in England, be a member of the Ministry with the title "The Chancellor of New South Wales". The judges' role in the Parliament became controversial. Stephens soon resigned the presidency and within a few years all the serving judges had left, never to return<sup>1</sup>.

In this way Australia adopted, as a result of political controversy, a concept of the separation of powers which, notably in the case of the office of the Lord Chancellor, England and Wales have only implemented last year. Chapter III of the Australian Constitution and its jurisprudence may have been quite different if this early confusion had not been so quickly resolved.

As chapters in this volume attest, the Legislative Council of New South Wales has shown itself a singularly fertile source of constitutional discord. I am particularly

relieved that we avoided the conflicts that would inevitably have arisen if my distinguished predecessor, Sir Alfred Stephens, had had his way.

The chapters of this book cover the major landmarks, both cases and constitutional developments. Particularly for the early years they bring alive some of the personalities involved. Subject, as they have been for over a century, to the overriding effects of Commonwealth Constitutional law, State constitutional cases have arisen spasmodically but often with dramatic effect. They resolved deadlocks between the Houses of Parliament, determined the effect of manner and form provisions and the powers and privileges of individual Houses.

As in the case of the Commonwealth Constitution, there is no authoritative statement of the source of legitimacy of contemporary State Constitutions. Once, it was clear, the source of legitimacy for both the Commonwealth Constitution and of all of the State Constitutions, was by enactment of the British Imperial Parliament. That basis has long since been obsolete and was finally interred by the *Australia Acts*. There remain two general approaches to answering the question and it may never prove necessary to choose between them.

The first approach is to assert that the legitimacy of the Constitution lies in popular sovereignty. In the case of the Commonwealth, the relevant act of the sovereign people was the referenda held in each of the then Colonies which adopted the text of the Constitution of the Commonwealth. The second approach is to assert that legitimacy lies in the historical development of each Constitution, a development that can be traced back to common law foundations. The source of legitimacy on this analysis is the *legal* validity of each of the steps taken along the constitutional path.

The people of New South Wales have not voted for their Constitution except on one occasion. That was when the people of the then Colony voted in favour of the adoption of the Constitution of the Commonwealth. By s106, that Constitution provides that the Constitution of each State continues in effect. Indeed, it was the Constitution of the Commonwealth that transmogrified the Colonies into States. It

may well be that the State Constitutions will come to be regarded as having force by reason of s106, based on the sovereign people who adopted that Constitution<sup>2</sup>

On the other hand, historical continuity as a source of legitimacy reflects more accurately our common law legal tradition which has traditionally abjured abstract concepts such as popular sovereignty. In his famous essay on *The Common Law as an Ultimate Constitutional Foundation*, Sir Owen Dixon emphasised the unique character of the common law as an antecedent system of jurisprudence<sup>3</sup>.

I congratulate Professor George Winterton on editing so impressive a collection of essays. I also applaud the Sesquicentenary of Responsible Government Committee of the State of New South Wales for providing financial assistance for this publication.

---

<sup>1</sup> See J M Bennett *Colonial Law Lords* (2006) at pp6-18, 20-26.

<sup>2</sup> See Quick and Garren *The Annotated Constitution of the Commonwealth* (1906) at pp928-930; B Selway *The Constitution of South Australia* (1997) p9; A. Twomey *The Constitution of New South Wales* (2004) pp797-794.

<sup>3</sup> Sir Owen Dixon *Jesting Pilate* (1965) pp203ff.